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Clear and Present Danger—Its Meaning and Significance

Chester James Antieau

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"CLEAR AND PRESENT DANGER"—ITS MEANING AND SIGNIFICANCE*

NOTWITHSTANDING its utilization for thirty-one years, the clear and present danger formula remains not only a determinant of doubtful applicability in many freedom controversies, but also a concept of some uncertainty to the courts and the profession. A fuller inquiry into its meaning and significance seems proper.

I.

Meaning of the Phrase "Clear and Present Danger"

No definition, states Mr. Justice Reed, can give an answer to "what is meant by clear and present danger."¹ Although Mr. Justice Black observed in 1941 that "restatement of the phrase 'clear and present danger' in other terms has been infrequent,"² an inquiry into the meaning of the concept had best begin with an analysis of synonymic statement by the Court.

*This is the third in a series of articles on the clear and present danger concept. "The Clear and Present Danger Formula: Its Origin and Application" appears in the May, 1950, issue of the *University of Detroit Law Journal*; and "The Rule of Clear and Present Danger: Scope of Its Applicability" appears in the April, 1950, issue of the *Michigan Law Review*.

¹ *Pennekamp v. Florida*, 328 U. S. 331, 348, 66 S. Ct. 1029, 90 L. Ed. 1295 (1946).

² *Bridges v. California*, 314 U. S. 252, 262 n. 3, 62 S. Ct. 190, 86 L. Ed. 192 (1941).

Although the word "danger" has been objected to as "highly emotional,"³ there is as yet inadequate evidence to justify a conclusion that its use has irrationalized the Court in its task. As used here it simply means that there must be a "grave" peril,⁴ a "serious threat"⁵ that the evil will result.⁶ This is not a focal word on which judges will debate or cases be decided.

More deserving of examination are the words descriptive of the danger. What is a "clear" danger? Although it "cannot be completely captured in a formula,"⁷ it means at least that there must exist "reasonable ground to fear that serious evil will result."⁸ The late Justice Murphy demanded "convincing proof that a legitimate interest of the state is in grave danger."⁹ Expressed otherwise, clear danger means that a "clear public interest" be "threatened not doubtfully."¹⁰ James Madison's words in 1776 afford an interesting comparison. "All men are equally entitled to the free exercise of religion," he wrote, "unless the preser-

³ Sinsheimer, *Employer Free Speech*, 14 U. OF CHI. L. REV. 617, 718 (1947).

⁴ *Thomas v. Collins*, 323 U. S. 516, 530, 532, 65 S. Ct. 315, 89 L. Ed. 430 (1945); *West Virginia State Board of Education et al. v. Barnette*, 319 U. S. 624, 639, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943); see also *id.*, 319 U. S. at 643 (Black, J., concurring opinion); see *Prince v. Massachusetts*, 321 U. S. 158, 176, 64 S. Ct. 438, 88 L. Ed. 645 (1944) (Murphy, J., dissenting opinion); "Gravest abuses," *Thomas v. Collins*, *supra*, 323 U. S. at 530; "Aggravated Danger", *Thornhill v. Alabama*, 310 U. S. 88, 105, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).

⁵ *Craig v. Harney*, 331 U. S. 367, 373, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947).

⁶ The Court has also said it must be a "public" danger; see *Thomas v. Collins*, note 4 *supra*.

⁷ See *Bridges v. California*, *supra* note 2, 314 U. S. at 261.

⁸ See *Whitney v. California*, 274 U. S. 357, 376, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (Brandeis, J., concurring opinion). *Herndon v. Lowry*, 301 U. S. 242, 258, 57 S. Ct. 732, 81 L. Ed. 1066 (1937). "Freedom of speech and freedom of assembly are empty phrases if their exercise must yield to unreasonable fear." FRANKFURTER, *LAW AND POLITICS* 122 (1939). "The test further requires that the supposed danger be 'clear'—that is, there must be a reasonable expectation that the harmful consequence prohibited by law will ensue." FRAENKEL, *OUR CIVIL LIBERTIES* 68 (1944).

⁹ *Prince v. Massachusetts*, *supra* note 4, 321 U. S. at 176 (dissenting opinion).

¹⁰ See *Thomas v. Collins*, *supra* note 4, 323 U. S. at 530. "Not merely a likely threat." *Craig v. Harney*, *supra* note 5, 331 U. S. at 376.

vation of equal liberty and the existence of the State are *manifestly endangered*.”¹¹ The Court will find a “clear” danger when there is proof that the serious evil will almost inevitably result from the particular exercise of freedom.

When is there a “present” danger? The Court has answered synonymously: when the peril is “imminent,”¹² “immediate,”¹³ “impending,”¹⁴ “urgent,”¹⁵ or “not remote.”¹⁶ In *Bridges v. California*, Mr. Justice Black, speaking for the Court, emphasized that “the degree of imminence [must be] extremely high before utterances can be punished.”¹⁷ Elsewhere he has indicated that the danger must be “pressingly imminent.”¹⁸ Justice Brandeis observed in *Gilbert v. Minnesota* that, “There are times when those charged with the responsibility of Government, faced with clear and present danger, may conclude that suppression of divergent opinion is imperative; because the *emergency* does not permit reliance upon the slower conquest of error by truth. And in such *emergencies* the power to suppress exists.”¹⁹ In *Whitney v. California* he added: “. . . no danger flowing from free speech can be deemed clear and

¹¹ BRANT, JAMES MADISON 246 (1941) Emphasis supplied.

¹² See *Abrams v. United States*, 250 U. S. 616, 630, 40 S. Ct. 17, 63 L. Ed. 1173 (1919) (Holmes, J., dissenting opinion); *Whitney v. California*, *supra* note 8, 274 U. S. at 376; *Bridges v. California*, 314 U. S. 252, 259, 62 S. Ct. 190, 86 L. Ed. 192 (1941); *Thornhill v. Alabama*, *supra* note 4, 310 U. S. at 105; *Craig v. Harney*, *supra* note 5, 331 U. S. at 373.

¹³ See *Abrams v. United States*, *supra* note 12, 250 U. S. at 630; *West Virginia State Board of Education et al. v. Barnette*, *supra* note 4, 319 U. S. at 639. See also, Note, 51 YALE L. J. 798, 802 (1942).

¹⁴ “Actual or impending,” *Thomas v. Collins*, *supra* note 4, 323 U. S. at 530, 532.

¹⁵ *West Virginia State Board of Education et al. v. Barnette*, *supra* note 4, 319 U. S. at 633.

¹⁶ *Thomas v. Collins*, *supra* note 4, 323 U. S. at 530. “The danger must not be remote or even probable; it must immediately imperil.” *Craig v. Harney*, *supra* note 5, 331 U. S. at 376. “. . . the test to be applied . . . is not the remote or possible effect.” See *Schaefer v. United States*, 251 U. S. 466, 486, 40 S. Ct. 259, 64 L. Ed. 36 (1920) (Brandeis, J., dissenting opinion).

¹⁷ *Supra* note 2, 314 U. S. at 263.

¹⁸ See *West Virginia State Board of Education et al. v. Barnette*, *supra* note 4, 319 U. S. at 634 (concurring opinion).

¹⁹ 254 U. S. 325, 338, 41 S. Ct. 125, 65 L. Ed. 287 (1920) (dissenting opinion). Emphasis supplied.

present unless the incidence of evil apprehended is so imminent that it may befall before there is opportunity for full discussion . . . Only an *emergency* can justify suppression." And he concluded: "It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no *emergency* justifying it."²⁰ Similarly, Justice Holmes stated: "Only the *emergency* that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law . . . abridging the freedom of speech.'"²¹ More recently, Justice Murphy re-emphasized that only the emergency that makes it "immediately dangerous to leave the correction of evil counsels to time warrants making any" abridgment of freedom.²²

This is, then, or should be, the meaning of "present" danger: if there is time for the rational democratic processes of thought and discussion, there is no present danger. As so understood and applied, the clear and present danger test can make a significant contribution to the delimitation of constitutional freedoms. Freedom cannot be abridged if it is only the fear of *future* evils that haunts the official. Justice Murphy was speaking for the Court when he observed:²³

There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—prediction that is not calculated or intended to be presently acted upon, thus leaving oppor-

²⁰ *Supra* note 8, 274 U. S. at 377. Emphasis supplied.

²¹ *Abrams v. United States*, *supra* note 12, 250 U. S. at 630-1. Emphasis supplied.

²² See *Korematsu v. United States*, 323 U. S. 214, 233-4, 65 S. Ct. 193, 89 L. Ed. 194 (1944) (dissenting opinion).

²³ *Schneiderman v. United States*, 320 U. S. 118, 157-8, 63 S. Ct. 1333, 87 L. Ed. 1796 (1943).

tunity for general discussion and the calm processes of thought and reason.

In this sense, then—that fear of *future* evil of any kind is unreasonable within the meaning of the test—it can be said that “present” danger will be found when the Court has “reasonable ground to believe that the danger apprehended is imminent.”²⁴

Meaning of the Term “Substantive Evils”:

The substantiality of the evil, or the opposed societal interest, may almost alone be determinative of many freedom controversies. Professor Chafee has of late concluded that “outside the political and economic area at least . . . if the evil is found to be substantial, the law seems likely to be upheld regardless of the unlikelihood that the evil will ever come to pass.”²⁵ Subject perhaps to a somewhat greater exception than he indicates, his conclusion is probably justified.

What are the “substantive evils” the clear and present danger of which may justify abridgments of freedom? As recently as 1947 an able observer intimated that the only substantive evil within the meaning of the test is violence. “The practical significance of the rule,” wrote Corwin, “is that the Supreme Court reserves the right in connection with any prosecution for forbidden utterances to say whether the defendant made them in circumstances which created a ‘clear and present danger’ that they would lead to violence, either the violence the defendant advocated, or any other kind.”²⁶ This is misleading. The cases amply illustrate that the Court considers certain non-violent results “substantive evils,” while, on the other hand, violence is not always a substantive evil.

²⁴ *Whitney v. California*, *supra* note 8, 274 U. S. at 376.

²⁵ 1 CHAFEE, *GOVERNMENT AND MASS COMMUNICATIONS* 54 (1947).

²⁶ CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 157-8 (1947).

In the case of origin, the particular evil was obstruction of the war effort.²⁷ This, to Justice Holmes, was admittedly not the only substantive evil, as witness his endorsement of the test in the post-war period in *Gitlow v. New York*, wherein overthrow of the government by force was the substantive evil involved.²⁸ The "substantive evil" was interference with the fair and orderly administration of justice in the *Bridges* case,²⁹ *Pennkamp v. Florida*,³⁰ and *Craig v. Harney*.³¹ Breach of peace was also the purported substantive evil in *Cantwell v. Connecticut*,³² *Terminiello v. City of Chicago*,³³ *Thornhill v. Alabama*,³⁴ and *Carlson v. California*.³⁵ In the last two cases interference with the employer's right of privacy was advanced—unsuccessfully—as a substantive evil, while in *West Virginia State Board of Education v. Barnette*,³⁶ lack of patriotic fervor was suggested as a substantive evil, though in vain. The case of *Giboney v. Empire Storage and Ice Co.*³⁷ indicates that restraint of trade qualifies as a substantive evil.

The overwhelming majority of individual and social discomforts and legislative antipathies will never qualify as "substantive evils." Meiklejohn is correct in his statement:³⁸

In the judgment of the Constitution, some preventions are more evil than are the evils from which they would save

²⁷ *Schenck v. United States*, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919).

²⁸ *Gitlow v. New York*, 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925).

²⁹ *Supra* note 2.

³⁰ *Supra* note 1.

³¹ *Supra* note 5.

³² 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

³³ 337 U. S. 1, 69 S. Ct. 894, 93 L. Ed. 865 (1949).

³⁴ *Supra* note 4.

³⁵ 310 U. S. 106, 60 S. Ct. 746, 84 L. Ed. 1104 (1940).

³⁶ *Supra* note 4.

³⁷ 336 U. S. 490, 69 S. Ct. 684 (1949).

³⁸ MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 48 (1948).

us. And the First Amendment is a case in point. If that amendment means anything, it means that certain substantive evils which, in principle, Congress has a right to prevent, must be endured if the only way of avoiding them is by the abridging of that freedom of speech upon which the entire structure of our free institutions rests.

Justice Brandeis in his great concurring opinion in the *Whitney* case insisted that the evil must be "serious."³⁹ "Prohibition of free speech and assembly is a measure so stringent," he said, "that it would be inappropriate as the means for averting a relatively trivial harm."⁴⁰ Only "substantial" evils will suffice, Justice Brandeis stated,⁴¹ and he continued by illustration:⁴²

. . . it is hardly conceivable that this Court would hold constitutional a statute which punishes as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state.

The insistence upon gravity of peril finds popular expression in Meiklejohn: "The danger must be clear and present, but also, terrific."⁴³

After quoting Brandeis to the effect that the evils must be serious and substantial, Mr. Justice Black in 1941 added: "And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of ex-

³⁹ *Supra* note 8, 274 U. S. at 376.

⁴⁰ *Id.* at 377.

⁴¹ *Id.* at 379.

⁴² *Ibid.* As to the same effect, that the evil must be substantial, see *Cantwell v. Connecticut*, *supra* note 32, 310 U. S. at 311; *Thomas v. Collins*, *supra* note 4, 323 U. S. at 536; *Associated Press v. United States*, 326 U. S. 1, 7, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945).

⁴³ MEIKLEJOHN, *op. cit.* *supra* note 38, at 51.

pression.”⁴⁴ He concluded significantly: “What finally emerges from the ‘clear and present danger’ cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.”⁴⁵ More recently the same Justice has re-emphasized that “States cannot consistently with our Constitution abridge those freedoms to obviate slight inconveniences and annoyances.”⁴⁶ It has been recognized elsewhere that only serious societal perils will justify the denial of freedom.⁴⁷

Beyond overthrow of the government by force and interference with the Nation’s war effort, there may not be many more “substantive evils.” Mill wrote: “The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection.”⁴⁸ Quite similarly, an able scholar and practitioner states that under the clear and present danger test, freedom is to be denied only when “an immediate check is required to save the country.”⁴⁹

There was dicta in the *Cantwell*⁵⁰ and *Thornhill*⁵¹ cases that any breach of the peace might constitute a substan-

⁴⁴ *Bridges v. California*, *supra* note 2, 314 U. S. at 262.

⁴⁵ *Id.* at 263. Quoted with approval in *Pennekamp v. Florida*, *supra* note 1, 328 U. S. at 334.

⁴⁶ *Giboney v. Empire Storage and Ice Co.*, *supra* note 37, 336 U. S. at 496.

⁴⁷ *Whitney v. California*, *supra* note 8, 274 U. S. at 377. “Moreover, even imminent danger cannot justify a prohibition of the functions essential to effective democracy unless the evil apprehended be relatively serious.” CHAFEE, *FREE SPEECH IN THE UNITED STATES* 349 (1941). “‘Clear and present danger’ means that there must be an imminent danger of serious evil.” Walsh, *Is the New Judicial and Legislative Interpretation of Freedom of Speech, and of the Freedom of the Press, Sound Constitutional Development*, 21 GEO. L. J. 161, 183 (1933).

⁴⁸ MILL, *ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 8 (McCallum ed. 1946).

⁴⁹ Hays, *Book Review*, 97 U. OF PA. L. REV. 751 (1949).

⁵⁰ “When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.” See note 32 *supra*, 310 U. S. at 308.

tive evil, but the words of Justice Brandeis foreshadowed a contrary determination. The Court has now held that "public inconvenience, annoyance or unrest" are not substantial evils.⁵² In the *Terminiello* case there was evidence of actual rioting following the speech, but this evil was not so serious and substantial as to justify punishment for speech. And this must always be the result under the clear and present danger test lest mobs and rowdies who have planned violence can effectively deny expression by ensuring the likelihood of attendant violence.

Justice Roberts nicely illustrated the point that most evils are less than "substantive." In *Schneider v. State*, he remarked: "The purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it."⁵³

Allegation that governmental control of monopolistic practices was a "substantive evil" was summarily dismissed, as it well deserved.⁵⁴ Similarly rejected was the claim that the injury to an industrial concern from peaceful picketing constituted such an evil.⁵⁵ There are, however, rather clear indications that there are, even presently, a few more substantive evils. Restraint of trade is almost surely such.⁵⁶ Even dicta is sufficient to support the conclusion that "destruction of life" will so qualify.⁵⁷ And interference with the fair and orderly administration of

⁵¹ "The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter." See note 4 *supra*, 310 U. S. at 105.

⁵² *Terminiello v. City of Chicago*, note 33 *supra*.

⁵³ 308 U. S. 147, 162, 69 S. Ct. 155, 84 L. Ed. 155 (1939).

⁵⁴ *Associated Press v. United States*, *supra* note 42.

⁵⁵ *Thornhill v. Alabama*, note 4 *supra*.

⁵⁶ *Giboney v. Empire Storage and Ice Co.*, *supra* note 37.

⁵⁷ *Thornhill v. Alabama*, *supra* note 4, 310 U. S. at 105.

justice well may be a serious societal evil.⁵⁸ From *Prince v. Massachusetts*,⁵⁹ it seems safe to deduce that impairment of the health or morals of children is a substantive evil. There is dicta that "fraudulent solicitation,"⁶⁰ "destruction of property,"⁶¹ and "invasion of the right of privacy"⁶² might constitute "substantive evils," but it remains to be seen if all of these will be held to qualify as substantial.

Vague verbalizations such as "substantive evils within the allowable area of state control,"⁶³ "other immediate threat to public safety, peace, or order,"⁶⁴ or "where the public safety, morality or health is involved,"⁶⁵ provide no further clue to what will amount to a "substantive evil." Furthermore, they are deceptive by their reference to language of the police power which is not, of course, an automatic definition of the constitutional freedoms.

Commentators, too, have been misleading in their use of loose language that "criminal" activity is per se a substantive evil. Even Chafee contributes to such an implication when he says that the clear and present danger test fixes "the boundary line of free speech . . . close to the point where words will give rise to unlawful acts."⁶⁶ Fraenkel has also stated that the state may punish expressions if there is a clear and present danger "that they will result in action harmful to the state."⁶⁷ It is, of course, proper to insist upon the proximity of the peril, but there is an attendant obligation to avoid language inferring that "harmful" and "unlawful" acts always qualify

⁵⁸ *Bridges v. California*, note 2 *supra*; *Pennekamp v. Florida*, note 1 *supra*; *Craig v. Harney*, note 5 *supra*.

⁵⁹ *Supra* note 4.

⁶⁰ *Cantwell v. Connecticut*, *supra* note 32, 310 U. S. at 306.

⁶¹ *Thornhill v. Alabama*, *supra* note 4, 310 U. S. at 105.

⁶² *Ibid.*

⁶³ *Carlson v. California*, *supra* note 35, 310 U. S. at 113.

⁶⁴ *Cantwell v. Connecticut*, *supra* note 32, 310 U. S. at 308.

⁶⁵ *Thomas v. Collins*, *supra* note 4, 323 U. S. at 536.

⁶⁶ CHAFEE, *op. cit. supra* note 47, at 35.

⁶⁷ FRAENKEL, *THE SUPREME COURT AND CIVIL LIBERTIES* 6 (1937).

as substantive evils within the meaning of the concept. It must be continually borne in mind that the Constitution is the test of labels, and, in the weighing of societal utilities by the judiciary, public inconvenience or annoyance does not become a "substantive evil" because it has been made "unlawful" by some municipal council.

And courts are weighing societal interests when they talk of "substantive evils" grave enough to outweigh constitutional freedoms when imminently endangered. This is evident when the Court refers to "paramount interests" that must be protected even at the interest of freedom of communication.⁶⁸ And so, when the Court speaks of "substantive evils," it has in mind grievous impairment of another equally or more important societal interest, such as preservation of the state. If such a social interest is certainly and immediately imperiled by the exercise of freedom, then expression will be limited.

Is It Only a "Felicitous Phrase"?:

Mr. Justice Frankfurter seems to feel that clear and present danger is but a "felicitous phrase." In his dissent in the *Bridges* case in 1941, he said:⁶⁹

It was urged that the words "reasonable tendency" had a fatal pervasiveness, and that their replacement by "clear and present danger" was required to state a constitutionally permissible rule of law. The Constitution, as we have recently had occasion to remark, is not a formulary. Nor does it require displacement of an historic test by a phrase which first gained currency on March 3, 1919. Our duty is not ended with the recitation of phrases that are the shorthand of a complicated historic process. The phrase "clear and present danger" is merely a justification for curbing utterance where that is warranted by the substan-

⁶⁸ *Thomas v. Collins*, *supra* note 4, 323 U. S. at 530. *Semble*: "grave and immediate danger to interests which the state may lawfully protect." *West Virginia State Board of Education v. Barnette*, *supra* note 4, 319 U. S. at 639; "a legitimate interest of the state." *Prince v. Massachusetts*, *supra* note 4, 321 U. S. at 176.

⁶⁹ *Supra* note 2, 314 U. S. at 295-6.

tive evil to be prevented. The phrase itself is an expression of tendency and not of accomplishment, and the literary difference between it and "reasonable tendency" is not of constitutional dimension.

Again in dissent in the *Barnette* case, Mr. Justice Frankfurter developed his opposition to the formula. He wrote: ⁷⁰

But to measure the state's power to make such regulations as are here resisted by the imminence of national danger is wholly to misconceive the origin and purpose of the concept of "clear and present danger." To apply such a test is for the Court to assume, however unwittingly, a legislative responsibility that does not belong to it. To talk about "clear and present danger" as the touchstone of allowable educational policy by the states whenever school curricula may impinge upon the boundaries of individual conscience, is to take a felicitous phrase out of the context of the particular situation where it arose and for which it was adapted. Mr. Justice Holmes used the phrase "clear and present danger" in a case involving mere speech as a means by which alone to accomplish sedition in time of war. By that phrase he meant merely to indicate that, in view of the protection given to utterance by the First Amendment, in order that mere utterance may not be proscribed, "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." The "substantive evils" about which he was speaking were inducement of insubordination in the military and naval forces of the United States and obstruction of enlistment while the country was at war. He was not enunciating a formal rule that there can be no restriction upon speech and still less, no compulsion where conscience balks, unless imminent danger would thereby be wrought "to our institutions or our government."

Concurring separately in the *Pennekamp* case in 1946, Mr. Justice Frankfurter reiterated the theme, saying: ⁷¹

. . . it does violence to the juristic philosophy and the judicial practice of Mr. Justice Holmes to assume that in using the phrase "a clear and present danger" he was expressing even remotely an absolutist test or had in mind

⁷⁰ *Supra* note 4, 319 U. S. at 663.

⁷¹ *Supra* note 1, 328 U. S. at 352-3.

a danger in the abstract. He followed the observation just quoted by the emphatic statement that the question is one "of proximity and degree," as he conceived to be most questions in connection with the large undefined rights guaranteed by the Constitution. And Mr. Justice Brandeis, co-architect of the great constitutional structure of civil liberties, also recognized that "the permissible curtailment of free speech is . . . one of degree. And because it is a question of degree the field in which the jury may exercise its judgment is, necessarily, a wide one." If Mr. Justice Brandeis' constitutional philosophy means anything, it is clear beyond peradventure that he would not deny to a State, exercising its judgment as to the mode by which speech may be curtailed by punishment subsequent to its utterance, a field less wide than that which he permitted a jury in a federal court. "Clear and present danger" was never used by Mr. Justice Holmes to express a technical legal doctrine or to convey a formula for adjudicating cases. It was a literary phrase not to be distorted by being taken from its context. "The clear and present danger" to be arrested may be danger short of a threat as comprehensive and vague as a threat to the safety of the Republic or "the American way of life." Neither Mr. Justice Holmes nor Mr. Justice Brandeis nor this Court ever suggested in all the cases that arose in connection with the First World War, that only imminent threats to the immediate security of the country would authorize courts to sustain legislation curtailing utterance. Such forces of destruction are of an order of magnitude which courts are hardly designed to counter. "The clear and present danger" with which its two great judicial exponents were concerned was a clear and present danger that utterance "would bring about the evil which Congress sought and had a right to prevent." Among "the substantive evils" with which legislation may deal is the hampering of a court in a pending controversy, because the fair administration of justice is one of the chief tests of a true democracy.

Most recently, in dissenting in *Craig v. Harney*, Mr. Justice Frankfurter takes issue not so much with the applicability of the test—it was utilized by the state court whose judgment he would affirm—but rather with its interpretation by the majority of the United States Supreme Court.

He stated:⁷²

If under all the circumstances the Texas court here was not justified in finding that these publications created "a clear and present danger" of the substantive evil that Texas had a right to prevent, namely the purposeful exertion of extraneous influence in having the motion for a new trial granted, "clear and present danger" becomes merely a phrase for covering up a novel, iron constitutional doctrine. Hereafter the States cannot deal with direct attempts to influence the disposition of a pending controversy by a summary proceeding, except when the misbehaviour physically prevents proceedings from going on in court, or occurs in its immediate proximity. Only the pungent pen of Mr. Justice Holmes could adequately comment on such a perversion of the purpose of his phrase.

Since the Justice's notion of the clear and present danger concept is supposedly rooted in the thoughts of Justices Holmes and Brandeis, a re-examination of their views can indicate the extent of Mr. Justice Frankfurter's appreciation of the masters. In the very sentence in which Mr. Justice Holmes originated the concept he stated: "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. . . ." ⁷³ It cannot seriously be claimed that "in every case" was but statutory interpretation in view of the fact that Justice Holmes brilliantly argued for the application of the test to a state statute that the Court's majority considered vastly different from the Espionage Act of 1917.⁷⁴ Clear and present danger is "the correct test," emphasized Justice Holmes.⁷⁵ "It is apparent," writes Professor Freund, "that he found in the test

⁷² *Supra* note 5, 331 U. S. at 391. Recently Mr. Justice Frankfurter's views seem to have been shared by Chief Justice Rosenberry of the Wisconsin Supreme Court. "Whether there is a 'clear and present danger' warranting the enactment of the statute is for the legislature," he writes. *State v. Evjue*, 253 Wis. 146, 33 N. E. (2d) 305, 311 (1948).

⁷³ *Schenck v. United States*, *supra* note 27, 249 U. S. at 52. Emphasis supplied.

⁷⁴ *Gitlow v. New York*, note 28 *supra*.

⁷⁵ *Id.*, 268 U. S. at 673. Emphasis supplied. Justice Brandeis joined Holmes in this dissent.

a useful measure of the range of free discussion where our institutions are challenged in the public forum.”⁷⁶ There is evidence that Mr. Justice Frankfurter realizes that Holmes refused to treat abridgments of First Amendment freedoms in the same way as other legislative activity. In 1938 he wrote:⁷⁷

These enduring liberties . . . were . . . specifically enshrined in the Bill of Rights . . . Because these civil liberties were explicitly safeguarded in the Constitution, or conceived to be basic to any notion of the liberty guaranteed by the Fourteenth Amendment, Mr. Justice Holmes was far more ready to find legislative invasion in this field than in the area of debatable economic reform.

And, as recently as 1949, he re-acknowledged that “Mr. Justice Holmes was far more ready to find legislative invasion where free inquiry was involved than in the debatable area of economics.”⁷⁸

To imagine that Mr. Justice Brandeis did not consider “clear and present danger” to be a test is to remain unappreciative of his words in *Schaefer v. United States*. “There must be the clear and present danger,” he wrote. “Certainly men, judging in calmness and with this test presented to them, could not reasonably have said that this coarse and heavy humor immediately threatened the success of recruiting.”⁷⁹ For Mr. Justice Frankfurter to ignore the difference between “tendency” and “clear and present danger” is to defeat the efforts of Justices Holmes and Brandeis who, when the majority decided to apply the former test in the *Schaefer* case, reminded their colleagues that “. . . the test to be applied . . . is not the remote or possible effect. There must be clear

⁷⁶ FREUND, ON UNDERSTANDING THE SUPREME COURT 25 (1949).

⁷⁷ FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 51 (1938).

⁷⁸ See *Kovacs v. Cooper*, 336 U. S. 77, 95, 69 S. Ct. 448, 93 L. Ed. 379 (1949) (concurring opinion).

⁷⁹ *Supra* note 16, 251 U. S. at 486 (concurring in part and dissenting in part). Emphasis supplied.

and present danger.”⁸⁰ There is evidence, furthermore, that at least in 1931 Mr. Justice Frankfurter realized that Justice Brandeis believed in the clear and present danger test.⁸¹

Likewise, there is indication that Mr. Justice Frankfurter once appreciated the constitutional freedoms and perhaps even the clear and present danger concept. He has written:⁸²

If men cannot speak or write freely, they will soon cease to think freely. Limits there are, of course, even to this essential condition of a free society. But they do not go beyond the *minimum* requirements of an *imminent and substantial threat* to the very society which makes individual freedom significant.

Even in 1941 he admitted that the Court must look for “a real and substantial threat to” the opposed societal interest. “The threat must be close and direct . . .,” he added.⁸³ It is doubtful if there is a constitutional difference between *this* language and that of “clear and present danger.”

It is an unfortunate misconception of our constitutional society to ennoble the will of some municipal council above the basic principles of freedom enshrined in the Bill of Rights. Dean Pound has written:⁸⁴

. . . we hear many urge today that judicial power as to unconstitutional legislation is something never intended and its exercise is a judicial usurpation. But the clear understanding of American lawyers before the Revolution, based on the seventeenth-century books in which they had been taught, the unanimous course of decision after independence and down to the adoption of the Constitution, not to speak

⁸⁰ *Ibid.*

⁸¹ Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33, 87-93 (1931).

⁸² *Id.* at 88. Emphasis supplied.

⁸³ *Bridges v. California*, *supra* note 2, 314 U. S. at 303.

⁸⁴ Pound, *The Development of Constitutional Guarantees of Liberty*, 20 NOTRE DAME LAWYER 347, 395 (1945).

of the writings of two of the prime movers in the convention which drafted the instrument, are abundant proof to the contrary.

One of the Founding Fathers wrote: "We may appeal to every page of history for proofs irrefragible, that the people when unchecked have been as unjust, tyrannical, brutal, and barbarous as any king or senate of uncontrolled power. The majority has eternally and without exception usurped the rights of the minority."⁸⁵ Mr. Justice Frankfurter's brethren have reminded him that "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."⁸⁶ And another old master to whom Mr. Justice Frankfurter has looked for guidance can remind him that: "The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders."⁸⁷

Carl Becker was sure that:⁸⁸

Jefferson and his contemporaries . . . were fully aware that even in a republic the natural rights of man needed to be safeguarded against another sort of tyranny—the tyranny of the majority. Against the tyranny of the majority,

⁸⁵ See Part IV of ADAMS, *A DEFENSE OF THE CONSTITUTIONAL GOVERNMENT OF THE UNITED STATES* (1787).

⁸⁶ *West Virginia State Board of Education v. Barnette*, *supra* note 4, 319 U. S. at 638. Almost certainly in reply to Mr. Justice Frankfurter's contention that liberty is to be protected by legislatures, rather than courts, Mr. Justice Jackson added, 319 U. S. at 628: "One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

⁸⁷ CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 92-3 (1921).

⁸⁸ BECKER, *FREEDOM AND RESPONSIBILITY IN THE AMERICAN WAY OF LIFE* 26 (1945).

or at all events against hasty and ill-considered action by the majority, the founding fathers endeavored, therefore, to erect adequate safeguards.

Similarly, Professor Haines wrote:⁸⁹

To protect the minority against the danger of oppression by majority rule was another purpose which the founders of the American government set about to accomplish in the process of constitution-making. It was thought by Madison and others that the merits of the federal Constitution lay in the fact that it secured the rights of the minority against "the superior force of an interested and overbearing majority."

After observing that "majorities may be as unjust and brutal as a despotic monarch," Professor Cushman attests to the belief of the founders of our Nation that "Civil liberties could be made safe only if placed beyond the reach of temporary majorities by being firmly imbedded in a carefully drawn bill of rights."⁹⁰ Another competent scholar and practitioner concludes that "legislative majorities, because they so quickly reflect the passions and prejudices of the populace, cannot . . . be depended upon to protect the freedom of individuals."⁹¹

Significantly, it was Mr. Justice Frankfurter's mentor, Justice Brandeis, who said of the Founding Fathers: "Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."⁹² There are recent indications that Mr. Justice Frankfurter will again admit that the "specifically enshrined" freedoms of expression deserve a judicially independent examination in the fullest sense because of the danger of the occasional tyrannies of temporal majorities. In *Kovacs v. Cooper*, he acknowledged that "those liberties of the individual which history has attested as the indispensable conditions of an open as

⁸⁹ HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 82-3 (1930).

⁹⁰ CUSHMAN, *Civil Liberty and Public Opinion*, in SAFEGUARDING CIVIL LIBERTY TODAY 84 (1945).

⁹¹ PATTERSON, FREE SPEECH AND A FREE PRESS 3 (1939).

⁹² *Whitney v. California*, *supra* note 8, 274 U. S. at 376.

against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.”⁹³ Indulgence in the whim of majorities accords no legal significance to the First Amendment, and it is to be hoped that Mr. Justice Frankfurter will soon completely repudiate his judicial abdication in this area of constitutional freedom. Such a re-consecration to his task may well be accompanied by his recognition of the test that has best succeeded in giving legal significance to the fundamental freedoms—clear and present danger.

Is It a “Rule of Reason”?:

Mr. Justice Frankfurter has denominated the clear and present danger formula a “rule of reason.”⁹⁴ Initially it was so referred to by Justice Brandeis who, writing in 1920, said:⁹⁵

This is a rule of reason. Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities, and from abuse by irresponsible, fanatical minorities. Like many other rules for human conduct, it can be applied correctly only by the exercise of good judgment; and to the exercise of good judgment calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty. The question whether in a particular instance the words spoken or written fall within the permissible curtailment of free speech is, under the rule enunciated by this Court, one of degree.

Seven years later the United States Supreme Court struck down a state statute, which was limitative of freedom, without reference to the language of clear and present danger because it was, in the Court’s opinion, “an arbitrary and unreasonable exercise of the police power of

⁹³ *Supra* note 78, 336 U. S. at 95.

⁹⁴ *Bridges v. California*, *supra* note 2, 314 U. S. at 296.

⁹⁵ *Schaefer v. United States*, *supra* note 16, 251 U. S. at 482 (dissenting opinion).

the State, unwarrantably infringing the liberty of the defendant. . . .⁹⁶ Although the present Court—most particularly Mr. Justice Frankfurter—is unlikely to express its rationale this way, it was only recently that Mr. Justice Reed said of his colleagues: “All agree there may be reasonable regulation of the freedom of expression.”⁹⁷

So long as mortals sit upon the Court, and so long as they utilize subjective criteria, they will probably determine the constitutionality of legislative abridgments of freedom according to their ideas of reasonableness, be the test expressed in terms of “clear and present danger” or anything else.⁹⁸ A jurist as consistently devoted to the clear and present danger test as Justice Murphy once remarked: “We are concerned solely with the reasonableness of this particular prohibition. . . .”⁹⁹

There is no inexplicable paradox in the current Bench’s characteristic acquiescence in determinations of reasonableness by the legislature in regulations of other interests while the Court manifests a greater willingness to avoid, as unreasonable, legislative denials of freedom of speech, press, religion and assembly. The absolute language of the First Amendment—“no law”—must at least mean that every attempt by temporary majorities to deny the fundamental freedoms is *prima facie* unreasonable or, otherwise expressed, burdened by a presumption of unconstitutionality.

The clear and present danger test is certainly not a “rule of reason” in the sense that anything considered by the legislature as having a reasonable relation to an anticipated

⁹⁶ *Fiske v. Kansas*, 274 U. S. 380, 387, 47 S. Ct. 655, 71 L. Ed. 1108 (1927).

⁹⁷ See *Martin v. City of Struthers*, 319 U. S. 141, 155, 63 S. Ct. 862, 87 L. Ed. 1313 (dissenting opinion).

⁹⁸ “In the United States, the judge, in virtue of his right to review the law, inquires whether an act of the legislative body is reasonable . . . ” ROMMEN, *THE NATURAL LAW* 198 (1947).

⁹⁹ *Prince v. Massachusetts*, *supra* note 4, 321 U. S. at 173.

evil can be proscribed. Speaking of the First Amendment freedoms, Mr. Justice Rutledge said for the Court:¹⁰⁰

Any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation.

Very little is to be gained, it is suggested, by labelling the clear and present danger test a "rule of reason." Courts will better contribute to an understanding and appreciation of their constitutional role and responsibility if they indicate, not that they are the sole oracles of reason, but rather that the legislative expression is being annulled because it is far outweighed by the greater, enduring societal interest in freedom of expression—an interest of whose dignity and weight the judiciary must be ever mindful under our Constitution.

Is It Simply the Old Incitement Test?:

Arthur Garfield Hays remarked recently:¹⁰¹

I often wonder whether there is anything new in the doctrine announced by Mr. Justice Holmes. Direct incitements to crime are criminal. All that Mr. Justice Holmes said was that there are words which in peace time might not be incitements where the words might have a different effect in time of war. In other words, conditions should determine whether or not the words are incitements to violation of law. The question is really not whether the utterances of certain words "will be endured" but whether or not they are incitements. Likewise the determination of the fact of whether words are incitements would depend upon whether or not they are imminent or serious. Isn't this about what the clear and present danger doctrine really means?

Thirty years earlier the same thought had been expressed. "The test laid down by Justice Holmes . . . is that of com-

¹⁰⁰ Thomas v. Collins, *supra* note 4, 323 U. S. at 530.

¹⁰¹ Hays, Book Review, 97 U. OF PA. L. REV. 751, 752 (1949).

mon law incitement to crime," wrote one commentator.¹⁰² And Professor Chafee recognizes the similarity: "This test draws the boundary line very close to the test of incitement at common law."¹⁰³ Professor Black has likewise observed that "the *Schenck* doctrine comes close to limiting criminal liability to words which directly incite acts in violation of law," although admittedly he detects a closer analogy to the common law doctrine of criminal attempt.¹⁰⁴

Even before the announcement of the clear and present danger test, Judge Learned Hand had indicated that utterances falling short of incitement could not constitutionally be punished. In 1917 he wrote in an opinion:¹⁰⁵

Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law . . . Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists. If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation.

That there is a constitutional difference between incitement to crime and mere advocacy of violation of law was recognized at an early date by Justice Brandeis. In the *Whitney* case, he said: "But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of in-

¹⁰² See Note, 29 YALE L. J. 337-8 (1919).

¹⁰³ CHAFEE, FREEDOM OF SPEECH 89 (1920).

¹⁰⁴ Black, *Debs v. United States—A Judicial Milepost on the Road to Absolutism*, 81 U. OF PA. L. REV. 160, 169 (1932).

¹⁰⁵ *Masses Publishing Co. v. Patton*, 244 Fed. 535, 540 (S. D. N. Y. 1917).

citement and there is nothing to indicate that the advocacy would be immediately acted on.”¹⁰⁶ It is evident that this great exponent of the clear and present danger test considered it, in its application to political expression, a criterion at least as severe as the incitement test known to the common law.

One of the greatest sociologists has expressed his belief that something comparable to an incitement test is needed to protect adequately the institutions of the group. Malinowski wrote in 1944: “In any case where speech is direct incitement to action which is dangerous to the freedom of others, rather than freedom of debate and submission of principles, we should exclude every statement which leads to activities forbidden by what we have defined as the constitutional, civil and criminal laws prevalent in a democracy. . . .”¹⁰⁷ It is interesting to note, too, that England has utilized an incitement standard in demarcating a large area of speech considered dangerous to the state.¹⁰⁸

Although at one time Justice Holmes felt that anyone who counselled crime was beyond constitutional protections, on another occasion he emphasized that not even incitements would always satisfy his clear and present danger test. In the early case of *Frohwerk v. United States*¹⁰⁹ he reflected: “We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.” However, in the later *Gitlow* case the Justice was clear that not all

¹⁰⁶ *Supra* note 8, 274 U. S. at 376.

¹⁰⁷ MALINOWSKI, *FREEDOM AND CIVILIZATION* 221-4 (1944).

¹⁰⁸ The Incitement to Mutiny Act, 1797, 37 GEO. 3, c. 70, §1, provides for the punishment of “any person who shall . . . incite or stir up . . . person or persons to commit any act of mutiny. . . .” See also *R. v. Bowman*, [1912] 22 Cox C. C. 729.

¹⁰⁹ 249 U. S. 204, 206, 39 S. Ct. 249, 63 L. Ed. 561 (1919).

incitements, if any, were constitutionally punishable. He wrote:¹¹⁰

It is said that this Manifesto was more than a theory, that it was an incitement. 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 of 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.

Meiklejohn is convinced that Justice Holmes rejected the test "that speech which incites men to action is, as such, debarred from the First Amendment,"¹¹¹ and he believes that Holmes intended a test more protective of freedom.¹¹² To Riesman, however, "the clear and present danger test means . . . that only innocuous and academic incitements to the overthrow of the existing government will not be labeled sedition."¹¹³

Notwithstanding the Court's affirmance of Gitlow's conviction in 1925 for *advocating* overthrow of the government, the Holmes-Brandeis philosophy might well influence the present Court to insist upon at least direct incitement under the clear and present danger test. However, in 1943 Professor Cushman could see "no reason to suppose that the Supreme Court would decide the *Gitlow* case differently today from what it did in 1925."¹¹⁴ And, although the Court refused to insist upon the minimum of incitement when it denied certiorari in *Dunne v. United States*,¹¹⁵ this refusal to review may not justify the belief that a Court which has elsewhere recognized the propriety of the

¹¹⁰ *Supra* note 28, 268 U. S. at 673.

¹¹¹ MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 43 (1948).

¹¹² *Id.* at 47 *et seq.*

¹¹³ Riesman, *Civil Liberties in a Period of Transition*, 3 PUBLIC POLICY 33, 38-9 (1942).

¹¹⁴ Cushman, *Some Constitutional Problems of Civil Liberties*, 23 B. U. L. REV. 335, 344 (1943).

¹¹⁵ 138 F. (2d) 137 (8th Cir. 1943), *cert. denied*, 320 U. S. 790, 64 S. Ct. 205, 88 L. Ed. 475 (1943).

clear and present danger test will condone penalties for mere advocacy. As Fraenkel has noted of the "Smith Act":^{115a} "No inference as to the constitutionality of the sedition part of the law can be drawn from this refusal, since the conviction rested also on a charge of causing disaffection in the armed forces."¹¹⁶

Analogizing the clear and present danger test to the incitement test may have value when the former criterion is applied to prosecutions for violation of sedition and syndicalism statutes, but the attempted parallel is fruitless, if not deceptive, in a whole host of free speech, press, religion and assembly controversies. The concept of incitement nowhere provides for evaluation of the substantiality of the societal interest imperiled by expression. As the *Terminiello* case¹¹⁷ well illustrates, incitements to minor social inconveniences cannot justify denials of expression, even though the resultant activity be labelled "criminal" by the temporal majority in control of some municipality.¹¹⁸ Furthermore, the incitement rule is an unsatisfactory description of the "proximity and degree" aspect of the clear and present danger standard. Expansion, if not distortion, of definition would be required to denominate many expressions of religion and the other freedoms, such as standing silently during flag salutes, as "incitements" to any serious societal antipathy.

The incitement analogy fails completely in the application of the clear and present danger formula to non-criminal situations. It is suggested that use of this analogy will only obfuscate further the judicial role in the delimitation of liberty, and its use should therefore be discouraged.

^{115a} 54 STAT. 671 (1940).

¹¹⁶ Fraenkel, *Some Current Civil Liberties Problems*, 15 BROOKLYN L. REV. 12 (1948).

¹¹⁷ *Supra* note 33.

¹¹⁸ "We know that all incitement to action may not be abridged or punished." Sherman, *Freedom of Speech and the Need for Public Order*, 26 DICTA 217, 219 (1949).

Does It Shift the Burden or Quantum of Proof?:

In devising the clear and present danger test, Justice Holmes, according to an able scholar, "put the burden of proof, in effect, on the legislature by requiring that the evil be 'substantive' and that the danger of its eventuation be 'clear and present.' " ¹¹⁹ Similarly, Justice Murphy indicated that the burden is upon the state to prove the necessity of abridging freedom and the propriety of the means chosen. In the *Prince* case he wrote: "The burden was therefore on the State of Massachusetts to prove the reasonableness and necessity of prohibiting children from engaging in religious activity. . . ." ¹²⁰ This is the extent of the Supreme Court's acknowledgement of a shifted burden in freedom controversies, although it is implicit in the recognition of a presumption of unconstitutionality. ¹²¹

Speaking for the Court in the *Pennekamp* case, Mr. Justice Reed explained that "for circumstances to create a clear and present danger . . . a *solidity of evidence* should be required. . . ." ¹²² What constitutes such a measure of evidence is unclear, but the language of the Court indicates it will require an unusual quantum of proof to justify abridgment of the First Amendment freedoms. When the government threatened the sanction of deportation after alleged Communist Party associations in *Schneiderman v. United States*, the Court insisted that the "evidence must be clear, unequivocal, and convincing." ¹²³ Cases concerned with the more common criminal sanctions have not disclosed a similar judicial insistence, although Mr. Justice Reed followed his "solidity of evidence" language with the

¹¹⁹ Barnette, *Mr. Justice Murphy, Civil Liberties and the Holmes Tradition*, 32 CORNELL L. Q. 177, 181 (1946).

¹²⁰ *Supra* note 4, 321 U. S. at 173.

¹²¹ See *United States v. Congress of Industrial Organizations*, 335 U. S. 106, 140, 68 S. Ct. 1349, 92 L. Ed. 1849 (1948) (concurring opinion of Justice Rutledge, joined in by Justices Black, Douglas and Murphy).

¹²² *Supra* note 1, 328 U. S. at 347.

¹²³ 320 U. S. 118, 125, 63 S. Ct. 1333, 87 L. Ed. 1796 (1943).

suggestion that we "Compare *Baumgartner v. United States* and *Schneiderman v. United States*." ¹²⁴

Recognition of the "preferred position" of the fundamental freedoms means, according to Green, that:¹²⁵

. . . clear and present danger may perhaps now be said to require that in the balancing of interests there must be placed in the scales, against the social value of the governmental abridgment, a heavy (and uniform) weight representing the absolute value of the freedom, apart from and in addition to the Court's estimate of the social value of the utterance in the particular case.

Unfortunately, "preferred places" and "weights" are vagaries devoid of legal significance. Nor has "a solidity of evidence" much more judicial meaning. It has been recognized that a presumption of unconstitutionality is "implicit in the rule" of clear and present danger,¹²⁶ and the affixation of such a taint to all ordinances and statutes abridging freedom of speech, press, religion and assembly will accord import and legal significance to the deliberate constitutional enshrinement of these liberties far more constantly and effectively than "weights" and "preferences."

II.

Evaluation of the Clear and Present Danger Concept

Every socio-political group must, if it is to survive, safeguard its basic political institutions. And societies usually have other interests which they are unwilling to have jeopardized. Accordingly, organs of the state will somewhere along a line anticipatory of calamity say "Freedom ends here." Absolutists will aver that expression should never be punished, and at the other extreme it will be argued that freedom must be denied whenever it "tends" to evil. As Justice Holmes early recognized, it is a question

¹²⁴ *Pennekamp v. Florida*, *supra* note 1, 328 U. S. at 347.

¹²⁵ Green, *The Supreme Court, the Bill of Rights and the States*, 97 U. of PA. L. REV. 608, 636 (1949).

¹²⁶ *Id.* at 635.

of "proximity and degree."¹²⁷ And, as Fraenkel has noted, "The difference is one of emphasis, difficult either to define or to illustrate."¹²⁸ The clear and present danger cases "do not purport to mark the furthestmost constitutional boundaries of expression," according to Mr. Justice Black,¹²⁹ but they are points on the line, shifting with the composition and mood of the Court and generally occupying an intermediate position.

Libertarians have argued that the clear and present danger test is undesirable as an admission that the fundamental freedoms can be abridged by a temporal majority, in derogation of the absolutist language of the First Amendment. Meiklejohn, for instance, claims that "it has, in effect, led to the annulment of the First Amendment rather than to its interpretation,"¹³⁰ and he calls it "a peculiarly inept and unsuccessful attempt to formulate an exception to the principle of the freedom of speech."¹³¹ Similarly, Baldwin writes: "When the United States Supreme Court laid down the rule that Congress could, in violation of the First Amendment, abridge free speech if there were in particular cases 'clear and present danger . . .,' the door was opened wide enough for legal suppression to enter. And it has come in and made itself at home since."¹³² It is "a dangerous and unwarranted breach in the Constitution and the First Amendment" according to another.¹³³ Inasmuch as libertarians frequently believe that "public" speech is never to be denied, and practically all of them agree that abridgments are not to be tolerated until dangerous activity

¹²⁷ *Schenck v. United States*, *supra* note 27, 249 U. S. at 52.

¹²⁸ FRAENKEL, *OUR CIVIL LIBERTIES* 68 (1944).

¹²⁹ *Bridges v. California*, *supra* note 2, 314 U. S. at 263.

¹³⁰ MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 39 (1949).

¹³¹ *Id.* at 50.

¹³² Baldwin, *Personal Liberty*, 185 *ANNALS* 162, 164 (1936).

¹³³ Rosenwein, *The Supreme Court and Freedom of Speech—Terminiello v. City of Chicago*, 9 *LAW. GUILD REV.* 70, 73 (1949).

ensues, no subjective test limitative of liberty would be satisfactory to them.

Ernest Sutherland Bates feels that clear and present danger "itself is clearly a dangerous principle," because it can "be applied successfully only by men of Justice Holmes' caliber—and such men are few."¹³⁴ This test is no more "dangerous" to the cause of freedom than any other subjective test; certainly far less so than some. In its implicit denial of other societal interests,¹³⁵ an absolutist approach to freedom is both unrealistic and unwise. An overthrown government is unable to provide much protection for an unpopular speaker. The clear and present danger formula has facilitated decisions solicitous of freedom far better than any other test with which it has competed, and practical liberals should appreciate its contributions to the cause of freedom. The record of the recent Court is proof that a Holmes is not needed to protect liberty through application of the formula, although Bates is obviously right in intimating that a court unsympathetic to the particular expression can find it a clear and present danger to some societal interest. No subjective test, however, is insurance against the personal predilections of the bench. Ethereal criticism of the clear and present danger concept will exert little influence upon the judiciary charged with delimiting liberty, or upon serious thinkers concerned with working out a feasible formula for the solution of clashing societal interests.

Some observers, on the other hand, feel that the clear and present danger criterion is unsafe in that it does not adequately protect the security of the state.¹³⁶ The Illinois Supreme Court in 1932, after argument that the test was

¹³⁴ BATES, *THIS LAND OF LIBERTY* 159 (1930).

¹³⁵ "There is no question of balancing social interests when freedom of speech is involved." Rosenwein, *supra* note 133, at 74.

¹³⁶ Ober, *Communism vs. The Constitution: The Power to Protect Our Free Institutions*, 34 A. B. A. J. 645 (1948).

applicable, was nevertheless convinced that "the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government without waiting until there is a present and imminent danger of the success of the plan advocated."¹³⁷ "If the State were compelled to wait until the apprehended danger became certain," the court explained, "then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law."¹³⁸ And the majority of the United States Supreme Court in 1925 approved this as "aptly said."¹³⁹ It is, however, quite unnecessary to fear that the clear and present danger test will prevent a court so disposed from punishing words far in advance of society's overthrow. The very case in which the test originated should have constituted ample proof of this. In *Schenck v. United States*,¹⁴⁰ the Court had no difficulty finding a clear and present danger without any semblance of governmental overthrow. State courts have also illustrated how very readily expressions can be punished with the clear and present danger standard, although any overthrow of anything was far in the future.¹⁴¹

Is the Test Too Subjective and Uncertain?:

The subjectivity of the clear and present danger criterion is occasionally singled out for attack. Bates wrote: "The principle of Justice Holmes still leaves the application of the law in any given instance a matter of conjecture, since man's conception of danger is notoriously subjective; a danger clear to one will be laughed at by another."¹⁴²

¹³⁷ *People v. Lloyd*, 304 Ill. 23, 35, 136 N. E. 505 (1922).

¹³⁸ *Ibid.*

¹³⁹ *Gitlow v. New York*, *supra* note 28, 268 U. S. at 669.

¹⁴⁰ *Schenck v. United States*, note 27 *supra*.

¹⁴¹ *People v. Malley*, 49 Cal. App. 597, 194 Pac. 48 (1920); *State v. Boloff*, 138 Ore. 568, 4 P. (2d) 326 (1931).

¹⁴² BATES, *THIS LAND OF LIBERTY* 159 (1930).

Similarly, Whipple states: "Words that to one man seem perfectly harmless are viewed by another as likely to produce imminent dangers." And he added that "no man can know in advance what words he will be punished for."¹⁴³ Sherman opines: "The clear and present danger test seems somehow inadequate. Where do we draw the line to mark off the statements . . . which are permissible and what are not so? Does not the formula become purely subjective depending upon the judge?"¹⁴⁴ And, in the same vein, Green writes: "Clear and present danger modified the old rule of 'dangerous tendency' by adding a different emphasis; but it is still a subjective test. . . . Indeed, the Court is now required to appraise, with no fixed objective standard, not only the danger of the evil, but the social value of the utterance."¹⁴⁵ Admittedly, clear and present danger is a subjective test. The case of *Craig v. Harney*¹⁴⁶ illustrates how the United States Supreme Court detected no such peril, although a state court had perceived such danger. This is, however, a characteristic of all the tests from which the clear and present danger standard has received serious competition. As Radin has aptly observed: "It is hard to see how subjectivism can be avoided or how the personality of the judge can be made to count for nothing" ¹⁴⁷ Admittedly, too, a court applying the test has the difficult and delicate task of weighing opposed societal interests, but it must be realized (and Green must know) that the courts faced this responsibility, though

¹⁴³ WHIPPLE, *OUR ANCIENT LIBERTIES* 96 (1927).

¹⁴⁴ Sherman, *Freedom of Speech and the Need for Public Order*, 26 *DICTA* 217, 219 (1949).

¹⁴⁵ Green, *The Supreme Court, the Bill of Rights and the States*, 97 *U. OF PA. L. REV.* 608, 636 (1949). See also Note, 24 *ST. JOHN'S L. REV.* 83, 85 (1949): "The term 'clear and present danger' has many connotations, of course, and the court in any given instance must subjectively determine what is a 'clear and present danger' to a large degree unaided or perhaps unhampered by precedent. What to one court or judge may be a 'clear and present danger,' may not be to another court or judge."

¹⁴⁶ *Supra* note 5.

¹⁴⁷ Radin, *Statutory Interpretation*, 43 *HARV. L. REV.* 863, 881 (1930).

often unconsciously, before and without the application of the clear and present danger standard. Nor is such a responsibility imposed upon the judiciary solely in freedom controversies.

Similarly, the test is at times said to be uncertain. "The 'clear and present danger' rule defies exact definition," writes one commentator.¹⁴⁸ "It has yet to be defined in such manner as to permit any degree of certainty in its application," according to Justice Spence of the California Supreme Court.¹⁴⁹ Mr. Justice Reed once referred to the test as having the "vice of uncertainty," although he readily acquiesced in applying the criterion.¹⁵⁰ Walsh charges that "the clear and present danger test . . . is not definite,"¹⁵¹ and Teller has similarly asserted: "The 'clear and present danger' test has by no means been clarified. . . ." ¹⁵² In 1940 Professor Swisher was of the belief that the clear and present danger doctrine "is significant in terms of theory, but the doctrine is so vague as to constitute a highly indefinite standard. . . ." ¹⁵³ And two years later Riesman charged that "the formula proved unilluminating," because the Court divided in *Abrams v. United States*,¹⁵⁴ *Pierce v. Society of Sisters*,¹⁵⁵ and in the *Schaefer* case, and because convictions were sustained in the *Frohwerk* case and in *Debs v. United States*,¹⁵⁶ where he felt "the conduct . . . seems quite as far removed from endangering the prosecution of the war as was the conduct

¹⁴⁸ See Note, 24 NOTRE DAME LAWYER 236, 239 (1949).

¹⁴⁹ See *Danskin v. San Diego Unified School District*, 28 Cal. (2d) 536, 171 P. (2d) 885, 889 (1946) (dissenting opinion).

¹⁵⁰ *Pennekamp v. Florida*, *supra* note 1, 328 U. S. at 334.

¹⁵¹ Walsh, *Is the New Judicial and Legislative Interpretation of Freedom of Speech, and the Freedom of the Press, Sound Constitutional Development?*, 21 GEO. L. J. 161, 182 (1933).

¹⁵² Teller, *Picketing and Free Speech*, 56 HARV. L. REV. 180, 196 n. 74 (1942).

¹⁵³ Swisher, *Civil Liberties in Wartime*, L. V. POL. SC. Q. 321, 330-1 (1940).

¹⁵⁴ *Supra* note 12.

¹⁵⁵ 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925).

¹⁵⁶ 249 U. S. 211, 39 S. Ct. 252, 63 L. Ed. 566 (1919).

in the *Abrams* case itself.”¹⁵⁷ When the majority failed to apply the clear and present danger criterion in any of these cases, it is as unwise as it is unfair to condemn the formula as “unilluminating.”

Another writer who admits the utility of the test in the usual freedom controversy claims it is too subjective and indefinite when freedom of the press is opposed by the interest in an impartial administration of justice. He charges that:¹⁵⁸

. . . while the test has practical validity in determining whether there is actual danger of the destruction of the government . . . it has no bearing or materiality when applied to the coercion of the judicial mind. The determination as to when words present an “imminent danger” of leading to insurrection, or fomenting a breach of peace, or organizing criminal syndicalism, though concededly difficult in given fact situations, nevertheless seems possible of accomplishment by rational process. Testing whether printed or spoken words constitute a “clear and present danger” of subverting the judicial process, however, leaves courts with results reached by undisclosed convictions or, what is even worse and perhaps more likely, mere visceral sensation. Danger to the government’s physical control over its territories can be regarded objectively. The possible effect on the mind of the judge being subjected to an ostensibly intimidating attack and on the mind of the individual litigant whose day in court has become a mere sideshow while his case is argued on the newsstands, are too subjective to be measured by such supposed criteria.

It should be suggested that the clear and present danger concept necessitates no psychoanalysis of litigants. It might also be recalled that the test superseded by this standard (to which the writer presumably would have us return) permitted the punishment of publications that had a “reasonable tendency” to obstruct the administration of jus-

¹⁵⁷ Riesman, *Civil Liberties in a Period of Transition*, 3 PUBLIC POLICY 33, 41 (1942).

¹⁵⁸ Wickham, *The “Clear and Present Danger” Test in Constitutionality of Proceedings to Punish for Contempt by Publication During Pending Case*, [1948] WIS. L. REV. 125, 130-1.

tice,¹⁵⁹ and it is proper to ask if any lesser investigation into the mind and fortitude of the judge was required by such standard. Difficulty in determining the interference with the administration of justice has inhered for centuries in the law of contempt, and adoption of the clear and present danger test in this situation adds nothing subjective to traditional and necessary perplexities.

Every student of the problem should realize that some measure of uncertainty will, at least initially, characterize any subjective test. "Those who desire their constitutional standards capsuled will search, especially in this field, in vain."¹⁶⁰ Certainty and guidance will accrue, however, from "the gradual process of judicial inclusion and exclusion,"¹⁶¹ as the continued application of the test demarcates areas of permissible expression. In 1927 it was well enough for Justice Brandeis to admit that "This Court has not yet fixed the standard by which to determine when a danger shall be clear; how remote the danger may be and yet be deemed present,"¹⁶² but by 1941 the Court could truthfully recognize that the "language of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections was in issue."¹⁶³ If the test be for the moment unclear, it is no more uncertain than any other subjective test. Listen to Professor Freund commenting on the *tendency* test: "To know what you can do and what you may not do and how far you may go in criticism is the first condition of political liberty. To be permitted to agitate at your peril, subject

¹⁵⁹ *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 38 S. Ct. 560, 62 L. Ed. 1186 (1918).

¹⁶⁰ Cohen and Fuchs, *Communism's Challenge and the Constitution*, 34 CORNELL L. Q. 352, 365 (1949).

¹⁶¹ *Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. Ed. 616 (1877). Chief Justice Hughes indicated that where constitutional principles are involved, "the process of construction is essential to fill in the details." *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398, 426, 54 S. Ct. 231, 78 L. Ed. 413 (1934).

¹⁶² *Whitney v. California*, *supra* note 8, 274 U. S. at 374.

¹⁶³ *Bridges v. California*, *supra* note 2, 314 U. S. at 262.

to a jury's guessing at motive, tendency and possible effect, makes the right of free speech a precarious gift."¹⁶⁴ The foremost authority on freedom of speech has concluded that the clear and present danger "test, though not automatic, is much more practicable than any other which has been authoritatively suggested."¹⁶⁵ Elsewhere it has been described as "the nearest approach to a concrete test,"¹⁶⁶ and "the most exact definition yet devised."¹⁶⁷

The United States Supreme Court has indicated its expectation that "from the formula's repeated application by the courts, standards of permissible comment . . . [will] emerge . . .,"¹⁶⁸ and the belief is not at all unjustified. Apparent or initial subjectivity of standard is not the enduring serious defect imagined, for certainty and even objective rule derive from continued judicial application of the determinant.

In the delimitation of liberty, the flexibility of subjective criteria is far preferable to rigidity of rule. When "it is a Constitution we are expounding,"¹⁶⁹ "convenient vagueness"¹⁷⁰ susceptible of varying limits in time of peace and war, and permissive of expanding freedom with societal maturation is not only advantageous but imperative. A jurist who has faced and studied the task has observed:¹⁷¹

In the last analysis, any test as to what constitutes an unlawful abridgment of freedom of speech and of the press is bound to present difficulties inherent in the very nature of the problem. It is a question of degree, of reason, and of good judgment. Any test, necessarily, is general and

¹⁶⁴ Ernst Freund, *The Debs Case and Freedom of Speech*, New Republic, May 3, 1919, p. 13.

¹⁶⁵ CHAFEE, *THE INQUIRING MIND* 132 (1928).

¹⁶⁶ Note, 24 ST. JOHN'S L. REV. 83, 85 (1949).

¹⁶⁷ Note, 41 HARV. L. REV. 525, 528 (1927).

¹⁶⁸ *Pennekamp v. Florida*, *supra* note 1, 328 U. S. at 334.

¹⁶⁹ See *McCullough v. Maryland*, 4 Wheat. 316, 407, 4 L. Ed. 579 (1819) (Chief Justice Marshall).

¹⁷⁰ See Hough, *Due Process of Law—Today*, 32 HARV. L. REV. 218 (1919).

¹⁷¹ Shientag, *From Seditious Libel to Freedom of the Press*, 11 BROOKLYN L. REV. 125, 153 (1942).

flexible, depending upon the time, the place, the particular occasion and the surrounding circumstances.

To decry the subjectivity of standard in this area is to utter ill-advised criticism.

Is a mechanical jurisprudence induced by utilization of the clear and present danger test? It has been so charged by Mr. Justice Frankfurter. After reminding us again that "The Constitution is not a formulary,"¹⁷² he continued his attack in the *Pennekamp* case when he stated: "Formulas embodying vague and uncritical generalizations offer tempting opportunities to evade the need for continuous thought."¹⁷³ He claims that "'Clear and present danger' was never used by Mr. Justice Holmes to express a technical legal doctrine or to convey a formula for adjudicating cases."¹⁷⁴ And Justice Frankfurter adds: "It does an ill-service to the author of the most quoted judicial phrases regarding freedom of speech, to make him the victim of a tendency which he fought all his life, whereby phrases are made to do service for critical analysis by being turned into dogma."¹⁷⁵ Most recently in his dissent in *Craig v. Harney*, the Justice belabored the same point. By the decision, he alleges, "'clear and present danger' becomes merely a phrase for covering up a novel, iron constitutional doctrine . . . Only the pungent pen of Mr. Justice Holmes could adequately comment on such a perversion of the purpose of his phrase."¹⁷⁶

There is ample evidence that Justice Holmes considered clear and present danger a test—it need not be repeated here. But it is proper to express a doubt that Mr. Justice Frankfurter weighed more consciously or intelligently the opposed societal interests in the aforementioned cases than did his brethren of the majority "confused" by the work-

¹⁷² See *Bridges v. California*, *supra* note 2, 314 U. S. at 295.

¹⁷³ *Supra* note 1, 328 U. S. at 351.

¹⁷⁴ *Id.* at 353.

¹⁷⁵ *Id.* at 352.

¹⁷⁶ *Supra* note 5, 331 U. S. at 391.

ing principle of clear and present danger.¹⁷⁷ The difference between the Court's majority and Mr. Justice Frankfurter lies far less in anyone's succumbing to the "tempting opportunities to evade the need for continuous thought," than in disparate hierarchies of values.¹⁷⁸ Discarding or avoiding statement of test or principle can accomplish little to reconcile such a divergence. It is suggested that utilization of the test can stimulate a more conscious search for opposed societal interests and encourage a more intelligent weighing of the need for restriction—somewhat preferable to suspected projection of judicial prejudices.

The application of the clear and present danger formula has afforded "an opportunity for sympathetic judges to protect a wider area of free discussion,"¹⁷⁹ but it would be naive to imagine that it is any more or less liberal than the high court justices who administer it. The record is clear that even the United States Supreme Court is willing to overlook the test when they are unsympathetic to the particular expression,¹⁸⁰ and the standard, like any other, will produce liberal decisions only, in the words of one commentator, "so long as it is wielded by a willing arm."¹⁸¹

"Clear and present danger of substantive evil" is essentially a "working principle"¹⁸² for weighing societal utilities, with an implicit recognition of added weight to the interest in expression flowing from the deliberate constitu-

¹⁷⁷ Note the language of Mr. Justice Reed: ". . . reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes . . . We must, therefore, weigh the right of free speech which is claimed by the petitioner against the danger of the coercion and intimidation of courts in the factual situation presented by this record." *Pennekamp v. Florida*, *supra* note 1, 328 U. S. at 346.

¹⁷⁸ Most evident in *Craig v. Harney*, *supra* note 5, where Mr. Justice Frankfurter would have upheld the trial court which had applied the clear and present danger test and insulated the judiciary from criticism.

¹⁷⁹ Note, 51 *YALE L. J.* 798, 801 (1942).

¹⁸⁰ See *Prince v. Massachusetts*, note 4 *supra*.

¹⁸¹ Green, *The Supreme Court, the Bill of Rights and the States*, 97 *U. OF PA. L. REV.* 608, 636 (1949).

¹⁸² *Bridges v. California*, *supra* note 2, 314 U. S. at 263.

tional enshrinement of these "preferred" values, and with the added emphasis that only a virtual certainty that the opposed societal interest be immediately and gravely endangered will justify abridgment of the fundamental freedoms. This careful balancing of societal interests has been thought to be the extent of utility of the concept. Wechsler, for instance, states: "In short, what the clear and present danger test can do, and all that it can do, is to require an extended judicial review in the fullest legislative sense of the competing values which the particular situation presents."¹⁸³ That this is the test's *raison d'être* has been recognized by other observers.¹⁸⁴ Nevertheless, Professor Freund expresses quite unjustified fears that the clear and present danger formula may deter rather than encourage a conscious weighing of opposed societal interests. He alleges:¹⁸⁵

The truth is that the clear-and-present-danger test is an oversimplified judgment unless it takes account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity; the availability of more moderate controls than those which the state has imposed; and perhaps the specific intent with which the speech or activity is launched. No matter how rapidly we utter the phrase "clear and present danger," or how closely we hyphenate the words,

¹⁸³ Wechsler, *Symposium on Civil Liberties*, 9 AM. L. SCHOOL REV. 881, 887 (1941).

¹⁸⁴ "... it appears that the present Supreme Court considers the 'clear and present danger' rule merely a convenient phrase to adorn a decision in reality grounded on what is termed, 'a balance between desirability of free discussion' [and the opposed societal interest]." Note, 24 NOTRE DAME LAWYER 236, 240 (1949). "There must be a balancing of interests . . . To help strike this balance, the Supreme Court has developed the rule that to justify a speech restriction there must be a 'clear and present danger.'" Note, CALIF. L. REV. 596, 601 (1948). "The clear and present danger rule . . . was regarded as 'a working principle' in reconciling the apparent conflict between a person's freedom and the operations of government." Sherman, *Loyalty and the Civil Servant*, 20 ROCKY MOUNT. L. REV. 381, 383 (1948). "The clear and present danger rule . . . has been frequently employed to strike a balance between the exercise of governmental authority and the protection of rights guaranteed in the First Amendment." Emerson and Helfield, *Loyalty Among Government Employees*, 58 YALE L. J. 1, 85 (1948).

¹⁸⁵ PAUL FREUND, ON UNDERSTANDING THE SUPREME COURT 27-8 (1949).

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 complexity of the strands in the web of freedoms which the judge must disentangle.

This criticism has little merit. Implicit in the very use of the clear and present danger working principle is the judicial inquiry into the "relative seriousness of the danger." A comparison of opposed values is inherent in every determination that the opposed interest is "substantive." And any attempt to evaluate the "occasion" of the expression is utterly unwise. Society's interest in receiving new ideas does not hinge upon whether they are announced at national political conventions or from soapboxes. Exploration into the possibility or desirability of more moderate controls is not a judicial but a legislative task far beyond attainment under the limitations of case-to-case adjudication. Furthermore, to suggest exploration into the subjectivity of the speaker's intent is to be particularly unhelpful in this area. It is perplexing how a conscientious scholar can hinge constitutional freedom upon intent in the light of the doctrine of constructive intent run riot in World War I sedition trials. There is no justification for a revival of this pernicious doctrine. Lastly, there is no proof whatever that the Court has been subjected to "a delusion of certitude" from utilization of the clear and present danger formula. Instead, the available evidence indicates that this "working principle" has stimulated the judiciary to an awareness of the clash of societal interest and has encouraged a more intelligent evaluation of the necessity for abridging freedom.

Some commentators feel that clear and present danger is not so much a test as it is a judicial policy, philosophy or attitude. Mosher, for example, writes:¹⁸⁶

This doctrine, as distinguished from the "reasonableness" test, implies a different social and political philosophy, for it insists upon a stronger, more positive justification for curtailment of civil rights. The "clear and present danger"

¹⁸⁶ Mosher, *Mr. Justice Rutledge's Philosophy of Civil Rights*, 24 N. Y. U. L. Rev. 661, 666 (1949).

philosophy expresses an attitude which regards the freedoms protected by the First Amendment as fundamental to our framework of democracy, and requires more than a mere showing of rationality before these basic rights may be restricted.

Likewise Emerson and Helfield write:¹⁸⁷

Both the test of "reasonableness" and the test of "clear and present danger" are broad formulæ which do not decide concrete cases. Upon analysis both resolve into issues of balancing competing values. Yet the "clear and present danger" rule implies a different social and political philosophy in approaching the constitutional issue. It implies that the courts will insist upon a stronger, more positive justification for governmental infringement upon freedoms guaranteed by the First Amendment. It expresses an attitude which regards these freedoms as fundamental to our framework of democracy and holds it the function of the courts to demand more than a mere showing of rationality before such rights may be sacrificed.

And Sherman similarly observes that, "The clear and present danger test is itself not a rigid rule or formula. It is more of an attitude or approach through which the Court evaluates personal rights and freedoms against the interference of government."¹⁸⁸ Like these others, Cohen and Fuchs look upon clear and present danger as "a sense of the importance of free speech rather than a formula that determines. . . ." ¹⁸⁹ Quite similarly, Biddle believes that the particular value of the concept lies in its insistence upon a standard of approach, both cautious and realistic.¹⁹⁰

Admittedly, clear and present danger is indicative of a judicial philosophy cognizant of the import of freedom in a democracy. Assuredly, too, it is subjective and anything but an automatic solution of conflicting interests. Nevertheless, clear and present danger of substantive evil is—as Justice Holmes pointed out—"the correct test."¹⁹¹ Surely,

¹⁸⁷ Emerson and Helfield, *supra* note 184, at 86.

¹⁸⁸ Sherman, *supra* note 184, at 385.

¹⁸⁹ Cohen and Fuchs, *Communism's Challenge and the Constitution*, 34 CORNELL L. Q. 352, 365 (1949).

¹⁹⁰ BIDDLE, MR. JUSTICE HOLMES 156 (1946).

¹⁹¹ See *Gitlow v. New York*, *supra* note 28, 268 U. S. at 673 (dissenting opinion).

courts are balancing societal utilities when they speak of clear and present danger, but it is that and something more; it is an insistence that there be imminent peril to the opposed societal interest—what Wechsler recognized as “the one item of genuine strength that the clear and present danger test has.”¹⁹² And, although it is understandable that observers may see in the phrase an attitude of favor to the fundamental freedoms inasmuch as most applications of the test have protected liberty, its place as a test is perceived more readily by noting the instances wherein its use has upheld denials of expression.

Application of the clear and present danger standard will annul very few expressions of the national majority will. High court jurists are apt to mirror the hierarchy of socio-legal values of the common culture,¹⁹³ and there are already signs that the Court pays to the Congress, even where First Amendment freedoms are concerned, a greater deference than to state legislatures or municipal councils.¹⁹⁴ In reversing convictions under municipal ordinances and state statutes, the Supreme Court is not denying the democratic process, but is rather—as it must in many situations—balancing the local interest against the national.¹⁹⁵ To our constitutional society the Court has the responsibility of intelligently balancing interests even where the Congress abridges freedom—the interest of a temporal majority and the evaluation of interest of the Nation’s permanent majority as expressed in the Constitution.

¹⁹² Wechsler, *supra* note 183 at 888.

¹⁹³ In the sole reversal of conviction under a federal law, the Supreme Court posited it upon lack of proof of the required intent, rather than upon absence of clear and present danger. *Hartzel v. United States*, 322 U. S. 680, 64 S. Ct. 1233, 88 L. Ed. 1534 (1944).

¹⁹⁴ See, e.g., *United Public Workers v. Mitchell*, 330 U. S. 75, 67 S. Ct. 556, 91 L. Ed. 754 (1943).

¹⁹⁵ Cf., e.g., *Thomas v. Collins*, note 4 *supra*, or *Martin v. City of Struthers*, 319 U. S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943). For further indication that a problem of federalism is involved, note the language of Mr. Justice Reed for the Court in *Pennekamp v. Florida*, *supra* note 1, 328 U. S. at 335: “Were it otherwise the constitutional limits of free expression in the Nation would vary with State lines.”

To recognize that the clear and present danger formula facilitates an intelligent, conscious weighing of societal interests is not to say that it permits balancing against an opposed societal interest the judge's notion of the worth of the expression. It should be noted well that the clear and present danger concept demands an inquiry into the substantiality of the evil—which is but an indirect way of appraising society's value in the opposed interest—but it nowhere demands or even permits a judicial exploration into the "substantiality" of the ideas expressed. There is a societal interest in expression, recognized and enshrined in the Constitution, and it is this interest that courts are to weigh in applying the clear and present danger test. Because the formula assumes a constant societal interest in expression, it is avoided by judges inclined to project their personal values into the task of delimiting freedom of expression. It is noteworthy that the worst decisions of the Supreme Court have been those in which it avoided application of the concept and permitted projection of their own actions of ideational worth.

The clear and present danger test will remain but a subjective criterion handy to express the libertarian predilections of any judge, but just as available to condone denials of freedom, unless and until from within its implicitness is extracted and recognized by the Court the presumption of unconstitutionality to all attempted abridgments of the First Amendment freedoms by temporal majorities. A recent scholarly article states:¹⁹⁶

Although Justice Douglas did not expressly rely on the presumption against constitutional validity of legislation pertaining to civil rights in his majority opinion in the *Terminiello* case, that presumption is at least implicit in his statement of the "clear and present danger" test. He has assented to the doctrine in the past as have other members of the majority. The "presumption against validity" in civil rights cases serves as one of the most important components

¹⁹⁶ Note, 25 NOTRE DAME LAWYER 99, 115 (1949).

used by the Court as it applies the test of "clear and present danger." A realization of the importance of this presumption in the disposition of civil rights cases is basic to an understanding of the methodology utilized by the present Court.

What Wechsler has said about the presumption of constitutionality in other areas—"The existence and role of such a presumption is of the highest importance for the future of the law"¹⁹⁷—is equally true of the presumption of unconstitutionality for attempted legislative denials of the First Amendment freedoms.

Lastly, appreciation of the clear and present danger formula must begin with a realization that verbalization of any subjective principle is never a solution to controversy. Justice Holmes was right in remarking that, "The boundary at which conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side."¹⁹⁸ Similarly Charles Evans Hughes stated that "the protection both of rights of the individual and those of society rests not so often on formulas, as to which there may be agreement, but on a correct appreciation of social conditions and a true appraisal of the actual effect of conduct."¹⁹⁹ There are enough decided cases to indicate that unanimity of belief in the applicability of a particular criterion is no assurance of uniformity of result.²⁰⁰

By its stimulus to conscious evaluation of opposed societal interests, and by its recall to the judicial mind of the Nation's omnipresent interest in freedom of expression, the clear and present danger test deserves perpetuation.

Chester James Antieau

¹⁹⁷ Wechsler, *supra* note 183 at 883.

¹⁹⁸ *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355-6, 28 S. Ct. 529, 52 L. Ed. 828 (1908).

¹⁹⁹ HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 166-7 (1928).

²⁰⁰ *Abrams v. United States*, note 12 *supra*; *Craig v. Harney*, note 5 *supra*.