ON "CLEAR AND PRESENT DANGER"

*Leslie Kendrick**

INTRODUCTION

Justice Oliver Wendell Holmes's dissent in *United States v. Abrams* gave us the "marketplace of ideas" metaphor and the "clear and present danger" test.[1] Too often unremarked is the contradiction between the two. At the same time that Holmes says "the best test of truth is the power of the thought to get itself accepted in the competition of the market," he also says that "the present danger of immediate evil" permits Congress to restrict the expression of opinion.[2] When the anticipated harm comes about through acceptance of the speaker's idea, then the imposition of the clear and present danger test stops the operation of the marketplace of ideas.[3] The market is not free if the clear and present danger test intervenes right when an idea gains traction.

In *Abrams*, the "evil" that preoccupied Congress was the embrace of socialism and concomitant opposition to the World War I draft. The five defendants in *Abrams* had printed and distributed circulars aimed at persuading the market to accept the truth of their socialist perspective on the war.[4] Holmes concluded that the printing and distribution of the circulars did not present a clear and present danger. "[N]obody," he said, "can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without

* Vice Dean and David. H. Ibbeken '71 Research Professor of Law, University of Virginia School of Law. The author would like to thank Paul Horwitz, Fred Schauer, Micah Schwartzman, the participants of the *Notre Dame Law Review* Symposium on *Contemporary Free Speech: The Marketplace of Ideas a Century Later*, and the editors of the *Notre Dame Law Review*.

1 *See* Abrams v. United States, 250 U.S. 616, 628, 630 (1919) (Holmes, J., dissenting).

2 *Id.*

3 *See* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 17–22 ("Holmes's 'clear and present danger' formula allows government officials to prohibit expression precisely when such speech threatens to incite action. An interpretation of the first amendment that permits the state to cut off expression as soon as it comes close to being effective essentially limits the amendment's protection to encompass only abstract or innocuous communication." (footnote omitted)); *see also* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 910–12 (1963).

4 *See Abrams*, 250 U.S. at 617–18.

more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so."[5] But had Holmes concluded that the leaflets did present a clear and present danger of persuading others of the truth of the defendants' perspective, such that opposition to the draft and other war activities increased by some unspecified degree, the clear and present danger test would have intervened to disrupt the "free trade in ideas"[6] that Holmes praised.

If sometimes the clear and present danger test seems to interrupt the free trade in ideas, there are instances in which it seems to provide more protection than necessary within the marketplace. John Stuart Mill gave the famous example of the speech against the corn dealer:

> An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.[7]

Mill's hypothetical imagines that speech in front of the corn dealer's house, in front of an angry mob, may be punished. But intervention at that time may be too late. Likewise, Holmes argued that "falsely shouting fire in a theatre" is not protected by the First Amendment, but it is difficult to understand how to apply the clear and present danger test to such an utterance.[8] If the law is serious about prohibiting physical harm as a result of an exchange of ideas, the clear and present danger standard sometimes does too little too late.

If the marketplace of ideas and the clear and present danger test are in tension with each other, either one of them could be identified as the problem. The marketplace of ideas has received a great deal of criticism, but mostly about various forms of market failure. Less common is a rejection of the basic idea that, as human beings and subjects of the state, individuals have a strong interest in receiving information so that they may make their own decisions about what constitutes a good life and what constitutes good policy. Whether a completely unregulated speech market actually provides adequate information is another matter, but the basic claim to information is commonly accepted. If it remains so, then the clear and present danger test is an intervention that overrides this claim to information in some contexts. As such, it requires some justification.

For many years, the clear and present danger test received its share of criticism.[9] Recently, however, few have focused on its difficulties. This is, perhaps, because technically speaking it is no longer a current doctrinal standard, having been superseded in the context of incitement and subversive

5 *Id.* at 628 (Holmes, J., dissenting).

6 *Id.* at 630.

7 JOHN STUART MILL, ON LIBERTY 55 (Alburey Castell ed., Harlan Davidson, Inc. 1947) (1859).

8 Schenck v. United States, 249 U.S. 47, 52 (1919).

9 *See infra* Parts I–II.

advocacy by the test set forth in *Brandenburg v. Ohio*[10] (and perhaps, with some uncertainty as to their remaining force, cases such as *Yates v. United States*,[11] *Scales v. United States*,[12] and *Noto v. United States*[13]). Yet the clear and present danger test is still with us. It is the shaping force behind *Brandenburg* and the dominant popular articulation of when incendiary or objectionable speech loses its protection.[14] It informs state laws on unlawful assembly and breach of the peace.[15] Also, when courts encounter speech for which the Supreme Court has not developed a clearly articulated standard, they often fall back on the principles of clear and present danger or *Brandenburg*, whether they make sense in the given area or not.[16]

If the clear and present danger test still exerts force, it also still carries the mysteries it has had since the beginning. The most frequent criticisms are that it is hard to apply and easy to manipulate. But problems in application are only the last of several along the line from conceptualizing to implementing the standard. In many ways, it raises as many questions as it answers. This Article addresses some of these questions.

I. Clear and Present Danger, Then and Now

The clear and present danger test originated in *Schenck v. United States*.[17] Holmes, writing for a unanimous Court upholding the defendants' convictions under the Espionage Act for overseeing the distribution of socialist leaflets, utilized the term "clear and present danger" in rejecting the claim that the convictions violated the First Amendment.[18] In doing so, Holmes articulated an approach to subversive advocacy rooted in his views on criminal attempt:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. . . . If the act, (speaking, or circulating a paper,) its tendency and

10 *See* Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam) (developed the current standard for unprotected incitement discussed in Part I).

11 354 U.S. 298 (1957), *overruled by* Burks v. United States, 437 U.S. 1 (1978).

12 367 U.S. 203 (1961).

13 367 U.S. 290 (1961).

14 *See, e.g.*, Geoffrey R. Stone, Perilous Times: Free Speech in Wartime 522 (2004) ("[E]xactly fifty years after *Schenck*, the Supreme Court finally and unambiguously embraced the Holmes-Brandeis version of clear and present danger[.]").

15 *See, e.g.*, Va. Code Ann. § 18.2-406 (West 2018) ("Whenever three or more persons assembled share the common intent to advance some lawful or unlawful purpose by the commission of an act or acts of unlawful force or violence likely to jeopardize seriously public safety, peace or order, and the assembly actually tends to inspire persons of ordinary courage with well-grounded fear of serious and immediate breaches of public safety, peace or order, then such assembly is an unlawful assembly.").

16 *See infra* Part II; *see also infra* notes 48–52 and accompanying text.

17 *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

18 *Id.*

> the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.[19]

In *The Common Law*, Holmes had suggested that liability for criminal attempt and other inchoate crimes required both criminal intent and action that came close to achieving a crime.[20] Thus, if a speaker intended to bring about an unlawful occurrence, and his speech created a clear and present danger of that occurrence, then the speech could be punished. The upshot of applying a standard for liability for inchoate crimes was that Holmes did not understand the First Amendment to provide additional protections in this situation beyond those offered by general criminal law principles. Clear and present danger was part of the exact same standard of liability that he would have applied in cases of criminal attempt, whether or not speech was involved.

Holmes's views changed between *Schenck* and *Abrams*, as has been documented exhaustively.[21] At the encouragement of Professor Zechariah Chafee, Jr., Holmes repurposed clear and present danger into a First Amendment standard that drew a line between protected speech and unprotected subversive advocacy:

> I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. . . .
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> . . . It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.[22]

Later cases would largely forget Holmes's suggestion that intent to cause harm was an independent and sufficient basis on which to restrict advocacy. The likelihood of a clear and present danger would come to occupy the field.

Indeed, during the 1940s, the Supreme Court suggested that "clear and present danger" could function as an all-purpose test to determine the scope of free speech protection. For example, discussing "peaceful and truthful discussion of matters of public interest," the Court in *Thornhill v. Alabama* said, "abridgment of the liberty of such discussion can be justified only where

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19 *Id.*

20 *See, e.g.*, O.W. HOLMES, JR., THE COMMON LAW 66–67 (Boston, Little, Brown & Co. 1881).

21 *See, e.g.*, DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 346 (1997); David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97, 163–74 (1982); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 726 (1975); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1208–09 (1983) [hereinafter Rabban, *The Emergence*]; Fred D. Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 J. AM. HIST. 24, 25 (1971); G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CALIF. L. REV. 391, 392 (1992).

22 Abrams v. United States, 250 U.S. 616, 627–28 (1919) (Holmes, J., dissenting).

the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."[23] This formulation suggests that clear and present danger is the standard for all regulations that abridge truthful and peaceful discussion—apparently including time-place-manner regulations, obscenity regulations, and so forth.[24] This proposition was almost immediately put to the test in several contexts, including picketing and obscenity, where the Court began to develop other standards.[25]

Developments in the 1950s and 1960s led many to conclude that the clear and present danger test was no longer good law, even in its core area of operation. Beginning with *Dennis v. United States*, the Supreme Court for a time embraced Chief Judge Learned Hand's reformulation of the test.[26] Although Hand claimed to be applying the clear and present danger standard, and although the Supreme Court in *Dennis* seemingly took him at his word, commentators noticed a strong divergence. Hand transformed the clear and present danger test into straightforward cost-benefit analysis—into, in fact, the Hand formula that he also applied in *United States v. Carroll Towing Co.* and other torts cases to define negligent conduct.[27] Alexander Meiklejohn and Thomas Emerson concluded that the test had been abandoned.[28] Justice Brennan, writing in 1965, observed, "[t]here are many who

23 Thornhill v. Alabama, 310 U.S. 88, 104–05 (1940); *see, e.g.*, Bridges v. California, 314 U.S. 252, 262–63 (1941) ("And very recently we have also suggested that 'clear and present danger' is an appropriate guide in determining the constitutionality of restrictions upon expression. . . . 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.").

24 *But see* Hans A. Linde, Comment, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163, 1163 (1970) (criticizing suggestions that clear and present danger works for all purposes).

25 *Id.* at 1169.

26 341 U.S. 494, 510 (1951) (plurality opinion). In Hand's reformulation, courts "must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* (internal quotation marks omitted) (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951)).

27 *Compare id.*, *with* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

28 Emerson, *supra* note 3, at 912 (1963) ("The clear and present danger test was abandoned by a majority of the Supreme Court in the *Dennis* case. The substitute—the gravity of the evil, discounted by its improbability—excised the main features of the original test by eliminating or minimizing the requirement that the danger be immediate and clear. The present status of the clear and present danger test is thus in some doubt. There is still some blood remaining in the doctrine, and it has continued to be used in certain types of situations. But, as a general test of the limits of the first amendment, the clear and present danger test must be regarded as unacceptable." (footnote omitted)); Alexander Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CALIF. L. REV. 4, 13 (1961) (stating in discussing *Dennis* that "the Court has reinstated as 'controlling' the 'clear and present danger' test of 1919, but with the words 'clear' and 'present' left out" (footnote omitted)).

doubt that this test has much vitality today."[29]

But the Supreme Court never abandoned clear and present danger. In *Dennis*, the Court was still taking the same general kind of approach prescribed by Holmes: hinging speech protection on a context-specific risk assessment of the likely results of speech. Those pronouncing the death of clear and present danger were discussing the substitution of one context-specific risk assessment for another. Meanwhile, elsewhere the principles of clear and present danger were alive and well. It influenced the "fighting words" doctrine, which permits regulation of speech directed at the listener and likely to provoke an immediate violent reaction.[30] It was invoked in "heckler's veto" cases such as *Feiner v. New York*, decided the same year as *Dennis*, where the Court upheld a criminal penalty levied against a speaker whose words were likely to provoke violence against him.[31] It was influential in *Cohen v. California*, where the Court struck down Cohen's conviction for wearing a jacket with the slogan "Fuck the Draft" under California's disorderly conduct law.[32] Because Cohen was prosecuted for the slogan, without regard for how likely it was to provoke negative reactions, his conviction could be understood as an application of neither the fighting words doctrine nor the heckler's veto doctrine.[33]

The Supreme Court reaffirmed clear and present danger in *Brandenburg v. Ohio*, which set the current standard for unprotected incitement.[34] The *Brandenburg* Court held that

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[35]

With this standard, the Court affirmed the basic principle of the clear and present danger test: that the risk posed by speech in its immediate context is a factor that must be considered in deciding when it can be regulated. Under *Brandenburg*, courts should invalidate any restriction on persuasive

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29 William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 8 (1965).

30 *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1, 3 (1949); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

31 Feiner v. New York, 340 U.S. 315, 321 (1951).

32 Cohen v. California, 403 U.S. 15, 16–17 (1971).

33 *Id.* at 20 (rejecting arguments that Cohen's jacket could be punished under the fighting words or heckler's veto doctrines in part because "[t]here is, as noted . . . no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result").

34 Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (per curiam) (striking down a law punishing "persons who 'advocate or teach the duty, necessity, or propriety' of violence 'as a means of accomplishing industrial or political reform'; or who publish or circulate or display any book or paper containing such advocacy" (quoting OHIO REV. CODE ANN. § 2923.13 (West 1958)).

35 *Id.* at 447.

speech that does not take likely effects into account in keeping with the clear and present danger standard.

If clear and present danger is still with us, so are its difficulties. Although the test is most often criticized as difficult to apply, more fundamental is the problem of when, if ever, it is the appropriate standard—or part of the appropriate standard—on which to judge the protection for speech under the First Amendment.

II. Fallibility and Manipulability

Critics have questioned the clear and present danger test from its very inception. The earliest and most common criticisms were about the fact that it requires judges to assess the dangerousness of speech. Judges are not particularly equipped to do this, critics have said, and they are no less susceptible to uproar or hysteria than other public officials. For these reasons, the test is difficult to apply consistently, easy to manipulate, and unlikely to hold up in the very situations where it is most required. Hand voiced this concern in a letter to Chafee shortly after Holmes first developed the test:

> I am not wholly in love with Holmesy's test and the reason is this. Once you admit that the matter is one of degree, while you may put it where it genuinely belongs, you so obviously make it a matter of administration, i.e. you give to Tomdickandharry, D.J., so much latitude . . . that the jig is at once up. Besides their Ineffabilities, the Nine Elder Statesmen, have not shown themselves wholly immune from the "herd instinct" and what seems "immediate and direct" to-day may seem very remote next year even though the circumstances surrounding the utterance be unchanged. I own I should prefer a qualitative formula, hard, conventional, difficult to evade.[36]

Indeed, Chafee himself was not particularly entranced with Holmes's approach. Professor David Rabban has observed:

> It is a major irony of the first amendment tradition that both Chafee, the most effective advocate of the "clear and present danger" test, and Brandeis, the Justice who did most to add substance to this phrase, seem to have recognized its deficiencies. Instead of a test dependent upon predicting the potential consequences of speech, both seem to have preferred an approach analyzing the meaning of the offending words themselves, the method suggested by some of the prewar commentary on the first amendment and employed by Learned Hand in *Masses Publishing Co. v. Patten.* Yet Brandeis, Chafee, and other civil libertarians were not willing to abandon what looked,

36 Letter from Judge Learned Hand to Zechariah Chafee, Jr., Professor, Harvard Law School (Jan. 2, 1921), *in* Gunther, *supra* note 21, at 770. Later in *Dennis*, Hand would apply his own version of clear and present danger, *see* Dennis v. United States, 341 U.S. 494 (1951); *supra* note 26 and accompanying text, but his applying existing law in his capacity as an appeals court judge should not be confused for personal endorsement. He articulated his own view as a district court judge in 1917 in the *Masses* case, where he proposed that the proper test was whether the speech in question amounted to direct advocacy of overthrow of the government. *See* Masses Publ'g Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

> especially after *Abrams*, like one of the few hints of tolerance in the history of Supreme Court adjudication of first amendment issues. They tried to make the most of a bleak situation, in part by ignoring prior hostile decisions and in part by [reading] . . . ["]the dissenting *Abrams* eloquence . . . back into *Schenck* as though it had been there all the time."[37]

Since its inception, the test has been criticized time and again for depending too much on circumstances[38] and thereby giving judges too much discretion[39] and failing to give speakers proper notice of the legality of their activities.[40] Because of these features, the clear and present danger test was sometimes likened to ad hoc balancing and criticized for presenting similar problems.[41]

For these reasons, Meiklejohn concluded that "the 'clear and present danger' formula denies rather than expresses the meaning of the Constitu-

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37 Rabban, *The Emergence*, *supra* note 21, at 1212 (second omission in original) (footnote omitted) (quoting Harry Kalven, Jr., *Professor Ernst Freund and* Debs v. United States, 40 U. CHI. L. REV. 235, 238 (1973)).

38 John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1493 n.44 (1975) ("[A] given message will be sometimes protected and sometimes not, depending on the actual or projected behavior of the audience in response to it."); Emerson, *supra* note 3, at 911 ("In all but the simplest situations the factual judgment demanded of the court is difficult or impossible to make through the use of judicial procedures."); Linde, *supra* note 24, at 1169.

39 Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 474 (1985) ("In crafting standards to govern specific areas of first amendment dispute, courts that adopt the pathological perspective should place a premium on confining the range of discretion left to future decisionmakers who will be called upon to make judgments when pathological pressures are most intense. Constitutional standards that are highly outcome-determinative of the cases to which they apply are thus to be preferred. This observation would counsel against standards such as the clear-and-present-danger test and its many variants that require in their application a contemporary assessment of social conditions.").

40 Emerson, *supra* note 3, at 911 ("The clear and present danger test is excessively vague. As experience has shown, its application by the Court leads to no one ascertainable result. And for the main participants in the system of freedom of expression—police, prosecutors, and other officials on the one hand and the individual seeking to exercise his rights on the other—the test furnishes little clarity in advance of a judicial decision."); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 888–89 (1970) ("The clear and present danger test—or the 'gravity discounted by improbability' test—avoids overinclusive characterization of unprotected conduct at the risk of providing no characterization at all which is determinate and focused enough to give warning in advance of conduct how far an overbroad statute may permissibly reach. Absent specific per se categories which define the character of privileged conduct, a danger test is little more than an adjuration that the Court carefully inspect the conduct of a particular complainant to see whether under the circumstances the interest in expression overrides governmental interests in intervention. Such a device is indistinguishable in operation from the process of piecemeal, ad hoc excision and does not meet the need to restructure a substantially overbroad statute in order to dissipate its chilling effect." (footnotes omitted)).

41 *See, e.g.*, Ely, *supra* note 38, at 1493 n.44; Emerson, *supra* note 3, at 910–12; Note, *supra* note 40, at 887–89.

tion."[42] On Meiklejohn's view, the clear and present danger test was not a clear rule—it was an easily manipulated standard that was at odds with the First Amendment. These problems of unbounded discretion and manipulability have always been among the criticisms of clear and present danger, but they express only one of its many difficulties.

III. Unsuitability Beyond Persuasive Speech

Another problem arises from the diversity of activities and purposes potentially encompassed within "freedom of speech." After a majority of the Supreme Court endorsed clear and present danger, the Court sometimes suggested that it was the single test of First Amendment protection. In *Thornhill v. Alabama*, for example, the Court held that the clear and present danger standard governed picketing and other activity at the site of a labor dispute, and the Court further implied confidence in the test as an all-purpose tool.[43] In *Bridges v. California*, the Court acknowledged that it had "suggested that 'clear and present danger' is an appropriate guide in determining the constitutionality of restrictions upon expression."[44] But "speech" performs all sorts of functions and poses all sorts of risks. Not all "speech" within "freedom of speech" poses risks well described in terms of clear and present danger. Early ambitions for the standard were thus doomed to failure: it could not define the line between unprotected and protected speech for all purposes.

The difficulty was, and is, that speech can pose many risks other than in-the-moment positive or negative reactions that could lead to harmful results. Some of these harms have nothing to do with the content of the speech—for example, streets and sidewalks blocked by demonstrations, or loud noise caused by sound trucks. Other harms arise from the content of speech but have little to do with imminent risk.[45] In the obscenity context, for example, the Court concluded that the line between protected speech and unpro-

42 Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245, 246 n.4 (quoting Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 92 (1948)).

43 Thornhill v. Alabama, 310 U.S. 88, 105 (1940) ("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.").

44 Bridges v. California, 314 U.S. 252, 262 (1941).

45 *See, e.g.*, Emerson, *supra* note 3, at 911 ("The doctrine grew out of cases where the restriction at issue was a direct prohibition of expression by criminal or similar sanctions, and is of doubtful application to other kinds of interference with freedom of expression. In a legislative investigating case, for example, a rule allowing the committee to inquire about expression that might create a clear and present danger of some substantive evil would seem to impose no limits whatever upon the scope of investigation into expression. And where the regulation in question is not aimed directly at punishing a particular utterance but affects freedom of expression in a more generalized or indirect way, as in a tax law or a disclosure requirement, the issues are not framed in terms of whether a specific

tected obscenity did not depend on a clear and present danger. Instead, it was defined by the content—its prurience and its value.[46] Struggles like the one over obscenity prompted Hans Linde to observe that "the Supreme Court has had trouble with the question whether it is intrinsic content or extrinsic circumstances that take some kinds of expression outside the protection of the first amendment."[47] As the Court adopted new constitutional standards for libel, invasion of privacy, threats, intentional infliction of emotional distress, and other kinds of speech, it did not invoke clear and present danger. Instead, it mostly relied on standards attempting to define protection by the "intrinsic content" of the speech and the state of mind of the speaker.

Nevertheless, when courts today encounter speech for which the Supreme Court has not set out a specific test, they sometimes fall back upon the concept of clear and present danger, regardless of how appropriate that seems. In particular, they utilize the *Brandenburg* factors, which incorporate the earlier clear and present danger test. For example, courts have fallen back on *Brandenburg* in addressing speech that teaches how to commit a crime.[48] In several cases involving instructions for tax fraud,[49] courts have concluded that the instruction had to meet the *Brandenburg* criteria in order to fall outside the protection of the First Amendment.[50] Curiously, the courts concluded that the speech *did* meet the *Brandenburg* criteria, even though it was implausible to say that it threatened "imminent" lawlessness.[51] Instructions on how to commit tax fraud only pose "imminent" peril if "imminent" is defined as between now and the end of tax season.[52] Construing imminence in this extended sense undermines the entire point of the clear and present danger test and risks distorting *Brandenburg* into something closer to the old "bad tendency" test that Holmes rejected.

Courts facing cases involving criminal instruction have other options. In some instances, such as the tax fraud cases, they could conclude that the speech falls outside the scope of the First Amendment altogether, much like conspiracy and criminal solicitation. Alternatively, the courts could develop a standard distinguishing between instruction that is covered by the First

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utterance creates a specific danger. In any event, the clear and present danger test has not been applied in such cases.").

46 *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957).

47 Linde, *supra* note 24, at 1169.

48 Leslie Kendrick, Note, *A Test for Criminally Instructional Speech*, 91 VA. L. REV. 1973 (2005).

49 *See id.* at 1975 n.4.

50 *See id.*

51 *Id.* at 1993.

52 *See id.* at 1993–94 (discussing the distortion required of the imminence requirement to allow tax code violations to satisfy this prong of the *Brandenburg* test).

Amendment and instruction that is not.[53] This standard would not need to depend on clear and present danger any more than the standard for obscenity does. It could address the real harm of instructional speech—which is not so much that the speech persuades others to commit crimes as that it provides them the means to do so. Instead, reliance on the clear and present danger test has arguably interfered with the development of this area of law. The fact that courts view *Brandenburg* as relevant is an indication of the power of the clear and present danger test as a core First Amendment principle.

IV. Persuasive Speech and Clear and Present Danger

More important, however, is whether the clear and present danger test asks the right questions within its original scope of operation. One might ask what the original scope of the proposition is. As noted earlier, the clear and present danger test existed for some time as a potential all-purpose standard for speech protection. This proved untenable, as perhaps should have been clear from the beginning. Holmes originally described the scope of the proposition as follows: "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."[54] To Holmes, the realm at issue was "expression of opinion," and "clear and present danger" was the appropriate test within that realm, so long as "private rights" were not implicated.[55] Later cases suggested that the only type of speech at issue was subversive advocacy—expression of opinion directed particularly at criticizing the government and seeking to overturn it.[56] Still later, with *Brandenburg*, the Court broadened the scope to "advocacy of the use of force or of law violation."[57] This reformulation stops short of all expression of opinion but includes all advocacy of violence or law violation, including apparently advocacy of jaywalking or other minor infractions.

Meanwhile, the test has also had influence in the realm of expression of opinion that repels rather than persuades. Cases involving negative reactions to speech, including *Cantwell v. Connecticut*[58] and *Feiner v. New York*,[59] invoked clear and present danger as the relevant standard as a matter of course. Unlawful assembly laws and other contemporary standards do not

53 *See* Eugene Volokh, *Crime-Facilitating Speech*, 57 Stan. L. Rev. 1095, 1106 (2005) (proposing a test for crime-facilitating speech); Kendrick, *supra* note 48, at 1995–96 (proposing a test for criminal instruction).

54 Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

55 *Id.*

56 *See, e.g.*, Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S. 203 (1961).

57 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

58 310 U.S. 296, 308 (1940).

59 340 U.S. 315, 320 (1951).

distinguish between violence encouraged by speech and negative reactions against it, and they tend to track the principles of clear and present danger.[60]

Whatever the precise scope of the clear and present danger test, it pertains to expressions of opinion, or some subset of expressions of opinion, that might either persuade or provoke a negative reaction. In this arena, it is not obvious that it is the right test, either in terms of the values underlying free speech or in terms of the harms that might outweigh speech values in some contexts.

A. The Danger of Ideas

One difficulty with Holmes's view in the early cases is that it is not clear whether he is talking about only preventing dangerous actions—such as falsely shouting "Fire!" in a crowded theater—or also about preventing the adoption of ideas and attitudes that, on the margins, undermine the American project. The speech at issue in cases such as *Schenck*, *Debs v. United States*,[61] *Frohwerk v. United States*,[62] and *Abrams* had more the flavor of the latter. In *Schenck*, the speakers were prosecuted on the theory that they conspired to persuade others to oppose or avoid the draft, where draft obstruction was prohibited by the Espionage Act.[63] Under the clear and present danger test, it would seem that the leaflet in *Abrams* could be punished if it were capable of persuading others of the wrongness of the draft, such that they might oppose it to some unspecified degree.

Holmes's language suggests that causing others to hold anti-American ideas may be among "the substantive evils that Congress has a right to prevent."[64] He defines as his subject the limits placed on "the expression of opinion," and he argues that "Congress certainly cannot forbid all effort to change the mind of the country," which implies that Congress can forbid *some* effort to change the mind of the country.[65] Holmes then describes the danger at issue as "any immediate danger that [the leaflet's] opinions would hinder the success of the government arms or have any appreciable tendency to do so."[66] But this language is still capacious. It suggests that a speaker could be punished for speech that presents a *danger* of an *appreciable tendency* to *hinder* the success of the government. There is some possibility here that speakers could be punished for advocacy that, on the margin, affects the ten-

60 *See, e.g.*, VA. CODE ANN. § 18.2-406 (West 2018) ("Whenever three or more persons assembled share the common intent to advance some lawful or unlawful purpose by the commission of an act or acts of unlawful force or violence likely to jeopardize seriously public safety, peace or order, and the assembly actually tends to inspire persons of ordinary courage with well-grounded fear of serious and immediate breaches of public safety, peace or order, then such assembly is an unlawful assembly.").

61 249 U.S. 211 (1919).

62 249 U.S. 204 (1919).

63 Schenck v. United States, 249 U.S. 47, 48–49 (1919).

64 *Id.* at 52.

65 Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

66 *Id.*

dency of others to oppose government aims. Given this possibility, it is worth considering how well the clear and present danger test governs this realm of heterodox ideas.

Application of the clear and present danger test to attempts to persuade others of ideas that have a tendency to frustrate government aims would seem to run directly counter to the "marketplace of ideas" framework that Holmes embraces. If "the best test of truth is the power of the thought to get itself accepted in the competition of the market,"[67] then interfering with speech just as it presents a likelihood that others might resist the draft would seem to rig the game. Thomas Emerson criticized the clear and present danger test on these grounds:

> The formula assumes that once expression immediately threatens the attainment of some valid social objective, the expression can be prohibited. But no very viable system of freedom of expression can exist under such limitations. The basic theory contemplates that conflict with other objectives must occur, and indeed the system can be said to operate only where such conflict does take place. To permit the state to cut off expression as soon as it comes close to being effective is essentially to allow only abstract or innocuous expression. In short, a legal formula framed solely in terms of effectiveness of the expression in influencing action is incompatible with the existence of free expression.[68]

If we leave aside the marketplace metaphor, it is not obvious that the clear and present danger test finds justification in other theories of the First Amendment. From an autonomy standpoint, suppressing ideas at the very point at which they pose some marginal risk of persuading others to oppose governmental action seems unjustified unless there is some sort of manipulation or coercion in play—and the clear and present danger test does not require that.[69] Meanwhile, it is not clear that such a rule is required on a democratic self-governance theory. John Rawls, for example, has criticized the test for permitting too much regulation.[70] On Rawls's view, a clear and present danger of just any type of harm is not sufficient to justify governmental suppression of ideas. Instead, only a clear and present danger to the democratic order itself should override free speech protections.[71]

At the same time, if the spread of pernicious or illiberal ideas is ever a harm with which the government may concern itself, perhaps more intervention is needed rather than less. The clear and present danger standard limits itself to acute situations, where particular expression is highly likely to have

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67 *Id.* at 630.

68 Emerson, *supra* note 3, at 910–11.

69 See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991), for an attempt to reconfigure the clear and present danger test to meet this problem. *See also infra* note 82 and accompanying text.

70 *See* JOHN RAWLS, POLITICAL LIBERALISM 348–56 (1993).

71 *Id.*; *see also* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 802–03 (1994) ("As I read him, Rawls does not mean to argue that this is simply a greater degree of danger than any other; instead he means to argue that, to regulate political speech, government needs an interest of a particular sort.").

an immediate, demonstrable impact. It does not capture speech that erodes democratic ideals gradually—speech that promotes anti-Semitism and racial hatred, undermines evidence-based inquiry and argument, or delegitimizes democratic systems and the rule of law. The judges who embraced the "bad tendency" test saw the dangers inherent in speech that erodes rather than explodes. The clear and present danger test expressly rejected that approach. Other than invoking the marketplace of ideas, Holmes did not particularly explain why freedom of speech requires a wholesale rejection of bad tendencies in all contexts. Justice Brandeis said more in *Whitney*, in arguing that "the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom."[72] But later caselaw has suggested that Brandeis's pronouncements—including that suppression is only justified if danger is "imminent"—do not apply to all forms of speech.[73] To this extent, the clear and present danger test has not been accepted as striking the appropriate balance between authority and freedom in all contexts. Its scope of operation warrants critical inquiry as much as its alternatives do.

B. The Danger of Concrete Harms

It is not clear how much Holmes means to include marginal damage to, or frustration of, government objectives in the set of harms to which the clear and present danger test applies. But his analogies do envision the test applying to more concrete harms. He demonstrates as much in his famous invocation of "falsely shouting fire in a theatre and causing a panic."[74] Similarly, he says in *Abrams*:

> I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.[75]

Holmes's reasoning begins with the types of harm familiar to the criminal law, and he seems to include them within the ambit of his analysis.

As in the case of speech that frustrates particular societal goals, the speech Holmes discusses here accomplishes its harm through positive or negative reactions to the speech's message. A die-hard liberal or libertarian could make the same argument about this type of speech as about speech frustrating societal goals: that the best test of truth is the power of an idea to get itself accepted in the market, and the speaker should not be held liable for others having translated his or her ideas into action. At the same time,

72 Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

73 *See supra* Part III (discussing categories of speech that do not employ the clear and present danger test).

74 Schenck v. United States, 249 U.S. 47, 52 (1919).

75 Abrams v. United States, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting).

however, it is difficult to argue that free speech protections must include all speech, no matter how closely related to concrete harms the state may seek to prevent. The question is whether the clear and present danger test appropriately identifies speech that is sufficiently related to the risk of harm that it may be restricted.

The clear and present danger test defines proscribable speech in a purely consequentialist way. All that matters are the potential risks of speech: speech that is sufficiently likely to lead to harm is unprotected, while all other speech is protected. Accepting for the moment that purely consequentialist risk assessment is both an acceptable and the exclusive way of determining protection for expression of opinion, the clear and present danger test is not obviously an acceptable, let alone exclusive, way of implementing it.

For one thing, the clear and present danger test works better for some concrete harms than others.[76] It does not work for expression of opinion that causes harm directly, through its utterance rather than through the choices that its message causes others to make.[77] Once upon a time the Court seemed to recognize this, by identifying a category of fighting words that "by their very utterance inflict injury" and that do not require application of the clear and present danger test to be proscribed.[78] Whatever the problems with fighting words doctrine, it acknowledges that certain harms are not forestalled by application of a clear and present danger test. Similarly, the test does not apply to obscenity, whatever its harms are. The test also does not capture the risk of opinion or advocacy that works cumulatively—this might include certain instances of hostile-environment harassment, some forms of bullying, and persistent cajoling of individuals, say, to end their lives or take other harmful action. Repeated, corrosive exposure causes harm by accumulation, and any one instance is unlikely to trigger regulation under the clear and present danger test. A literal reading of Holmes's and Brandeis's opinions would suggest that such harms are not the type of emergency that justifies suppression.

Even with regard to acute contexts, the clear and present danger test may not draw the line correctly. The risk of the test, in general and also as implemented in American courts over the last decades, is that it may not limit speech until it is too late. Mill's corn dealer example suggests that the speech against the corn dealer could be prohibited if it occurred on the corn dealer's doorstep in front of an angry and hungry mob.[79] But American law would not work to prohibit the three elements of speaker, audience, and location from coming together in the first place, even if everyone involved could predict what would result. Indeed, the test is likely not to kick in until after the incendiary speech has been uttered. At this point, harm may be

76 *See, e.g.*, Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81.

77 *See, e.g.*, LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? (2005) (distinguishing speech that harms through utterance from speech that provokes other harmful action).

78 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

79 *See* MILL, *supra* note 7, at 55.

inevitable. If the idea is that the state has both the power and the obligation to prevent concrete harm, the clear and present danger test may often fail to do the very job it purports to do.

If the clear and present danger test is essentially a consequentialist safety valve, meant to cut off speech protection where risks of harm are too high, then it is performing a cost-benefit function. If cost-benefit analysis is the order of the day, free speech jurisprudence must explain why the clear and present danger variety is the right one. Hand was perhaps not wrong to translate clear and present danger into cost-benefit terms in *Dennis*—he just did so with more candor and less deference toward speech than other iterations.[80] The test in its usual form performs its cost-benefits analysis by putting a thumb on the scale against intervention—so much so that it may fail to head off harm in many cases. One alternative would be a more *Dennis*-like, cost-benefit analysis, with no thumb on the scale, or some middle ground between the current test and pure cost-benefit analysis. It is unclear why exactly the line should be drawn at any point in particular, other than some rough sense that a particular line strikes the right balance between enhancing the benefits of speech protections and reducing the risks of concrete harm.

This analysis assumes that a purely consequentialist approach is the right one and the only one. That is not clear either. I have already noted that the test is in tension with the marketplace of ideas metaphor Holmes invoked in purporting to explicate it. Hand, for one, seemed to think that principles of democratic self-governance pointed in another direction: the approach he took in *Masses* essentially recognized protection for all except those who had forfeited it by arguing for the rejection of the very Constitution whose protection they sought.[81] This approach makes the scope of protection consonant with the reasons those protections exist in the first place. If democratic self-governance is what is at stake, it does not seem obvious that the clear and present danger test draws a legitimate line between protected and unprotected speech—or that, if it does, it draws the only legitimate line.

Meanwhile, from an autonomy standpoint, clear and present danger seems to make little sense. This is perhaps why autonomy theorists have tried to translate the test into more palatable frameworks. Professor David Strauss, for example, has argued that persuasive speech is protected except in situations where the listeners' rationality is effectively overcome—where, for example, an incendiary speech whips a crowd into such a frenzy that they are not capable of reasoned responses.[82] But this is quite different from what the clear and present danger test provides on its face. There is no require-

80 Dennis v. United States, 341 U.S. 494, 510 (1951) (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951)).

81 *See* Masses Publ'g Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917). For an analysis of why forfeiture arguments might be relevant to incitement and might explain the *Brandenburg* requirement of an intent to commit harm, see Leslie Kendrick, Essay, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255 (2014).

82 *See* Strauss, *supra* note 69, at 337–39.

ment that listeners' rationality be overcome. A speech from one Klansman to other Klansmen may present a clear and present danger without short-circuiting the listeners' rational faculties: it may work by appealing to beliefs they already hold. On an autonomy rationale, the clear and present danger test appears to be a consequentialist safety valve designed to prevent certain harms.

Professor Cass Sunstein once observed,

> Some judgments are shallow but wide. In *Brandenburg v. Ohio*, the Court adopted a form of the clear and present danger test that is very wide in the sense that it is used in a great range of cases. But the Court did not give a deep theoretical grounding for the test. It did not, for example, try to root its test in a conception of democratic deliberation, or explore the link between the interest in autonomy and the right to free expression.[83]

The same can be said of the clear and present danger standard itself. First Amendment doctrine often takes for granted that the test reflects either an important principle or an unassailable balancing of the value of speech protection against the risks. In important respects, however, it is shallow.

Conclusion

"Clear and present danger" is a renowned phrase in constitutional law. From the beginning, however, it was in tension with the equally renowned concept of the marketplace of ideas. In addition, it is hard to apply and easy to manipulate, and its proper scope of application is not well explicated. From early on, its applications proved more limited than its proponents' expansive rhetoric suggested, and whether its remaining scope of application is justified is often assumed rather than explored. Professor Paul Freund once said: "No matter how rapidly we utter the phrase 'clear and present danger,' or how closely we hyphenate the words, they are not a substitute for the weighing of values."[84] This is as true today as it was in 1951 or in 1919.

83 Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 24 (1996).

84 Paul A. Freund, On Understanding the Supreme Court 27 (1949).