FREEDOM OF SPEECH

CATEGORIES OF SPEECH

Incitement and Advocacy of Crime

Introductory Comments

The history of the First Amendment's "clear and present danger" doctrine portrays a long and protracted struggle of the Supreme Court to emerge from the early and least speech-protective stages of the "bad tendency" test and of the "seriousness of the evil" test for incitement to arrive at a much more speech-protective standard that distinguishes advocacy of illegal activity from incitement of illegal activity.

The "bad tendency" test was articulated in different ways in four classic cases:

(1) *Schenck v. United States* (1919) (circulations denouncing conscription viewed as causing insubordination in the military forces and obstructing military recruitment in violation of the Criminal Espionage Act of 1917);

(2) *Frohwerk v. United States* (1919) (involving the illegal publication of twelve newspaper articles that attacked American involvement in WWI);

(3) *Debs v. United States* (1919) (involving a speech that challenged America's participation in WWI);

and (4) *Gitlow v. New York* (1925) (involving a manifesto that attacked capitalism and the American government in violation of a state criminal syndicalism statute).

The "seriousness of the evil" test was articulated in *Dennis v. United States* (1951) (prosecution under the Smith Act of 1940, which made it a crime to conspire to overthrow the government by force and violence). And the modern incitement standard differentiating advocacy and incitement is established in *Brandenburg v. Ohio* (1969).

The Bad Tendency Test:

Professor David Rabban characterizes Justice Holmes's early approach in the "clear and present danger" doctrine of *Schenck*, *Frohwerk*, and *Debs* as follows: "Holmes approved [criminal] punishment based on the *indirect tendency* of speech, upheld substantial judicial deference to jury evaluations of evidence, and supported greater restrictions on speech during times of war."

In *Schenck*, Justice Holmes first formulated the "bad tendency" test for determining when advocacy was lawful or unlawful:

> The question in every case is whether the words are used in such circumstances and are of such a nature as to create a *clear and present danger that they will bring about the substantive evils that Congress has a right to prevent*. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."

Under the "bad tendency" standard, the free speech claims in *Schenck, Frohwerk*, *Debs*, and *Gitlow* could be rejected relatively easily. Given that speech was punishable (1) when specific intent could be inferred from the tendency of one's words (on the presumption that one intends the natural consequences of one's speech), and (2) when the natural and reasonable tendency of the speech would be to bring about a forbidden effect, then a jury would not be acting unreasonably in finding that:

> Circulars denouncing conscription as unconstitutional and encouraging draftees to "assert their rights" could be expected to persuade draftees unlawfully to refuse induction (*Schenck*)
>
> German newspaper articles censuring American involvement in World War I and the draft as unconstitutional could be expected to interfere with the war effort and induction into the armed forces (*Frohwerk*)
>
> An antiwar speech at a Socialist Party rally, calling service in the armed forces nothing better than "slavery" and "cannon fodder," could be expected to obstruct recruiting or cause insubordination in the armed forces (*Debs*)

> And publication of the Left Wing Manifesto could be expected to bring about "strikes of protest" and "revolutionary mass action for the conquest of the power of the state" (*Gitlow*)

"Seriousness of the Evil" Test:

The Supreme Court majority in *Dennis v. United States* distanced itself from the earliest formulation of the "clear and present danger" doctrine. In his plurality opinion, Chief Justice Vinson adopted the "seriousness of the evil" test articulated by Judge Learned Hand in the 2nd Circuit Court of Appeals decision in the same case:

> [W]hether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.

As applied to the factual context of *Dennis* itself, the revised standard was satisfied by judicial notice of the highly disciplined organization of the Communist Party and the tinder-box of world conditions. For Vinson and his brethren, the "evil" was plain to see: "it was the intended demise of capitalism, by revolution if necessary!" – a grave evil by any American measure. And for Justice Frankfurter, as per his concurring opinion, "Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech. . . . Can we establish a constitutional doctrine which forbids the elected representatives of the people to make this choice? Can we hold that the First Amendment deprives Congress of what it deemed necessary for the Government's protection?"

Brandenburg's Incitement Test: advocacy of illegal activity that is "imminent," "likely," and "intended" by the speaker:

In reversing *Whitney v. California* (1927) and striking the Ohio criminal syndicalism statute, the Supreme Court erected a new and speech-protective standard that reformulated the "clear and present danger" test.

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action. As we said in *Noto v. United*

> *States*, "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments.

Given this standard, it is entirely understandable why the Supreme Court in *Brandenburg* would reverse the conviction of a Ku Klux Klan leader under a state criminal syndicalism statute that was not properly limited to advocacy "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action."

In decisions since *Brandenburg*, the Court's contemporary First Amendment standard for incitement of illegal activity has proven much more highly protective of dissident expression, where there was no serious evidence beyond provocative advocacy of violence.

Thus it is that First Amendment defenses for protected advocacy prevailed in subsequent Supreme Court decisions to overturn:

> the conviction of an anti-draft demonstrator for threatening President Lyndon B. Johnson's life, when the protestor was clearly using political hyperbole at a public rally [*Watts v. United States* (1969)]
>
> the conviction for disorderly conduct of a student dissident protesting America's invasion of Cambodia who had yelled that the demonstrators would "take the fucking street later." Not only were his remarks directed to no one in particular, suggesting that they could not constitute incitement, but there was no evidence that the remarks were likely to produce such imminent disorder [*Hess v. Indiana* (1973)]
>
> the civil judgment against the NAACP and several of its members for damages arising out of an economic boycott of racially discriminatory stores, because Charles Evers's public addresses largely contained highly charged political rhetoric lying at the core of the First Amendment, and because any violence was sufficiently removed in time from Evers's speeches to disqualify his remarks as imminent incitement [*NAACP v. Claiborne Hardware* (1982)]

It is important to note that *Brandenburg* and its progeny, such as *Claiborne Hardware*, are not really "wartime decisions." In that sense, the holdings in *Schenck* and *Dennis*, which have never been overruled, still stand, at least in a formal sense. It remains to be seen whether the test in *Brandenburg* is flexible enough that its results will depend on how severe the threatened harm may be. On this score, Professor William Wiecek argues: "Perhaps, in some grave emergency, *Dennis*'s core doctrine – that a group may suffer diminution of First Amendment protections for its speech and associational rights because of its relationship to a foreign power and/or the content of its doctrines – might once again command the assent of American jurists."

Query: If, indeed, the balance between First Amendment freedom and national security fear has today tipped in favor of freedom, is that a freedom we can afford in our post-9/11 world? In periods of war or military engagement, are we likely to wait until that very moment when the danger is so imminent that it may be impossible to turn back? It is fair to ask: Is *Brandenburg* a wise First Amendment policy? If so, what makes it so?"

> First Amendment scholar Daniel Farber asks: Should we accept the *Brandenburg* rule that allows advocates – anarchists, Communists, Klanners, Nazis, homophobes, right-wing extremists, and skinheads – "to spread evil so long as there is no proof of immediate physical danger?"