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Clear and present danger: Brandenburg test after September 11, 2001

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CLEAR AND PRESENT DANGER:
BRANDENBURG TEST AFTER SEPTEMBER 11, 2001

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Abstract

In a post-September 11, 2001 America and in light of the very real threat posed by radical Islamic terrorist, the courts must rethink the line between protected speech and incitement to violence. The *Brandenburg* test, which was previously understood to be the modern test to distinguish protected from unprotected advocacy, should be questioned. By examining the development of the Court's First Amendment doctrine leading up to *Brandenburg v. Ohio* (1969), I establish that *Brandenburg* is ill fitted to be applied to advocacy of terrorism. In *Brandenburg*, the Court actually conflated two previously distinct speech tests—Judge Learned Hand's incitement test and Justice Oliver Wendell Holmes' clear and present danger test—without explaining how these two tests fit together. In addition, the Court founded *Brandenburg* on sandy soil. The Court failed to distinguish between the two traditions. They cited Hand's incitement tradition as precedent for the clear and present danger test. In doing so, they credited *Brandenburg's* imminence requirement to Hand's direct incitement tradition, which did not include an imminence requirement. Therefore, *Brandenburg* should be abandoned. I conclude that the courts should apply the clear and present danger test and the direct incitement test separately according to the particular circumstances of each case. I will give two modern examples of advocacy of terrorism. I will show how the courts would be better off applying the clear and present danger test as developed by Holmes and Brandeis in one case and the direct incitement test as developed in by Judge Hand in the other. By taking a two test approach to advocacy of terrorism, the government will better posses the tools it needs to protect national security.

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[1]

Congress shall make no law… abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble.[2]

Chapter 1
Introduction

How much speech does the First Amendment protect? The line between protected speech and incitement to lawless action is blurry and has shifted many times in United States history.[3] Judges, lawyers, and legal scholars have been trying to establish the line for nearly a hundred years. In the wake of the September 11, 2001 attacks on the World Trade Center and the Pentagon, and in light of what President George W. Bush has called the "War on Terror,"[4] some scholars think that the time has come to redraw the line once again.[5]

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[1] U.S. CONST. pmbl.

[2] U.S. CONST. amend I.

[3] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("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."); Dennis v. United States, 341 U.S. 494, 510 (1951) (plurality opinion) ("[I]n each case, [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 dangers," *cf.* Chief Judge Learned Hand's circuit court opinion, 183 F.2d (1950) at 212.); Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("That necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State may constitutionally seek to prevent."); and Schenck v. United States, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.") These are just four of the many different articulations of the line between protected and unprotected speech that the Court has drawn since it first started tying to draw the line following World War I.

[4] President George Walker Bush, Address to a Joint Session of Congress and the American People (September 20, 2001), at http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html.

[5] *See* Marin R. Scordato and Paula A Monopoli, *PART III: Civil Liberties After September 11th: Free Speech Rationales After September 11th: The First Amendment in Post-World Trade Center America*, 13 STAN. L. AND POL'Y REV 185, 190 (2002) (arguing that we must question the parameters of the First Amendment as we strike a balance between free speech and national security.); *see also* Robert S. Tanenbaum, *Preaching Terror: Free Speech or Wartime Incitement*, 55 AM. U.L. REV. 785, 791-92 (2006) (arguing that either the *Brandenburg's* imminence

The 9-11 attacks challenge anew the balance of personal liberty and national security. Does the Constitution protect advocacy of terrorist activity?[6] Certainly, precedent suggests that it does, at least up to a point.[7] But at what point does speech threaten the security of the nation? This question must be considered in face of the very real threats posed by radical Islamic terrorists. Regardless of whether one thinks speech advocating terrorism can and should be restricted, no one can doubt the harm that proponents of terrorist activity hope to accomplish. One scholar has called such advocacy the "purported source of terrorism,"[8] defining it as religious and political speech that advocates violent criminal activity against a civilian population to further a political goal. Although this paper is concerned with advocacy of terrorism, it also raises the broader question of the distinction between public and private speech.[9]

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requirement "be applied with an understanding of context rather than solely within the framework of temporal limitations," or that the *Brandenburg* test should not be the ruling precedent in terrorist cases. A non-*Brandenburg* test should be constructed using the *Dennis* standard.); and Holly S. Hawkins, *A Sliding Scale Approach for Evaluating the Terrorist Threat over the Internet*, 73 GEO. WASH. L. REV. 633 (2005) (arguing that the *Dennis* standard should be applied instead of *Brandenburg* to terrorist websites that do not engage in marketplace, public ideological advocacy.).

[6] For the purposes of this paper, I refer to advocacy of terrorism as speech relating to religiously motivated violence meant to instill terror in the civilian population. There is legally, however, no difference between advocacy of terrorism and speech advocating other unlawful activity. For more information on the nuances of terrorism and terrorist activity, *see* WAYNE MCCORMACK, LEGAL RESPONSES TO TERRORISM 1-10 (2005). *See also*, Tanenbaum, *supra* note 5, at n15.

[7] Brandenburg v. Ohio, *supra* note 3, at 447 (holding that speech must incite imminent lawless action and likely to produce that action before it can be prohibited.); and Yates v. United States, 354 U.S. 298, 320-324 (1957) (holding that the government cannot prohibit advocacy of abstract ideas, but can prohibit advocacy of concrete action).

[8] Tanenbaum, *supra* note 5, at 789. *See also* Holly Coates Keehn, *Terroristic Religious Speech: Giving the Devil the Benefit of the First Amendment Free exercise and Free Speech Clauses*, 28 SETON HALL L. REV. 1230, 1231-33 (1998) ("Terroristic speech is, at its heart, political speech - speech aimed at bringing down the governing authority in favor of a new, and supposedly different, regime. Political speech is exactly what the First Amendment's Free Speech Clause was designed to protect. Therefore, some of the most powerful and feared leaders of radical, violent groups can be difficult to stop when their role is limited to verbal encouragement of their followers.").

[9] Kenneth Lasson, *Incitement in the Mosques: Testing the limits of free speech and religious liberty*, 27 WHITTIER L. REV. 3, 23 (2005) ("…a causal connection between unlawful action and the speech that preceded it. Where such a nexus can be established, both speaker and the perpetrators should be held accountable.")

At the heart of this particular free speech debate is the struggle between speech's twin potentials. One the one hand, speech is the life blood of democracy. Justice Oliver Wendell Holmes contended that "every idea is an incitement,"[10] meaning that ideas do not occur in a vacuum but in the real world, where they have the power to change people's actions and beliefs. It is through this power that speech translates ideas into reality, which makes free government possible. Therefore, the government cannot silence speech without limiting society's ability to engage in what Holmes called a "free trade in ideas."[11] On the other hand, however, speech can be the spark that incites horrible crimes. Judge Learned Hand recognized in 1917 that words are "triggers to action."[12] Or, as Justice Holmes recognized in *Schenck v. United States*, the First Amendment cannot protect someone who falsely shouts fire in a crowded theater.[13] The government has an interest in prohibiting this type of speech, which causes harm apart from its potential to communicate ideas. These two great potentials—the potential to enable self-government and the potential to produce harm—represent the poles of the free speech debate. The challenge for the courts, historically and today, is how to distinguish speech that fuels democratic debate from speech that merely triggers criminal action.

Besides the difference between speech meant to persuade and speech meant to trigger action, however, there is also a related difference between speech made in public and speech made in private. Inherent in the above distinction is that when speech advocates an abstract idea,

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[10] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

[11] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (contending that "the ultimate good desired is better reached by free trade in ideas," and that the First Amendment requires us to tolerate speech that is "fraught with death."). In *Abrams*, Justice Holmes defends free speech because of its relationship to the search for truth.

[12] Masses Publishing Co. v. Patten, 244 F. 535, 545 (S.D.N.Y. 1917) (Hand, J.) ("Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state.").

[13] Schenck, *supra* note 3, at 52.

it is completely protected; it is not always protected, however, when it advocates concrete criminal action. The amount of protection that *advocacy of action* receives, then, should be a function of its either public or private nature. When considering the First Amendment, there is a logical difference between public speech and private speech. Logically, the First Amendment should almost always protect public speech because of its proximity to the broader democratic debate. Private speech that advocates criminal activity, however, should have somewhat less protection because of its conspiratorial nature. Justice Jackson recognized this point in his concurrence in *Dennis v. United States*[14] when he distinguished between speech made in public by an individual and private speech advocating criminal activity. He wrote, "The highest degree of constitutional protection is due to the individual acting without conspiracy…,"[15] but "the Constitution does not make conspiracy a civil right."[16] The challenge for the Court, then, should be to determine whether an instance of criminal advocacy is public or private according to the facts of each case, and then accord it the appropriate amount of protection.

The United States Supreme Court articulated the current incitement test in 1969's *Brandenburg v. Ohio*.[17] In *Brandenburg*, the Court advanced a three-pronged approach to determine whether speech could be restricted. The Court ruled that the First Amendment protects speech unless speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[18] In other words, the speech must (1) intend to incite (2)

[14] Dennis v. United States, 341 U.S. 494 (1951) (Jackson, J., concurring).

[15] *Id.* at 570.

[16] *Id.* at 573.

[17] *Supra* note 3.

See Keehn, *Terroristic supra* note 8, at 1244 ("The 'clear and present danger' doctrine found its most modern expression in *Brandenburg v. Ohio*."); Richard A. Parker, *Brandenburg v. Ohio*, *in* FREE SPEECH ON TRIAL: COMMUNICATION PERSPECTIVES ON LANDMARK SUPREME COURT DECISIONS 145 (2003) (calling *Brandenburg* "singularly significant precisely because it articulated the current standard for identifying the judicial limits of tolerance for such expression."); and David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50

imminent lawless action and will (3) likely produce the action. Following September 11, 2001, however, many scholars quickly realized that *Brandenburg*'s second prong, known as the "imminence standard," would stand in the way of prosecuting advocacy of terrorism,[19] a class of speech that many times is not time specific.

Although *Brandenburg* is widely recognized as the modern incitement standard, it is not without its critics. Long before the current crisis, one scholar has cautioned that "No language in the *per curiam* opinion elaborated the single sentence in which the Court announced its striking new standard….*Brandenburg* might not have intended the literal meaning of its own language."[20] Another scholar argued that *Brandenburg* contradicts itself because it introduced the most speech protective test yet, while claiming that it was nothing new and was fully consistent with earlier precedents.[21] A casual reading of the short, six-page *per curiam* opinion

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U. CHI. L. REV. 1207, 1351 (1983) (claiming that "subsequent decisions by Burger court have reaffirmed the *Brandenburg* Test," but also acknowledging that "the *Brandenburg* standard still remains uncertain.").

[18] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

[19] *See* Tanenbaum, Comment: *supra* note 5, at 791-92 (arguing that either *Brandenburg's* imminence requirement "be applied with an understanding of context rather than solely within the framework of temporal limitations," or that the *Brandenburg* test is not the ruling precedent in terrorist cases and that a non-*Brandenburg* test should be constructed using the *Dennis* standard.); Hawkins, *supra* note 5 (arguing that the *Dennis* standard should be applied instead of *Brandenburg* to terrorist websites that do not engage in marketplace, public ideological advocacy.); Thomas Crocco, *Inciting Terrorism on the Internet: An Application of* Brandenburg *to Terrorist Websites*, 23 ST. LOUIS U. PUB. L. REV. 451 2004) (arguing that *Brandenburg* only applies to public advocacy, or "soap box" speech, not terrorist speech.).

See also Tom Hentoff, *Speech, Harm, and Self-government: Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV. 1453 (1991) (arguing that the *Brandenburg* test only makes sense in situations where the presence of more, competing speech would have made a difference. If the presence of rebutting and competing speech would not have changed the outcome, the *Brandenburg* test cannot logically be applied.); Rabban, *supra* note 17, at 1351 (arguing that *Brandenburg* may not have meant all that it said, citing the differences between "public ideological solicitation" and "private nonideological solicitation."); and William Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of* Dennis v. United States, 2001 SUP. CT. REV. 375 (2001) (claiming that *Brandenburg* only applies to political speech).

[20] Rabban, *supra* note 17, at 1351.

[21] Marc Rohr, *Grand Illusions? The* Brandenburg *Test and Speech that Encourages or Facilitates Criminal Acts*, 38 WILLIAMETTE L. REV. 1, 7-8 (2002) ("The Court had just articulated a verbal formula that appeared more protective of seditious advocacy than any statement ever before made in a Supreme Court majority opinion, yet it was simultaneously suggesting that (a) this was nothing new, and (b) it was fully consistent with a decision (Dennis) that had upheld the conviction of advocates of revolution without any concern for the 'imminence' or 'likelihood' of that

might lead one to believe that *Brandenburg's* three-part test, including intent to incite, imminence and likelihood, is the culmination of what earlier precedents had developed. The sentence announcing the new "*Brandenburg* test" began with the words, "These later decisions have fashioned the principle that…."[22] What the Court meant by "These later decisions," however, is not clear. The doctrinal bases of the incitement test are not explicated in the text and can only be extrapolated from the precedents cited by the Court.

A few scholars have tried to explain *Brandenburg,* suggesting that it did more than it claimed to do. It did not merely rearticulate prior incitement tests; it synthesized two competing incitement traditions:[23] a direct incitement test born in Judge Hand's U.S. District Court opinion in *Masses v. Patten*[24] and the clear and present danger tradition that began with Holmes' majority opinion in *Schenck v. United States*.[25] In synthesizing these two tests, however, the Court failed to fully reconcile the vast differences between these two competing traditions. It certainly did not explain how the two came together in *Brandenburg*. In effect, the Court conflated two tests that it had previously applied to different types of speech.

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revolution. Either the author of the opinion was being quite disingenuous, or the apparently highly-protective new test was not meant to provide as much protection as its words suggested.").

[22] Brandenburg, *supra* note 18, at 447. The footnote to the above sentence read:

n2 It was on the theory that the Smith Act, 54 Stat. 670, 18 U. S. C. § 2385, embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality. Dennis v. United States, 341 U.S. 494 (1951). That this was the basis for *Dennis* was emphasized in *Yates* v. *United States*, 354 U.S. 298, 320-324 (1957), in which the Court overturned convictions for advocacy of the forcible overthrow of the Government under the Smith Act, because the trial judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action.

[23] Staughton Lynd, Brandenburg v. Ohio: *A Speech Test For All Seasons*, 43 U. CHI L. REV. 515, 159-160 (1975) ("The importance of *Brandenburg* lies precisely in the fact that it is neither an incitement test, nor a clear and present danger test, but a combination of the two, requiring both elements [incitement and clear and present danger] before speech may be forbidden or proscribed."); *See also*, Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 722 (1975) ("Today's operative first amendment doctrine, as first enunciated in *Brandenburg v. Ohio* in 1969, can be viewed as a coalescing of the best features of the two contending approaches.").

[24] *Supra* note 15; *rev'd*, 246 F. 24 (2nd Cir. 1917).

[25] *Supra* note 3.

The paper will explore the doctrinal origins of the *Brandenburg* test to show how Hand's direct incitement test and Holmes' clear and present danger test evolved. It will explore to which types of speech each test ideally should be applied and argue that the distinction between public and private speech has always been implicit in the differences between the two traditions. It suggests that advocacy of terrorism would be dealt with best by abandoning *Brandenburg* altogether, and applying Hand's incitement test and the clear and present danger test separately according to the circumstances of each case. First, I will explore the complex and often muddled development of the Court's direct incitement and clear and present danger doctrines. Second, I will establish that the justices in *Brandenburg* did an inadequate job synthesizing the two tests. Third, I will argue each test is better applied separately. Ultimately, judges should abandon *Brandenburg* as the controlling precedent in advocacy of terrorism cases and apply each test separately. In short, if the speech is done in private, it should trigger the direct incitement test; and if it is done in public, it should be subjected to the clear and present danger standard.

Chapter 2 will analyze the development of both criminal advocacy traditions and demonstrate that they historically applied to different types of speech. Chapter 3 will examine *Brandenburg* and show how it muddled the distinction between the two formerly distinct traditions. Chapter 4 will show how, since 1969, the Courts have only applied *Brandenburg* to cases of public advocacy where the government faced the potential of imminent lawless action. Chapter 5 will analyze two recent cases involving advocacy of terrorism and show how Hand's direct incitement test and the clear and present danger test, when disentangled from each other, provide a clear means to determine when advocacy of terrorism should be protected by the First Amendment – and when it should not. The conclusion will argue that in the wake of September 11, 2001 and in the face of the threat posed by radical Islamic terrorists, the courts should abandon *Brandenburg* altogether, break apart the tests, and instead apply them separately.

Hand's direct incitement test should be applied to speech advocating terrorism when its false cries of "fire" are *not* made in a public theater. When the shouts are made in public, however, they should be judged according to whether they produce imminent action under the clear and present danger test.

Chapter 2
The Emergence of the Court's Incitement Doctrine: the Evolution of Two Traditions

The Court's path to *Brandenburg v. Ohio* has been anything but smooth and unbroken. The Court's modern incitement jurisprudence emerged when America entered into World War I. Attempts to establish the line between speech and criminal incitement began in earnest in the late 1910s. At various times along the path, the Court has alternatively ignored the First Amendment, endowed it with far-reaching protective power, and sometimes even gutted it of any real meaning.[26] Moreover, the Court has never adopted a single First Amendment rationale in this area, but has instead used a hodgepodge of rationalizations to justify either protecting or prohibiting different types of speech.[27] These different approaches can be divided into two categories: a direct incitement test that focused on the *speaker's intent*, and a clear and present danger test that focused on the *elapsed time* between the speech and harm. The direct incitement test measures the direct link between speech and harm using intent established by the communicative meaning of the words. The clear and present danger test determines whether the link between speech and harm is direct by gauging how quickly the harm followed the speech. Although the two tests were occasionally intermingled in the jurisprudence, their ultimate

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[26] *See* Brandenburg, *supra* note 18, at 447 ("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."); Dennis, *supra* note 3, at 510 ("[I]n each case, [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 dangers," *cf.* Chief Judge Learned Hand's circuit court opinion, 183 F.2d (1950) at 212.); Whitney v. California, 274 U.S. 357, 373 (1927) (majority opinion) (holding that the state government had extensive leeway to curtail speech that may produce ill effects); Gitlow v. New York, 268 U.S. 652 (1925) (majority opinion) (holding that the state government had extensive leeway to curtail speech that may produce ill effects); and Schenck, *supra* note 3, at 52 ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.").
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[27] Scordato and Monopoli, *supra* note 5 (arguing that there are many competing rationales for free speech including personal expression, self-government, the marketplace of ideas, and the fourth estate.). *See also*, Rabban, *supra* note 17, at 1320-22 (arguing that Brandeis accepted more libertarian and self-government rationales for speech and considered speech "the essential prerequisite of a democracy.").

synthesis was executed in *Brandenburg v. Ohio*, which required the government to prove both intent and imminence before it could restrict speech. To fully understand *Brandenburg*, therefore, one must understand the development of these two distinct traditions and understand how the Court reconciled the intent and imminence requirements.

Although the states ratified the First Amendment over two hundred years ago, the United States court system did little to extrapolate its meaning until World War I. In fact, the courts did not even participate in the first controversy over the meaning of free speech and press. The Alien and Sedition controversy raged less than ten years after the First Amendment's ratification when Congress, under Federalist control, passed legislation to criminalize criticism of John Adams' administration. The controversy was settled when the Jeffersonian Republicans won the election of 1800 and did not renew the acts. By winning the election, their interpretation of the First Amendment triumphed. Thus, the First Amendment's initial meaning was politically constructed rather than constitutionally interpreted.[28] The Jeffersonian Republicans maintained that free speech and press were essential to republican government and that the Constitution did not grant the federal government the power to regulate speech.[29] They did not see a problem, however, with state prosecutions of speech largely along the lines of English common law of seditious libel. The Jeffersonian Republican reading of the First Amendment's free speech and press clauses, which forbade federal prosecutions of speech while allowing state prosecutions,

[28] *See* KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 1-8 (1999) (discussing the differences between constitutional constriction, judicial interpretation, and constitutional amendments).

[29] For an account of the Jeffersonian Republican rationale for free speech and press, *see* JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS, 1799-1800 SESSION, VIRGINIA STATE ASSEMBLY, MADISON'S WRITINGS, VI, 386 (1900-10).

therefore, became the dominant free speech paradigm at the federal level for the next one hundred years.[30]

Between the Alien and Sedition controversy in the late 1700s and America's entry into World War I, there were very few developments in First Amendment doctrine beyond the enforcement of the English common law of seditious libel at the state level, or became known as the bad tendency test. In two important cases, *Patterson v. Colorado*[31] and *Fox v. Washington*,[32] the Court upheld the dominant First Amendment regime, which was essentially the common law seditious libel enforced at the state level. Both cases involved state prosecutions of speech focusing on very speculative ill effects, or "bad tendency" of the speech to cause harm. Under this standard, states merely had to assert that speech had a tendency to harm the public welfare or would likely promote actions that the states had the power to forbid under their police powers.[33] At the time, the Supreme Court had not extended the First Amendment's protection against state governments, so they had abundant leeway to curtail speech by suggesting it was likely produce ill effects.

Shortly after America entered World War I, Congress passed the Espionage Acts of 1917,[34] which it amended in 1918, in an effort to repress "political agitation…of a character directly affecting the safety of the state."[35] The Espionage Act was the first federal law restricting dissent since the original Alien and Sedition acts. Soon after its passage, a plethora of

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[30] *See* LEONARD LEVY, EMERGENCE OF A FREE PRESS (1985) and JAMES MORTON SMITH FREEDOMS FETTERS (1956).

[31] Patterson v. Colorado, 205 U.S. 454 (1907).

[32] Fox v. Washington, 236 U.S. 273 (1915).

[33] DAVID M. RABBAN, THE FIRST AMENDMENT IN ITS FORGOTTEN YEARS 132 (1997).

[34] Act of June 15, 1917, ch. 30, 40 Stat. 217, *as amended*, Act of May 16, 1918, ch. 75, 40 Stat. 553.

[35] John Lord O'Brian, *Civil Liberty in War Time*, 42 REP. N.Y. ST. BAR ASS'N 275, 277, 300 (1919); *cited* in Rabban, *supra* note 17, at 1217.

cases challenged the constitutionality of the Espionage Act and the federal government's power to censor speech. This period marked the beginning of both the direct incitement and clear and present danger tests.

A. Judge Hand's Direct Incitement Test: Connecting Speech and Harm with Intent

The Original Direct Incitement Test

Although almost all of the early incitement cases under the Espionage Act led to convictions, one case stands out as an example of how the act could be construed in a speech-protective way. In *Masses Publishing Co. v. Patten,*[36] Max Eastman, publisher of *The Masses* magazine, a "monthly revolutionary journal," asked the Federal District Court for the Southern District of New York to grant an injunction against the enforcement of the Espionage Act's nonmailable clause. The clause forbade the dissemination of material that willfully caused or attempted to cause insubordination, disloyalty mutiny, or refusal of duty within the armed forces, or that willfully obstructed the military's recruiting efforts through the mails. In his decision, Judge Learned Hand granted an injunction against the act's enforcement because the words of the magazine did not amount to a direct incitement to criminal activity. Hand did not use the "bad tendency" test in coming to his decision, however. That test focused on the probable future consequences or "bad tendency" of speech, and Hand doubted whether judges could foresee the future well enough to determine speech's tendency or future effects. Instead, while acknowledging that words can be "triggers to action,"[37] Hand reasoned that even speech advocating criminal activity should not constitute incitement if "one stops short of urging upon others that it is their duty…to

[36] *Supra* note 15.

[37] *Id.* at 545 ("Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state.").

resist the law."[38] But, if it did, the government could prohibit it. The direct incitement test focused on the intent of the speech—did the speech directly intend to produce harm? Was there a direct connection between the speaker's intent and the harm threatened? Hand found that none of the language or cartoons in *The Masses* crossed the line of direct incitement. Therefore, the government could not censor it under the Espionage Act.

For Hand, the line between protected and unprotected speech was the line between direct incitement and abstract advocacy. If the government could restrict anything less than a *direct, clear intention* to produce criminal activity, a person's ability to criticize government or engage in abstract academic discussions would be severely limited. He wrote that the "normal assumption of democratic government" is that criticism of the government, even "by immoderate and indecent invective," is "the privilege of the individual" and "the ultimate source of authority."[39] And, even if "the indirect result of the language might be to arouse a seditious disposition," the government could not prosecute speech unless it directly advocated lawless action.[40] Under this reasoning, which required the government to prove the words were intended to incite criminal action, Hand's direct incitement test was far more speech-protective than the pre-war bad tendency test.

Hand's standard, however, was quickly rejected by the appeals court. The Second Circuit Court of Appeals reversed his injunction and applied the bad tendency standard instead. The circuit court found that the government could restrict speech anytime the "the natural and reasonable effect" of speech encourages "resistance to a law."[41] It did not matter whether the

[38] *Id.* at 540.

[39] *Id.* at 539.

[40] *Id.* at 542. *See also*, Letter from Learned Hand to Zechariah Chafee, Jr., Jan. 2, 1921, cited in Gunther, *supra* note 23, at 770 ("I should prefer a qualitative formula, hard, conventional, difficult to evade.").

[41] Masses Publishing Co. v. Patten, 246 F. 24, 38 (2d Cir. 1917).

speech directly or indirectly incited the criminal activity. The Second Circuit also found that the speech did not have to be a direct incitement to a crime in order to be prosecuted.[42] Where Hand's test required *intent* for the words to produce ill effects, the Second Circuit only required the government to prove speech would have the "natural and reasonable effect" of producing harm. This was not the death knell for Hand's incitement test, however. Instead, it continued to have influence through Hand's correspondence with Justice Holmes and Professor Zachariah Chafee in the years that followed.[43]

Eventually, the ideas underlying Hand's incitement test found their way into a U.S. Supreme Court majority opinion, although only nominally. In *Gitlow v. New York,*[44] the defendant was being prosecuted for publishing "The Left Wing Manifesto" and "The Revolutionary Age," two pamphlets that advocated the overthrow of the government. Although the Court majority used the bad tendency test to reach a speech-restrictive outcome, it considered the dichotomy between abstract advocacy and direct incitement in dicta – something the pre-war bad tendency test had never included. Without specifically citing Hand or *Masses*, it commended the New York law in question because it "does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action."[45] Abstract advocacy was protected while direct or "concrete" incitement was not. But, after addressing this distinction, the majority proceeded to uphold the defendant's conviction, even though it was clearly abstract advocacy. The Court reinforced this distinction,

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[42] *Id.* at 38 (It is not "necessary that an incitement to crime must be direct.").

[43] Gunther, *supra* note 23.

[44] 268 U.S. 652 (1925).

[45] *Id.* at 664.

also without reference to Hand or the incitement test, in the 1931 case *Stromberg v. California.*[46] In *Stromberg*, however, the distinction was actually used to overturn the conviction of a woman for displaying a Communist flag in her front yard. The Court ruled that displaying one's political affiliations formed an essential part of the nation's "free political discussion."[47] In neither of these two cases, however, did the Court recognize Hand's direct incitement contribution. It was not until 1951 that the Court explicitly treated and applied Hand's direct incitement test.

Hand's Test is Revived and Applied to Communist Conspiracy

By 1950, Judge Hand was the chief judge on the Second Circuit Court of Appeals. Now, thirty-three years after his first articulation of a direct incitement test in *Masses*, Hand had a second chance to have his test validated. In *Dennis v. United States,*[48] the Second Circuit was faced with the question of whether to apply the clear and present danger test as it had been developed by Holmes and Brandeis to a case of Communist conspiracy to overthrow the government. The defendants had been convicted under the federal Smith Act[49] for organizing a group that knowingly advocated the violent overthrow of the government – and also for conspiring to do so. The defendant, the jury had found, transformed the Communist Party into an organization dedicated to overthrowing the government through violence and sabotage totally outside of the

[46] 283 U.S. 359 (1931) (holding that displaying a red communist flag in a front yard constitutes constitutionally protected speech because it participated in "free political discussion.").

[47] *Id.* at 569 ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.").

[48] 183 F.2d 201, 212 (1950) (Hand, J.), *aff'd* 341 U.S. 494 (1951).

[49] Smith Act, 54 Stat. 671, §§ 2 (a) (1), 2(a)(3) and 3.

democratic process.[50] Unlike previous communist organizations, the present organization did not function within the political process as other political parties did. There was no attempt at public, ideological advocacy.

In considering the case, Hand declined to apply the clear and present danger test. He instead breathed new life into his direct incitement test. He found that where speech constitutes a direct incitement to criminal activity, it does not merit protection. He argued that although incitements are "no essential part of any exposition of ideas, and are of such slight social value,"[51] the government cannot prohibit them unless "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[52] Thus, courts must take into account three considerations: (1) Is the speech a direct incitement? (2) Is the danger serious? And, (3) is the speech likely to produce the danger? If the answer to all three questions was yes, the government could prohibit the speech.

The following year, the U.S. Supreme Court affirmed Hand's decision and the application of his direct incitement test. A four member plurality of the Court, led by Chief Justice Vinson, explicitly adopted Hand's language—gravity and improbability.[53] A fifth member of the Court, Justice Jackson, echoed Hand's direct incitement language in his

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[50] *See*, Dennis v. United States, 341 U.S. 494, 498 (1951) (plurality opinion) ("By virtue of their control over the political apparatus of the Communist Political Association, petitioners were able to transform that organization into the Communist Party; that the policies of the Association were changed from peaceful cooperation with the United States and its economic and political structure to a policy which had existed before the United States and the Soviet Union were fighting a common enemy, namely, a policy which worked for the overthrow of the Government by force and violence; that the Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by the members of the Party; that the literature of the Party and the statements and activities of its leaders, petitioners here, advocate, and the general goal of the Party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence.").

[51] Dennis, *supra* note 48, at 236; *citing* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1952).

[52] *Id.* at 212. Justice Vinson, writing for the plurality, adopted Hand's phrasing of the incitement test, Dennis, *supra* note 50, at 510.

[53] Dennis, *supra* note 50, at 510.

concurrence, although without reference to Hand. Jackson wrote, "I think direct incitement by speech or writing can be made a crime."[54] Thus, the majority of the Court accepted a direct incitement test with four justices explicitly adopting Hand's reformulated version of the direct incitement test.

Justice Vinson, in the plurality opinion, defended the application of the direct incitement test to cases of Communist conspiracy, saying that the circumstances of *Dennis* separated it from earlier incitement cases where the Court had applied the clear and present danger test.[55] Since the Communist party of the 1950s did not function as a legitimate political party, it did not merit protection in the same way other political parties had.[56] Because the speech in *Dennis* advocated violence in secret rather than in public, the Court had to apply a different test. Although Vinson used the phrase "clear and present danger" in his decisions, he did not to apply the test as justices Holmes and Brandeis had articulated it.[57] Vinson wrote in the plurality opinion, "The situation with which Justices Holmes and Brandeis were concerned in *Gitlow* was a comparatively isolated event….They were not confronted with any situations comparable to…the development

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[54] *Id.* at 571.

[55] *See infra* section II. B. for a discussion of the Holmes-Brandeis clear and present danger test.

[56] Dennis, *supra* note 50, at 498 ("By virtue of their control over the political apparatus of the Communist Political Association, petitioners were able to transform that organization into the Communist Party; that the policies of the Association were changed from peaceful cooperation with the United States and its economic and political structure to a policy which had existed before the United States and the Soviet Union were fighting a common enemy, namely, a policy which worked for the overthrow of the Government by force and violence; that the Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by the members of the Party; that the literature of the Party and the statements and activities of its leaders, petitioners here, advocate, and the general goal of the Party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence."). *See also*, American Communications Association v. Douds, 339 U.S. 382, 424-33 (1950) (Jackson, J., concurring) (differentiating the Communist party from other political parties and describing it as a "a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system.").

[57] Hentoff, *supra* note 19, at 1456 ("Because *Dennis* abandoned the key imminence requirement, a strong case can be made that the *Dennis* formulation was a clear and present danger test in name only.").

of an apparatus designed and dedicated to the overthrow of the government."[58] Whereas in earlier cases the government was concerned with speech threatening imminent harm—its direct impact on the military's recruiting, for example—in *Dennis* the government was concerned with harm a conspiracy to overthrow the government would create at a future point of time. The danger was at some indefinite point in the future "when the leaders [of the Communist Party] feel the circumstances permit."[59] Therefore, the Court could not use an imminence requirement to determine whether the government could restrict the speech—there was no threat of imminent danger. The Court had to connect the speech to harm using intent rather than temporal imminence. This meant the government had to prove that the defendants' speech had directly and explicitly incited the overthrow of the government and went beyond academic discussion of overthrowing the government. Did the defendants' speech directly intend to incite the overthrow of the government? Or, rather did their speech threaten an imminent danger of overthrowing the government? In *Dennis*, the Court found that the speech had directly incite the overthrow of the government.

Justice Jackson, in his concurring opinion, went even further than the Court plurality was willing to go in distinguishing the circumstances in *Dennis* from those in other cases involving isolated acts of public advocacy. Jackson argued that the clear and present danger test only applied when the speech created a threat of danger, but did not explicitly advocate a crime.[60] Moreover, when speech directly advocated a crime, the government did not have to prove a clear and present danger. Therefore, the clear and present danger test had never been applied in cases

[58] Dennis, *supra* note 50, at 510.

[59] *Id.* at 509.

[60] Dennis, *supra* note 50, at 569 (Jackson, J., concurring) ("The [clear and present danger] test applies and has meaning where a conviction is sought to be based on a speech or writing which does not directly or explicitly advocate a crime, but to which such tendency is sought to be attributed by construction or by implication from external circumstances….I think reason is lacking for applying the test in this case.").

of conspiracy, which directly incites a crime without posing an imminent threat.[61] Since the defendants in *Dennis* were involved in what Jackson called a "period of incubation; its preliminary stages of organization and preparation"[62] of the conspiracy, the clear and present danger test could not be applied.[63] It only applied to isolated acts of public advocacy that threatened to result in violence.

The direct incitement test was again refined by the Supreme Court six years later is *Yates v. United States*,[64] when the Court explicitly limited the government's ability to restrict speech to cases of advocacy of criminal action. In *Yates*, the Court reviewed the conviction of a group of defendants convicted under almost exactly the same circumstances in *Dennis*. But here, the Court found that the lower courts had overstepped the constitutionally protected line of free speech. The difference between *Dennis* and *Yates*, however, was a question of fact decided by the jury. The defendants in *Yates* were conspiring to *advocate* the overthrow of the government – in other words, they were engaging in abstract advocacy. In *Dennis*, however, the defendants were conspiring to *overthrow the government*.[65] The nature of their speech was closer to actual criminal conspiracy than to abstract discussion. Thus, *Yates* made it clear that the *Dennis* did not give the government a blank check to prohibit seditious speech. Instead, the government could only restrict speech that constituted a direct incitement to criminal activity.

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[61] *Id.* ("What really is under review here is a conspiracy.").

[62] *Id.*

[63] *Id.* at 570 ("The highest degree of constitutional protection is due to the individual acting without conspiracy. But even an individual cannot claim that the Constitution protects him in advocating or teaching overthrow of government by force or violence.")

[64] 354 U.S. 298, 320 (1957) ("In failing to distinguish between advocacy of forcible overthrow as an abstract doctrine and advocacy of action to that end, the District Court appears to have been led astray by the holding in *Dennis* that advocacy of violent action to be taken at some future time was enough.").

[65] *Id.* at 334 ("The substantive offense here charged as the object of the conspiracy is speech rather than the specific action that typically constitutes the gravamen of a substantive criminal offense.").

The Direct Incitement Test Applied to Association

Two other cases highlighted the development of direct incitement jurisprudence*: Scales v. United*[66] and *Noto v. United States.*[67] In another dimension of incitement jurisprudence, the Court drew a line between protected and unprotected association with organizations that advocate criminal activity.[68] In *Scales*, the Court upheld a conviction of an active member of the Communist Party because he was in full agreement with the party platform. The Court found that a "blanket prohibition of association with a group having both legal and illegal aims" would endanger the right of political express and association.[69] Therefore, there must be "clear proof" that a defendant is "specifically intending to accomplish [the group's aims] by resort to violence."[70] The Court, however, did find sufficient evidence showing the defendant's specific intent to accomplish the Communist Party's violent aims. In *Noto,* however, the Court reversed an association conviction along the same reasoning, because the defendant had not been an active member and did not share the aims of the party. There was not sufficient evidence connecting the defendant to the Communist Party's criminal goals. From *Noto* and *Scales* the First Amendment's free association clause protects a person who indirectly associates with a group that advocates criminal activity. The First Amendment does not protect a person, however who is in active agreement with the group's illegal intent. The courts must determine whether a

[66] 367 U.S. 203 (1961).

[67] 367 U.S. 290 (1961).

[68] This is essentially the same line as the line between advocacy of an idea and advocacy of action. Both dichotomies, ideas versus actions and direct and indirect association, pertain to the extent to which a person is actually involved in carrying out a crime.

[69] Scales, s*upra* note 66, at 229.

[70] Noto, *supra* note 67, at 299, reaffirming the Court's holding in DeJonge v. Oregon, 299 U.S. 353 (1937) (reversing a conviction for a member of the Communist Party who held recruiting meetings but had not incited anyone to illegal activity at the meetings).

person *intends* to accomplish illegal activity as a part of the group.[71] Intent is established by determining the extent to which person participates and agrees with the illegal aims of a group.

Thus, in the little over a decade between *Dennis* and the association cases of the 1960s, Hand's reformulation of the direct incitement test came into its own. In situations where the government was not concerned with speech or association producing imminent action, the courts applied Hand's direct incitement test, although without citing either Hand or *Masses*. And if the speech constitutes abstract advocacy, the government could not prohibit it. The Court applied this test without explicitly distinguishing it from other incitement jurisprudence. In these cases, the government had to prove that the speaker intended to produce criminal action. Where speech or association met the direct incitement or active participation standard, the courts determined whether the gravity of the evil threatened, less its improbability, merited prohibition. In sum, the direct incitement test determined whether speech directly intended to create a grave danger. Thus, if speech directly intended to incite grave criminal action and it would likely do so, it could be restricted. The direct incitement test should be applied in circumstances of private speech.

B. Holmes' Clear and Present Danger Test: Connecting Speech and Harm Temporally

Holmes' Original Clear and Present Danger Test

Two years after Judge Hand decided *Masses v. Patten,* the first incitement cases under the Espionage Act began to reach the Supreme Court. In the spring of 1919, in *Schenck v. United States,*[72] Justice Holmes first articulated what has become known as the clear and present danger

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[71] *See also,* HENRY J. ABRAHAM, FREEDOM AND THE COURT, 5TH EDITION: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES (1988) (discussing *Scales* and *Noto*).

[72] 249 U.S. 47 (1919).

test. Schenck had been convicted of conspiracy to obstruct the draft by printing and circulating a flyer claiming the draft violated the Thirteenth Amendment's provision against involuntary servitude. In upholding the conviction, Holmes wrote, "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[73] Holmes determined that the flyer had posed a clear and present danger of obstructing the draft. While Hand focused on the intent of the speech, Holmes focused on the temporal distance between speech and its effects. It was a question of proximity and degree. Hand connected speech to its ill effects using its direct intent, Holmes' connected speech to its effects temporally without examining the intent.[74] Despite introducing the clear and present danger test, however, *Schenck* did not mark a radical new direction in incitement jurisprudence. The outcome of the case, sustaining the defendant's conviction, was not any different than it would have been under the speech restrictive, pre-war bad tendency test.[75] Thus, the clear and present danger test was new in rhetoric only.

The Clear and Present Danger Doctrine becomes Speech Protective

In the following Court term in the fall of 1919, the clear and present danger doctrine took a major turn from being a speech restrictive to a speech permissive test. Although Holmes had construed the clear and present danger test restrictively in *Schenck,* he used it to defend free

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[73] *Id.* at 52.

[74] Gunther, *supra* note 23, at 735-41 ("Clear and present danger, like 'natural and probable consequences,' was a test of causation, a test calling for guesses about the future impact of words." *Id.* at 740.).

[75] Rabban, *supra* note 17, at 1265 ("Holmes continued the prewar judicial tradition of hostility to first amendment values by using the 'bad tendency' theory to reject fee speech claims in *Schenck, Frohwerk,* and *Debs*.").

speech in his dissent in *Abrams v. United States*.[76] The government prosecuted Abrams for unlawfully printing and distributing leaflets criticizing United States' anti-socialist involvement in Russia after the fall of the Czar's regime. Although the majority voted to uphold the conviction, Holmes, joined by Brandeis, argued that the speech in *Abrams* did not rise to the level of a clear and present danger. Holmes rearticulated the test by writing, "It is only the present danger of immediate evil…that warrants Congress in setting a limit to the expression."[77] He tightened the link between speech and harm from "clear and present" to "present danger of immediate evil." Speech must pose a temporally imminent danger. Therefore, after *Abrams* in the Holmesian conception, the clear and present danger test determined whether speech posed a danger of temporally imminent danger.

The biggest advancement in the clear and present danger doctrine came in Brandeis' concurring opinion in *Whitney v. California*.[78] Charlotte Anita Whitney was on trial for her association with the Communist Party of California, which the prosecution alleged advocated the overthrow of the government. Even though Whitney had been an active member of the party, while serving on the platform committee, she had actually voted against the parts of the party platform advocating the overthrow of the government. The majority opinion ignored her disagreement with the party platform, however. Using a rationale similar to the pre-war bad tendency test, which did not distinguish between direct incitement and abstract advocacy, the majority of the Court upheld her conviction. Although Brandeis, joined by Holmes, concurred in the decision, his concurrence sounded much more like a dissent. He sharply criticized the

[76] 250 U.S. 616 (1919) (Holmes, J., dissenting). *See also,* Rabban, *supra* note 17, at 1309 (for a discussion of the circumstances that led Holmes to change his position); and G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CALIF. L. REV. 391 (1992).

[77] *Id.* at 628.

[78] 274 U.S. 357 (1927).

majority opinion because it did not apply the clear and present danger test to the case. In applying the test, he rearticulated it by noting, "Valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled."[79] Under his articulation, the government had to prove that speech fit three criteria. First, speech must intend to produce substantive evil action[80]—not only must the evil be serious, but also the speech must intend to produce the action. Brandeis distinguished between abstract advocacy and direct incitement.[81] This was in fact the same distinction Hand had made—direct incitement—but without reference to Hand's direct incitement test. Second, Brandeis argued that the danger threatened must be clear and imminent; there must be a temporally imminent connection between speech and harm. To define imminence, he wrote, the "evil apprehended [must be] so imminent that it may befall before there is opportunity for full discussion."[82] Third, speech must be likely to produce the harm it threatens.[83] The government cannot prosecute idle threats. Therefore, the government can only prohibit speech when it amounts to an incitement that poses so imminent and likely a danger of substantive evil that the government has no choice prohibit it. In applying his new formulation to the facts of the case, Brandeis decided that the facts of the case were not sufficiently clear to determine whether Whitney's association with the party amounted to a direct

[79] *Id.* at 373 (Brandeis, J., concurring).

[80] *Id.* ("Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious.").

[81] *Id.* at 377 ("But even advocacy of violation, however, reprehensible morally, is not a justification for denying free speech where the advocacy falls sort of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind.").

[82] *Id.*

[83] *Id.* at 376 ("To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.").

incitement or not — thus, he concurred instead of dissented. After *Whitney*, it is clear that Brandeis' version of the clear and present danger test included a distinction between concrete incitement and abstract advocacy as well as temporal imminence and likelihood requirements. Even though the Brandeis did include an incitement standard, the focus of his test was imminence rather than direct intent as in Hand. As it developed in the 1930s and 1940s, however, the speech protective clear and present danger test emphasized the imminence requirement as the principle consideration when applying the test.[84]

The clear and present danger test amounted to largely an effects-based test to determine whether the context of speech presented a clear and present danger of substantial evil, although it did incorporate an advocacy versus incitement element. The focus of the test was to determine whether the connection between the speech and harm were temporally imminent enough to merit restriction. Therefore, the clear and present danger test differed substantially from Hand's incitement test, which focused on the intent of the speech. Whereas Hand connected speech and harm with intent—did the speaker intend to bring about harm?—Holmes' clear and present danger test connected speech and harm with time—did the speech threaten imminent harm?

Furthermore, until *Brandenburg*, the Court majority had applied the two tests to different types of speech. The Supreme Court applied the clear and present danger test to attempts at public advocacy and publishing. Hand's incitement test had been applied to Communist

[84] *See* Herndon v. Lowry, 301 U.S. 242 (1937) (for the first time using the words clear and present danger in a speech protective manner in a majority opinion. The decision, however, cites neither *Schenck*, Holmes' dissenting opinion in *Gitlow*, nor Brandeis' concurring opinion in *Whitney*. There is little in the decision to suggest that the words clear and present danger, as the Court used them in *Herndon*, were meant to institute the Holmes-Brandeis minority rationale into majority jurisprudence.); Thornhill v. Alabama , 310 U.S. 88, 104-06 (1940) (striking a law used to prohibit labor strikes because the strikes did not pose a clear and present danger); Bridges v. California , 314 U.S. 252, 260-63 (1941) (finding that the courts cannot prohibit speech about a trial unless the speech posed a clear and present danger of interfering with fair trial); and Thomas v. Collins , 323 U.S. 516, 530 (1945) (holding that the government could not prohibit labor leaders' speeches unless they presented a clear and present danger). *See also*, Dennis, *supra* note 50, at 507 ("Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale.").

associations and conspiracy to carryout illegal activity. In cases of public advocacy and publishing, the government was right in worrying about the imminent effects of the speech. In conspiracy and association cases, however, the government had not grounds to expect and therefore apply an imminence requirement. Conspiracy did not threaten imminent action; it threatened future criminal activity. Thus, in lieu of an imminence requirement, the Court applied a direct incitement, or intent, in cases where an imminence requirement did not make sense.

Chapter 3
Understanding Brandenburg as a Jumbling of Two Distinct Incitement Tests

In 1969, the Supreme Court decided *Brandenburg v. Ohio*,[85] which many scholars have called the modern incitement standard.[86] In *Brandenburg*, the Court reversed the conviction of a Ku Klux Klansman charged with advocating criminal activity as a means to political reform. Brandenburg made derogatory remarks toward "negros" and Jews, and said if the government "continues to suppress the white, Caucasian race," there might be some "revenge taken."[87] A local television station filmed and aired the speech. The Ohio government indicted Brandenburg under the state's criminal syndicalism laws[88] which forbade anyone from advocating the use of criminal means to accomplish industrial or political reform and voluntarily assembling a group to advocate the same. Ohio's statue was almost identical to the California law upheld by the Court in *Whitney v. California*[89] in 1927 and similar to New York's criminal anarchy laws upheld in *Gitlow v. New York*[90] in 1925. The justices, in a short, six-page *per curiam* opinion, invalidated the Ohio law and articulated what it understood as the modern incitement standard: "The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe

[85] 395 U.S. 444 (1969).

[86] *See* Keehn, *supra* note 8, at 1244 ("The 'clear and present danger' doctrine found its most modern expression in *Brandenburg v. Ohio*."); Parker, *supra* note 17, at 145 (calls *Brandenburg* "singularly significant precisely because it articulated the current standard for identifying the judicial limits of tolerance for such expression."); and Rabban, *supra* note 17, at 1351 (claiming that "subsequent decisions by Burger court have reaffirmed the *Brandenburg* Test," but also acknowledging that "the *Brandenburg* standard still remains uncertain.").

[87] Brandenburg, *supra* note 85, at 444-446.

[88] Ohio Rev. Code ann. § 2923.13.

[89] *Supra* note 26.

[90] *Supra* note 26.

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."[91]

In invalidating the Ohio syndicalism law, *Brandenburg* made two contributions to incitement jurisprudence.[92] First, it explicitly overruled *Whitney v. California*, which had upheld a conviction for what amounted to indirect incitement.[93] Second, it articulated the modern incitement test including intent to incite, imminence, and likelihood standards. Although the Court could have done both of these while staying within the bounds of the clear and present danger test—all three of these elements were present in the Holmes-Brandeis minority rationale

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[91] Brandenburg, *supra* note 85, at 447.

[92] This paper will be concerned with the following paragraph and one footnote that form the heart of the decision:

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. E. Dowell, A History of Criminal Syndicalism Legislation in the United States 21 (1939). In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, Cal. Penal Code 11400-11402, the text of which is quite similar to that of the laws of Ohio. Whitney v. California, 274 U.S. 357 (1927). The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. Cf. Fiske v. Kansas, 274 U.S. 380 (1927). But Whitney has been thoroughly discredited by later decisions. See Dennis v. United States, 341 U.S. 494 , at 507 (1951). These later decisions have fashioned the principle 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. 2 As we [395 U.S. 444, 448] said in Noto v. United States, 367 U.S. 290, 297 -298 (1961), "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." See also Herndon v. Lowry, 301 U.S. 242, 259 -261 (1937); Bond v. Floyd, 385 U.S. 116, 134 (1966). A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. Cf. Yates v. United States, 354 U.S. 298 (1957); De Jonge v. Oregon, 299 U.S. 353 (1937); Stromberg v. California, 283 U.S. 359 (1931). See also United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Baggett v. Bullitt, 377 U.S. 360 (1964).

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n2 It was on the theory that the Smith Act, 54 Stat. 670, 18 U. S. C. § 2385, embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality. Dennis v. United States, 341 U.S. 494 (1951). That this was the basis for *Dennis* was emphasized in *Yates* v. *United States*, 354 U.S. 298, 320-324 (1957), in which the Court overturned convictions for advocacy of the forcible overthrow of the Government under the Smith Act, because the trial judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action.

Brandenburg, *supra* note 85, at 446-47, n2.

[93] Whitney had actually voted against the part of the party platform advocating the overthrow of the government for which she was being prosecuted. Therefore on the basis of *Scales* and *Noto*, her participation in the Communist Party's illegal goals were indirect.

in *Whitney*—the justices went even further by trying to synthesize the direct incitement and clear and present danger traditions.[94] The Court now claimed the government had to prove both explicit intent and imminence before it could restrict speech. In synthesizing the two tests, however, the justices left many contradictions unresolved and failed to explicate the exact reach of *Brandenburg*. In fact, the justices did not even acknowledge its attempt to synthesize the two formerly distinct traditions. They lumped both traditions together using the words "These later decisions…."[95] This section of the paper will closely examine *Brandenburg's* text in an attempt to understand exactly what the justices did in the opinion and demonstrate why the opinion is ultimately unworkable. Ultimately, since the justices overreached by lumping the two tests together, lower courts would be better off using the two tests separately and applying them in the manner and to the situations in which the Court originally applied them—the direct incitement test in cases of private speech and the clear and present danger test in cases of public speech.

As said above, in invalidating the Ohio syndicalism law, the opinion did two things: First, it reversed the precedent set by the majority in *Whitney v. California*.[96] Second, it articulated what it alleged was the modern incitement test. In overruling *Whitney*, the Court gave two reasons in two separate parts of the decisions. First, the *per curiam* opinion a passage from cited *Dennis v. United States*[97] that acknowledged that since 1927 many of the Court's majority

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[94] Lynd, *supra* note 23, at 159-160 ("The importance of *Brandenburg* lies precisely in the fact that it is neither an incitement test, nor a clear and present danger test, but a combination of the two, requiring both elements [incitement and clear and present danger] before speech may be forbidden or proscribed."); *See also*, Gunther, *supra* note 23, at 722 ("Today's operative first amendment doctrine, as first enunciated in *Brandenburg v. Ohio* in 1969, can be viewed as a coalescing of the best features of the two contending approaches.").

[95] Brandenburg, *supra* note 85, at 447 ("These later decisions have fashioned the principle 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.").

[96] *Supra* note 26.

[97] Dennis, *supra* note 50, at 507 ("Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-

opinions have tended toward the Holmes-Brandeis minority rationale and has abandoned the majority opinion. It cited many cases from the 1930s and 1940s that had gradually introduced many aspects of the Holmes-Brandeis clear and present danger test into majority jurisprudence. Second, a few paragraphs later on, the justices wrote that they overruled *Whitney* because in *Whitney* the Court had not distinguished between abstract advocacy and direct incitement, or at least direct and indirect association.[98] This finding could have been made on the basis of Hand's incitement test, as in *Scales* and *Noto*, or on the basis of the incitement standard already in the Holmes-Brandeis rationale. Given the previous citation from *Dennis* regarding the adoption of the Holmes-Brandeis rationale by decisions in the 1930s and 1940s, it seems likely that the justices overruled *Whitney* on clear and present danger grounds. By reading these two passages together, it would seem that the justices adopted the Holmes-Brandeis concurring rationale in *Whitney*, which included an incitement, imminence, and likelihood standards. The justices had no need to even discuss the direct incitement tradition.

The justices, however, went further than merely invalidating the statute on abstract versus concrete advocacy grounds already present within the clear and present danger test. The Court also laid down what they understood to be the controlling "constitutional principle" for incitement based on previous precedents, thus rearticulating the clear and present danger test. The modern incitement test articulated by *Brandenburg*, which included incitement, imminence,

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Brandeis rationale."). This *Dennis* passage cites Craig v. Harney , 331 U.S. 367, 373 (1947); Pennekamp v. Florida , 328 U.S. 331, 333-36 (1946); Bridges v. California , 314 U.S. 252, 260-63 (1941); Thomas v. Collins , 323 U.S. 516, 530 (1945); Taylor v. Mississippi , 319 U.S. 583, 589-90 (1943); Thornhill v. Alabama , 310 U.S. 88, 104-06 (1940); West Virginia Board of Educations v. Barnette, 319 U.S. 624 (1943); Carlson v. California , 310 U.S. 106, 113 (1940); and Cantwell v. Connecticut , 310 U.S. 308, 311 (1940).

[98] Brandenburg, *supra* note 85, at 448-49 ("Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of Whitney v. California, supra, cannot be supported, and that decision is therefore overruled.").

and likelihood standards, makes since if the decisions merely meant to adopt the Holmes-Brandeis rationale. All three elements were present in *Whitney's* concurring opinion, and as *Dennis* had noted, majority opinions since then had tended toward it.[99] *Brandenburg* merely rearticulated what earlier clear and present danger cases had already established. If this were the case, Court merely cited *Dennis* as evidence, but not as an authority. Therefore, the Court could have done everything it did in *Brandenburg* by merely citing cases already within the clear and present danger tradition. Moreover, it is clear that if the Court would have done so, *Brandenburg* would only apply to similar clear and present danger cases—as opposed to conspiracy cases like *Dennis* where the Court had gone to lengths to distinguish between clear and present danger and conspiracy.

Even though the Court could have done everything it did by staying within the clear and present danger tradition, it reached outside and attempted to bring together both Holmes and Hand's traditions. In articulating the modern incitement test, the Court actually cited cases from Hand's direct incitement tradition instead of the clear and present danger tradition.[100] In failing to distinguish between the two traditions and instead treating them as if they were one, the Court ignored a major premise of *Dennis*, i.e. *Dennis* was not a clear and present danger case. Nonetheless, the modern standard, including incitement, imminence, and likelihood, cited *Noto* along with *Dennis* and *Yates* as precedents even though none of these cases included an imminence standard. Although the test was in reality a restatement of the Holmes-Brandeis

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[99] *See supra* section II. B.

[100] Brandenburg, *supra* note 85, at 447. The footnote to this sentence reads:

n2 It was on the theory that the Smith Act, 54 Stat. 670, 18 U. S. C. § 2385, embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality. Dennis v. United States, 341 U.S. 494 (1951). That this was the basis for *Dennis* was emphasized in Yates v. United States, 354 U.S. 298, 320-324 (1957), in which the Court overturned convictions for advocacy of the forcible overthrow of the Government under the Smith Act, because the trial judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action.

standard from their *Whitney* concurrence, the Court cited direct incitement cases. *Dennis*, *Yates*, and *Noto* required the government to prove direct incitement or explicit intent instead of imminence. These cases only required incitement and likelihood (or "improbability") standards. None of the cases cited included an imminence requirement. By citing cases from Hand's direct incitement tradition when the Court really should have been citing cases from the clear and present tradition, the Court failed to acknowledge the distinction between the two traditions.

Before *Brandenburg*, the Court had either applied one tradition or another. Since the circumstances of *Brandenburg* clearly fit within the clear and present danger tradition, the Court had no precedent in applying Hand's direct incitement standard. There was not compelling reason to attempt to apply a direct incitement standard. The government was worried about the imminent harm threatened by the speech, not the future threat. Thus, the application of Hand's direct incitement test was arbitrary and unnecessary.

In addition to conflating the two tests, the Court also failed to explicate *Brandenburg's* reach. Since the justices cited sources from both traditions, it would appear that *Brandenburg's* ambit covers cases in both traditions. The *per curiam* opinion's treatment of *Dennis* as well as evidence in the concurring opinions, however, seem to make this assumption questionable. Implicitly, the Court overruled *Dennis* because it did not include an imminence standard. If *Brandenburg* was supposed to be the modern incitement standard bridging both direct incitement and clear and present danger traditions, then *Dennis* must have been overruled. The Court, however, does not explicitly overrule *Dennis*, although it did explicitly overrule *Whitney*. In addition, it cited it as if *Dennis* and *Brandenburg* were in full agreement by not acknowledging their differences. Therefore, the relationship between the two cases is unclear.

Evidence from concurring opinions shows that the Court itself many have been divided as to whether *Brandenburg* overruled *Dennis* or not.[101] Some members of the Court did think that *Brandenburg* overruled *Dennis.* Justice Douglas wrote, "My own view is quite different. I see no place in the regime of the First Amendment for any 'clear and present danger' test, whether strict and tight as some would make it, or free-wheeling as the Court in *Dennis* rephrased it."[102] Justice Black wrote:

> I agree with the views expressed by MR. JUSTICE DOUGLAS in his concurring opinion in this case that the "clear and present danger" doctrine should have no place in the interpretation of the First Amendment. I join the Court's opinion, which, as I understand it, simply cites [*Dennis*] but does not indicate any agreement on the Court's part with the "clear and present danger" doctrine on which *Dennis* purported to rely.[103]

Although these two justices explicitly wanted *Brandenburg* to overrule *Dennis*, the majority of the Court did not seem to want to go that far.[104] In declining to explicitly uphold or overrule *Dennis*, especially when an argument could be made for either, the Court majority left the relationship between the two cases murky and open to interpretation.

In sum, the Court could have invalidated Ohio's syndicalism law by using only clear and present danger logic, which already included incitement, imminence, and likelihood standards. Instead, however, the Court attempted to synthesize the clear and present danger test and the

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[101] Bernard Schwartz, *Justice Brennan and the Brandenburg Decision—A Lawgiver in Action*, 79 Judicature 24 (1995).

[102] Brandenburg v. Ohio, 395 U.S. 444, 454 (1969) (Douglas, J., concurring). It seems from this case that Douglas did not acknowledge that *Dennis* was a clear and present danger case in rhetoric only and that the Court had taken pains to distinguish it from earlier clear and present danger case.

[103] Brandenburg v. Ohio, 395 U.S. 444, 449-50 (1969) (Black, J., concurring).

[104] By 1969, only two members of the *Dennis* court were still sitting on the Supreme Court. Justices Douglas and Black, who had dissented in *Dennis* because it was not speech protective enough, were the only ones remaining. However, among the newer members was Justice Harlan, who wrote the *Yates* opinion upholding the *Dennis* while drawing the line between abstract advocacy and incitement to action, and Justices Stewart and White, neither of whom were known to be "liberal" justices, were not likely to overturn long established precedents. *See* Rohr, *Grand supra* note 21, at 6. *See also*, Schwartz, *supra* note 101, at 237.

direct incitement test into one modern incitement standard. The Court tried to make the government prove both direct incitement and imminence in order to restrict speech. In doing so, however, the Court overstepped its bounds and did not properly recognize that the distinction between the two traditions. It cited Hand's direct incitement tradition as precedent for the clear and present danger test. It also cited the direct incitement tradition as precedent for an imminence standard even though the direct incitement tradition had never included an imminence standard. Instead of citing Hand's direct incitement tradition, the Court would have been on firmer doctrinal ground to stay with the clear and present danger tradition and cited its already existing incitement and imminence standards.

In light of the Court's improper synthesis of the two tests and in lieu of any explanation of the synthesis, the courts should rethink *Brandenburg*. Due to the inadequate synthesis of the incitement and clear and present danger traditions in *Brandenburg*, the courts should re-divide the two tests and apply them separately in appropriate situations. In re-dividing the tests, the Court should apply the clear and present danger test to public speech that threatens imminent lawless action—such as the Ku Klux Klan rally in *Brandenburg*, the labor rallies in *Thomas v. Collins* and *Thornhill v. Alabama,* and seditious publications in *Gitlow v. New York*, *Abrams v. United States,* and *Schenk v. United States*. The Court should apply the incitement test to private speech and when the imminence standard has no basis to be applied—such as in conspiracy and association cases like *Dennis, Yates, Scales,* and *Noto.* By applying the cases separately, the Court will remain within the solid foundations set by earlier precedents.

Chapter 4
The Court's Application of Brandenburg since 1969

Since 1969, the courts have never applied *Brandenburg* in cases of non-public advocacy of criminal activity. Since then, the Supreme Court has had two chances to explicate its meaning: *Indiana v. Hess*[105] and *NAACP v. Claiborne Hardware.*[106] In both of these cases, the Supreme Court applied *Brandenburg* to advocacy of criminal activity that took place at public rallies. And, in both cases, the Court found that the speech did not threaten imminent lawless action.

In *Indiana v. Hess,* the defendant was being prosecuted for incitement to violence for saying that he and a group of war protesters would "take the fucking street later," or "We'll take the fucking street again"—meaning that he would return after the police had left to continue the protest. The majority, in a *per curiam* opinion, applied the *Brandenburg* test and found that the speech was directed toward future action that was not likely and may not have even intended to produce imminent lawless action.[107] Hess's speech fails all three prongs of the *Brandenburg* test—intent to incite, imminence, and likelihood. In addition, *Hess's* speech was similar to the speech in *Brandenburg*; therefore, *Hess* sheds little light on *Brandenburg's* applicability outside public advocacy.

In *NAACP v. Claiborne Hardware*, the Court considered whether threats made by Charles Evers, a NAACP organizer, against blacks who violated a boycott against white businesses in Alabama, amounted to unprotect speech. The Court found that even though Evers'

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

[106] 458 U.S. 886 (1982).

[107] Hess, *supra* note 105, at 108 ("At best, however, the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time….Since the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State on the ground that they had "a 'tendency to lead to violence.'").

speech was an incitement to violence, it was protected because the resulting violence could not be temporally tied to the speech. The Court found that the speech did not produce imminent lawless action.[108] The Court defined imminence temporally as the amount of time elapsed between the speech and criminal action. *Claiborne Hardware* also did not shed any more light on the applicability outside of public speech—the circumstances of in *Claiborne* were also very similar to those in *Brandenburg*.

In both of the above cases, the Supreme Court applied *Brandenburg* in similar circumstances—public speech that could have been dealt with using the clear and present danger test as developed pre-*Brandenburg*. In both cases, the government was worried about the threat of lawless action. The Court, however, found that since neither case threatened *imminent* lawless action, the government could not prohibit the speech. In *Hess*, the government found that the speech failed all three parts of *Brandenburg*—incitement, imminence, and likelihood—and therefore was protected. In *Claiborne Hardware*, the Court found that since the lawless action occurred months after the speech, there was no threat of imminent harm. The connection between the speech and harm was not temporally direct. Both two cases dealt with circumstances where the imminence standard naturally applied, and they could have been adequately addressed with the pre-*Brandenburg* clear and present danger test. Therefore, it is clear that since 1969, the *Brandenburg* test has only been applied as the modern formulation of the clear and present danger test.

[108] NAACP, *supra* note 106, at 928 ("If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct. In this case, however - with the possible exception of the Cox incident - the acts of violence identified in 1966 occurred weeks or months after the April 1, 1966, speech.").

Chapter 5
Applying the Incitement Test to Advocacy of Terrorism

In the wake of September 11, however, America has been faced with the problem of how to deal with advocacy of radical Islamic terrorism. Even though some scholars have called advocacy of terrorism the source of terrorist activity, the First Amendment restrains America from prosecuting everyone who utters ill against the government. America, however, does not have to choose between fighting terrorism and allowing speech. Justice Jackson once wrote, "The choice is not between order and liberty. It is between liberty with order and anarchy without either."[109] Thus, America is not restricted to choosing between terrorism and speech. The nation, however, must find a way to accommodate speech while still protecting itself against enemy threats. This is the task of the Court in a post-September 11 America.

In applying an appropriate speech standard to advocacy of terrorism, the courts must apply a standard that stands firmly upon precedent and is appropriate to the type of speech in question. Because advocacy of terrorism is so complex, it must be dealt with practically. In this section, I will give two examples of how the courts have dealt with advocacy of terrorism. In the first case, which concerned public speech, the court should have applied the clear and present danger test, but did not. In the second case, which concerned private advocacy of terrorism, the direct incitement test should have been applied. In analyzing these cases, I will show how a two-test approach to incitement clears up confusion over how to treat advocacy of terrorism. In this

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[109] Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (the whole passage reads: In reversing the conviction of the defendant, the Court "has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

Justice Jackson's formulation of the liberty-order dichotomy underscores the Declaration of Independence, which recognizes the negotiated nature of both liberty and order, and acknowledges the necessity of balancing the two. *See* DECLARATION OF INDEPENDENCE para 2 (U.S. 1776).

way, courts should use either Hand's direct incitement test or the clear and present danger test according to the circumstances of a particular instance of speech.

The first example deals with isolated instances of public advocacy of criminal activity. In *United States v. Rahman*, the Second Circuit Court of Appeals reviewed the conviction of Ahmad Ali Rahman, an Islamic cleric convicted for masterminding the 1993 attack on the World Trade Center in New York. While Rahman was not involved in the detailed planning of the attacks, he made public speeches at mosques calling on his followers to make war against the United States and to take action to further Jihad.[110] The question before the Court was whether Rahman could be prosecuted for direct incitement of terrorism. Although the circumstances of Rahman's speech are very similar to *Brandenburg v. Ohio*—public advocacy of criminal activity[111]—the Second Circuit Court of Appeals did not apply *Brandenburg*, the clear and present danger test, or *Dennis*.[112] Instead, ignoring the well-established distinction between concrete incitement and abstract advocacy, it found that Rahman's speech constituted seditious conspiracy and therefore had no protection at all.[113] Since the speech involved in *Rahman* is very similar to the speech in *Brandenburg*, *Hess*, and *Claiborne*, the Court should have applied *Brandenburg* in the same manner—as the modern articulation of the clear and present danger test.

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[110] United States v. Rahman, 189 F.3d 88, 104 (1999). One scholar has described Rahman's role as "limited to fiery sermons and sispensing religious advice in the form of interpretations of Islamic law….There is apparently no evidence that Rahman ever came in contact with, let alone touched, and explosive device or other wise participated in the conspiracy." Keehn, *supra* note 8, at 1250.

[111] Rahman's speech occurred before 1993 and prior to America's "War on Terror."

[112] *See*, Rahman, *supra* note 110, at 114-16 (Seditious conspiracy was "further removed for the realm of constitutionally protected speech than those at issue in *Dennis* and its progeny," noting that the speech in *Dennis* is even further removed from the public, ideological speech in *Brandenburg.*).

[113] *Id.* at 117 (1999) ("One is not immunized from prosecution for such speech-based offenses merely because one commits them through the medium of political speech or religious preaching….If the evidence shows that the speeches crossed the line into criminal solicitation, procurement of criminal activity, or conspiracy to violate the laws, the prosecution is permissible. *See* United States v. Spock, 416 f.2d 165, 169-71 (1st Cir. 1969).").

Consistent with what has been argued above, the Court should have applied either the clear and present danger test or Hand's direct incitement test. Considering the particular circumstances of Rahman's case were similar to *Brandenburg* and previous cases in which the clear and present danger test had been applied, the Court should have applied the clear and present danger test. In applying this test, the Court should have determined whether Rahman intended to produce imminent lawless action and was likely to produce such action. Under the circumstances, Rahman's speech did intend to incite lawless action and obviously was likely to produce such action. The action, however, was not temporally imminent. Therefore, Rahman's speech should have been protected. Applied in this manner to public, ideological advocacy, the clear and present danger test would evaluate whether speech was intended to produce imminent lawless action and whether it will likely produce that action. There is no need to even reference cases in Hand's direct incitement tradition.

Another example of advocacy of terrorist activity can be seen in *United States v. Al-Timimi*.[114] In 2006, a jury convicted Ali Al-Timimi, a cleric at the Dar al-Arqam Center in Falls Church, VA, for inciting terrorism against the United States. Al-Timimi's conviction centered on advice he gave to eight followers at a secret meeting on the night of September 16, 2001, just a few days after the September 11 attacks.[115] This meeting was so secret that the window blinds

[114] The facts in the Al-Timimi case are taken from the indictment, United States v. Al-Timimi, 1:04cr385 (2004), and the related case of Unite States v. Kahn, 309 F. Supp. 2d 789 (E.D. VA, 2004), *aff'd* 461 F.3d 477 (4th Cir. Va., 2006). The actual court decision could not be obtained. A nearly complete account of the fact of the Al-Timimi case can be found in the district court opinion in *Khan*. *See also*, Tanenbaum, *supra* note 5. In writing an article specifically on the Al-Timimi case, Tanenbaum wrote that "there is no formal court opinion from which to draw the facts…aside from the related opinion affirming the conviction of Al-Timimi's associates in United States v. Khan" *Id* at n1. *See also*, Terry Friedan, *Muslim Cleric Convicted: Urged followers to fight U.S. after September 11*, CNN.COM, APRIL 26, 2005, AT http://www.cnn.com/2005/LAW/04/26/cleric.trial/; and Jerry Markon, *Jurors Convict Muslim Leader in Terrorism Case*, WASH. POST, APRIL 27, 2005, AT A01 .

[115] Al-Timimi's followers attended the Dar al Arqam Islamic center in Falls Church, VA were Al-Timimi often lectured. Al-Timimi preached on the necessity of Muslims to engage violent Jihad against the enemies of Islam. His followers were also members of a military style paintball group where members practiced military drills. Members of the paintball group were required to follow three rules: do not tell anyone about the group, do not bring

were drawn, the phones were unplugged, and, when a person from outside the group showed up, the meeting was suspended until he left. During that meeting, Al-Timimi claimed that the September 11 attacks were justified and that the "end time battle had begun." He counseled his followers to leave the United States and defend the Muslims in Afghanistan against an American attack by fighting with the Taliban and Al-Qaeda. As support, Al-Timimi cited fatwas calling on Muslims to defend Afghanistan. Within a month, four of the meeting's attendees were training in terrorist camps in Pakistan.[116] Although Al-Timimi did not actually undertake any overt actions against the United States himself, he was nonetheless convicted for inciting his followers to make war against the United States. The government indicted and convicted him for conspiracy to make war against the United States even though he did not undertake overt acts to accomplish the conspiracy. The Court found that his speech was a direct cause of his followers' crimes. The jury convicted him of incitement to terrorist activity on the grounds of conspiracy.

If the courts were to apply *Brandenburg* to this case, the government would have to show that Al-Timimi's case was (1) an incitement that (2) threatened imminent lawless action and was (3) likely to produce that action. Although Al-Timimi's speech did include aspects of abstract advocacy—advocating a religious doctrine and an Islamic world view—it is easy to see that his speech did in fact incite his followers to travel to Afghanistan and fight against the United States. His comments were both explicit and direct, and his intent is easily enough established. Given the context of the post-September 11 world, global Jihad or holy war, and the fact that his followers actually carried out the actions, Al-Timimi's speech was likely to produce the action he incited. Therefore, the only question left is whether the action Al-Timimi incited was

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anyone to meetings or paintball practices, and invoke the Fifth Amendment if questioned by the police. Kahn, *supra* note 114, at 483.

[116] *Id.* at 810-11.

imminent. Given that it took his followers over a month to arrive in Pakistan and begin training, his speech hardly posed an imminent danger in the strictest sense.

This raises the question of whether it matters if Al-Timimi's speech had imminent effects or not. Would his speech create any less harm to the United States if his followers began fighting against the United States the next day or the next year? The Court faced this same situation in *Dennis*. Then, the Court determined that the Communist leaders were not planning imminent action. They were planning to take action as soon as circumstances would permit at some future point. Even though the imminent requirement does not apply, the intent to produce criminal action was still there. Al-Timimi spoke and his followers engaged in unlawful activity as a direct consequence of his speech. Al-Timimi directly incited his followers to action; he intended to incite criminal activity regardless of the timing. There was a direct connection between his intent and harm done. Therefore, it is clear that since *Brandenburg's* imminence requirement cannot easily or logically be applied, the courts should not bother applying either *Brandenburg* or the clear and present danger test.

In lieu of applying *Brandenburg* or the clear and present danger test, the courts should apply the direct incitement test, determining if the speech is a direct incitement to criminal activity, and, if so, if the gravity of the evil, less its probability, warrants prohibition. There is no question that Al-Timimi's speech was a direct incitement with unambiguous intent. It took place at a secret meeting where he explicitly counseled his followers to engage in war against the United States by fighting with the Taliban in Afghanistan. There is also no question about the gravity and probability of the action—fighting against one's own country is certainly a grave offense that any government has the right to punish. And, since Al-Timimi's followers actually did travel and fight, the action was likely. Therefore, under the direct incitement test, the government could punish Al-Timimi for his speech.

Together *Rahman* and *Al-Timimi* illuminate how advocacy of terrorism is better dealt with by using the clear and present danger test and the direct incitement test separately. *Rahman* is an example of how the clear and present danger protects public, ideological advocacy. *Al-Timimi*, on the other hand, is an example of how *Brandenburg* and its imminence requirement are inadequate to deal with non-public advocacy of terrorism. Therefore, the public/private nature of the speech should trigger whether the courts apply either the direct incitement or the clear and present danger test.

Chapter 6
Conclusion

Although some scholars have tried to find a way to prosecute advocacy of terrorism from within the confines of *Brandenburg*, none have convincingly done so. One scholar suggests that the courts both skirt *Brandenburg's* imminence requirement by applying it contextually instead of temporally, or bypass *Brandenburg* altogether and apply *Dennis* to advocacy of terrorism.[117] No scholars, however, have satisfactorily navigated their way through *Brandenburg* to show how and why the temporal imminence requirement can be applied to advocacy of terrorism. By deconstructing *Brandenburg*, however, we can see how the courts can best deal with advocacy of terrorism by applying by Hand's direct incitement tradition separately from the clear and present danger test.

Prior to the 1969 *Brandenburg* decision, the Court's incitement jurisprudence consisted of two distinct traditions: a direct incitement tradition originating from Judge Hand's opinion in *Masses v. Patten Publishing*, and a clear and present danger test stemming from Justice Holmes' opinion in *Schenck v. United States*. The incitement test focused on the connection between the speaker's intent and the harm threatened, and was applied to private speech. The clear and present danger test focused on the temporal connection between the speech and the harm, and was applied to public speech. In *Brandenburg*, the Court synthesized the two tests, but without explaining their connection. In combining the tests, the Court it did not work out their internal contradictions and blurred the lines between the two traditions. In overruling *Whitney v. California* and articulating a three part incitement test, the Court could have relied solely on cases within the clear and present danger tradition. It went further, however, and unnecessarily

[117] Robert Tanenbaum, *supra* note 5 (arguing that within the context of a global war on terror and in the face of radical Islamic terrorist organizations, all advocacy of terrorism can be assumed to be likely to produce imminent action and therefore should not be giver protection. Therefore, either the courts should either apply *Brandenburg* without its imminence standard or disregard *Brandenburg* in favor of *Dennis*.)

jumbled the two traditions together. The justices cited cases from Hand's direct incitement tradition as precedents for an imminence requirement and did not explicitly note which tradition it relied on as the basis for its distinction between abstract advocacy versus incitement—it could have relied on either. In doing this, the Court left a murky decision full of internal contradictions. Therefore, *Brandenburg's* usefulness and reach are both questionable and on shaky constitutional grounds.

Since the Court did not convincingly synthesize the two traditions, it in effect left them independently intact. For public speech threatening imminent lawless action, the courts should apply the clear and present danger test as developed in the Holmes-Brandeis minority in *Whitney v. California*—intent to incite, imminence, and likelihood. In practice, since 1969, the courts have only applied *Brandenburg* along these lines. In instances of private speech where the imminence requirement does not apply, the courts should apply Hand's incitement test as developed in *Masses v. Patten* and *Dennis v. United States*—where speech is a direct incitement to criminal activity, the government can restrict it so long as the gravity of the evil threatened, minus its improbability, warrants restriction. By applying a direct incitement test to advocacy of terrorism, judges and scholars are able to deal with terrorist threats in a way that respects both speech and national security. Ultimately, the courts should abandon *Brandenburg* as the catchall standard for criminal advocacy and instead apply either the clear and present danger test or the direct incitement test accordingly in appropriate situations.

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Vita

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After graduation, Connor plans to move to California and work in the wine industry before possibly pursuing further education.