1-1-1983

An Absolutism That Works: Reviving the Original "Clear and Present Danger" Test, 8 S. Ill. U. L.J. 127 (1983)

Donald L. Beschle
John Marshall Law School, dbeschle@uic.edu

An Absolutism That Works: Reviving the Original "Clear and Present Danger" Test

Donald L. Beschle*

I. INTRODUCTION

The apparent simplicity of the first amendment to the United States Constitution is sufficient to warm the heart of any advocate of "plain English" in legal drafting. Insofar as it pertains to freedom of speech and of the press, the provision contains thirteen words.[1] Yet, as so often happens in the case of an apparently clear and simple statement by the lawmaker,[2] application of the rule has led to significant confusion. Courts, in deciding constitutional questions of first impression, have defined exceptions and set limits; academics and other theorists have attempted to interpret these decisions so that the lawyer and the citizen might act with confidence that he or she is within the scope of constitutional protection.[3]

Unfortunately, there has been little clear agreement on either the purpose or proper effect of the first amendment's free speech provision. Some particular first amendment problems (notably the power of the state to prohibit obscenity) have led to enormous confusion and the absence of a clearly accepted standard.[4] While there surely are questions of law that are difficult and complex and to which a simple solu-

* B.A., 1973, Fordham University; J.D., 1976, New York University; LL.M., 1982, Temple University. Assistant Professor of Law, John Marshall Law School.

1. "Congress shall make no law . . . abridging freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

2. *See, e.g.*, the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1982). *See also* the Bible, Exodus 20:4-17 (the Ten Commandments). In light of our experience with such rules, it might be asked whether the advocates of "plain English" laws, *see, e.g.*, N.Y. GEN. OBL. LAW § 5-702 (McKinney Supp. 1981-2) (requiring the use of "plain language" in consumer contracts), are chasing an impossible dream.

3. The attempt to explain the case law on this subject has generated an enormous amount of scholarship. It now takes about four pages of fine print just to list a single year's output of legal scholarship on freedom of speech and the press in the Index to Legal Periodicals. *See* 20 INDEX. LEG. PER. 178-82 (1980-81).

4. *See, e.g.*, Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968), in which Justice Harlan noted that the obscenity issue has "produced a variety of views among members of the court unmatched in any other course of constitutional adjudication." *Id.* at 704-05 (Harlan, J., dissenting).

tion would be unsatisfactory, a rule of law that can be more easily stated and applied is obviously preferable to one which lacks those virtues. This is particularly the case where the rule in question governs the conduct not only of the sophisticated actor with ready access to legal advice, but also of the average citizen. A relatively concrete rule is especially desirable when a misunderstanding of that rule's application may result in criminal penalties.[5]

This Article will discuss a central first amendment question: Under what circumstances may government punish speech as criminal activity? The rule of law proposed is not a new one. It is, in fact, the original test set down in the opinions of Justice Holmes in the early years of the twentieth century which has been labeled the "clear and present danger" rule. Over the years, that rule has been so altered as to become an entirely different rule that retains only the original name. It is this altered "clear and present danger" test which has justifiably drawn fire from critics, including the "absolutists," most notably Justice Hugo Black. Black would have had far less trouble with a strict application of the original "clear and present danger" test. In fact, under that test an "absolutist" position consistent with the language of the amendment is more defensible than Black's own "absolutism."

This Article's analysis will begin, then, not with Holmes and the "clear and present danger" test, but with Black's attempt to form a simple and clear first amendment rule governing legislative attempts to punish speech. After first examining the virtues and weaknesses of absolutism, this Article will discuss the origins of Justice Holmes' "clear and present danger" test. The Article will then explore the evolution of "clear and present danger" and demonstrate how it developed from a relatively clear test, which was quite protective of first amendment rights, to a vague and unreliable shield for such freedoms. At the same time, it will describe the re-emergence of at least part of Holmes' original test in the 1969 case of *Brandenburg v. Ohio*.[6] Finally, the Article will examine the efficacy of the proposed rule, that is, the original "clear and present danger" test, in a variety of first amendment settings.

---

5. A criminal statute which "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" is void for being unconstitutionally vague. United States v. Harris, 347 U.S. 612, 617 (1954). This principle has often been applied to cases in which the defendant's conduct was arguably protected by the first amendment, such as instances of flag desecration. *See, e.g.*, Smith v. Goguen, 415 U.S. 566 (1974). In such cases, it might be asked whether the true "vagueness" exists in the criminal statute itself, or in the definition of the types of activity that are protected by the first amendment, and therefore not permissibly within the scope of the statute.

6. 395 U.S. 444 (1969).

II. JUSTICE BLACK'S ABSOLUTISM: AN ATTEMPT AT CLARITY AND SIMPLICITY

In light of the desirability of clear rules of law and the fundamental nature of first amendment rights,[7] the approach of the "absolutists," most prominently Justice Hugo Black, exerts a strong initial appeal. Black's position was that the first amendment language, "Congress shall make no law," should be read literally; that no valid exception could be created which would allow the prohibition of speech, even when that speech might be particularly offensive or dangerous.[8] Black rejected any "balancing test" which would weigh freedom of speech against the governmental interest asserted in the statute in question.[9] To Black, such a test was "closely akin to the notion that neither the First Amendment nor any other provision of the Bill of Rights should be enforced unless the Court believes it is *reasonable* to do so,"[10] a notion which could render the "right" of free speech illusory. Likewise, Black rejected the prevailing "clear and present danger" test, on the grounds that it too would allow a criminal conviction in some cases "for just talking."[11]

Despite the virtue of simplicity, Black's position never commanded a majority of the Supreme Court. The Court considered the protection afforded by such absolutism to be far too broad. The majority view is understandable in light of the fact that speech can quite obviously be the cornerstone of an enormous amount of activity which is within the range of legitimate state concern to regulate. In addition to crimes which might be committed using speech but are rarely accomplished in such a way (*e.g.*, killing someone with a weak heart by yelling at him or by telling him shocking, distressing and untrue news),

---

7. Freedom of speech was one of the first provisions of the Bill of Rights to be incorporated into the due process clause of the fourteenth amendment. Fiske v. Kansas, 274 U.S. 380 (1927).

8. H. BLACK, A CONSTITUTIONAL FAITH 45-63 (1968).

9. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109 (1959) (Black, J., dissenting). In *Barenblatt*, the petitioner's conviction for refusal to answer questions put to him by the Subcommittee of the House of Representatives Committee on Un-American Activities was upheld over first amendment claims. Black argued in dissent that:

> To apply the Court's balancing test under such circumstances is to read the First Amendment to say 'Congress shall pass no law abridging freedom of speech, press, assembly and petition unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised.' Not only does this violate the genius of our *written* constitution, but it runs expressly counter to the injunction to court and Congress made by Madison when he introduced the Bill of Rights.

Id. at 143 (emphasis in original).

10. Black, *supra* note 8, at 50.

11. *Id.* at 52. *See* Yates v. United States, 354 U.S. 298, 340 (1957) (Black, J., dissenting). *See also* Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549, 558 (1962).

certain crimes (*e.g.*, solicitation and fraud) are more often than not carried out largely, if not entirely, by "just talking." Without some limiting principle, Black's absolutism is untenable.

Black himself sought to resolve this problem by creating a distinction between "speech" and "conduct." In *Giboney v. Empire Storage & Ice Co.*,[12] Black, writing for the Court, drew a distinction between the signs carried by pickets, which were protected by the first amendment, and the conduct of marching back and forth with those signs, which was not. Black and the Court rejected the contention "that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."[13]

Distinguishing "speech" and "conduct," and holding that the first amendment absolutely protects only the former, while appearing to simplify and clarify analysis, merely shifts the difficult step in first amendment analysis. Rather than asking whether certain "speech" is speech worthy of protection, the court must ask whether activity is "speech" at all, or whether it should be characterized as conduct. Such characterization of an activity is not always easy; for example, "[t]he act of praying often involves body posture and movement as well as utterances."[14] Asking whether activity is speech or conduct rather than whether "speech" is protected or unprotected merely changes the vocabulary used in close cases without making the outcome any more certain.

This point became most clear during Black's last years on the Court. For many years Black's absolute defense of speech had drawn criticism from the conservative end of the political spectrum.[15] But during the 1960s the speech/conduct distinction proved to be a double-edged sword. Where the activity involved was nontraditional "symbolic speech," such as the wearing of a black armband, a judge could, as Black did, classify it as "conduct" and then proceed to justify government restraints under a balancing approach.[16] These opinions sub-

12. 336 U.S. 490 (1949).

13. *Id.* at 498.

14. Brandenburg v. Ohio, 395 U.S. 444, 455 (1969) (Douglas, J., concurring).

15. *See, e.g.*, Griswold, *Absolute is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 UTAH L. REV. 167 (1963). Of Black's Supreme Court colleagues, Justice Frankfurter, a political liberal turned judicial conservative, was the most prominent advocate of a balancing test for first amendment decisions. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring).

16. Tinker v. Des Moines School District, 393 U.S. 503, 515 (1969) (Black, J., dissenting). Black disagreed with the Court's holding that students and teachers who wore black armbands to school to protest the Vietnam War were protected by the first amendment. This activity, he stated, was not "speech." *See supra* notes 12-13 and accompanying text.

jected Black and his "speech/conduct" distinction to a new barrage of criticism from liberal commentators.[17] It seemed that Black's limiting principle had grown strong enough to devour the rule in cases involving symbolic speech.

In this respect Black's analytical system retained the use of judicial balancing of rights and interests. Having classified activity as "conduct," Black did not automatically uphold any law governing that activity. Rather, in such cases Black applied a balancing test. For example, in *Schneider v. New Jersey (Town of Irvington)*,[18] the Court invalidated an ordinance which prohibited the distribution of handbills. Although the law was directed at conduct, not speech, Black joined the court in so holding. Even though the state was regulating "conduct," the statute was ruled unconstitutional because the legitimate state purpose could be achieved in a manner less restrictive of the accompanying "speech."[19]

The problems presented by Black's choice of the speech/conduct distinction as a limiting principle to his absolutism have contributed to the rejection of absolutism as a theory of first amendment analysis.[20] The virtues of absolutism, however, would seem to demand at least an attempt to set forth a more satisfying limiting principle. One such principle may be found in the opinions of the Court in a place which would seem unlikely—the "clear and present danger" test which has been regarded (by Black himself, among others) as antithetical to absolutism. An understanding of the possible synthesis of the two theories requires an analysis of the origins of the "clear and present danger" rule without the "refinements" (or distractions) added to it over the years.

III. The Origin and Definition of the "Clear and Present Danger" Test

The "clear and present danger" test was originated by Oliver Wendell Holmes. Perhaps more than any other justice in the history of the Supreme Court, Holmes has left us evidence of a theory of law, not only in his opinions but in his other writings, most notably his

17. *See, e.g.*, McBride, *Mr. Justice Black and His Qualified Absolutes*, 2 Loyola (L.A.) L. Rev. 37 (1969).

18. 308 U.S. 147 (1939).

19. *Id.* at 163. *See also* Black, *supra* note 8, at 61.

20. At least one commentator sees the speech/conduct distinction as, at least in part, an attempt by Black to remain consistent with his own early first amendment opinions which did not take an absolutist position, but applied a balancing test. Later, Black would describe them as cases involving "conduct." J. Magee, Mr. Justice Black: Absolutist on the Court, 82-93 (1980).

landmark work, *The Common Law*.[21] Indeed, in Holmes' case, the theoretical work preceded his court tenure. It is unsurprising then to see a consistency in Holmes' thought which helps to illuminate the details of any single opinion. This is true of Holmes' opinion in *Schenck v. United States*,[22] in which the "clear and present danger" test was first set forth.

Charles Schenck, convicted of "causing and attempting to cause insubordination . . . in the military"[23] in violation of the Espionage Act of 1917,[24] claimed that his conduct—printing and distributing thousands of circulars denouncing the draft—was protected by the first amendment. Holmes, writing for a unanimous court, rejected Schenck's claim using the following language:

> [T]he character of every act depends upon the circumstances in which it was done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effects of force. . . . 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.[25]

Two requisites of criminal liability appear in this statement: the first rather clear, the second far less so. First, the situation must involve a "substantive evil" that Congress "has a right to prevent." The context and the history of the first amendment would indicate that dissemination of the content of the message itself cannot be considered as such an evil;[26] the ultimate statutory aim must be to prevent something

---

21. O.W. HOLMES, THE COMMON LAW (1881).

22. 249 U.S. 47 (1919).

23. *Id.* at 48-49.

24. Ch. 30, 40 Stat. 217. Schenck was convicted of violating section three of the Act which stated that:

> Whoever . . . shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished. . . .

Id. at 219.

25. 249 U.S. at 52 (citations omitted).

26. If the "substantive evil" can be the message itself, then the first amendment becomes largely meaningless, and Holmes' reasoning becomes entirely circular. Certainly, dissemination of a message always creates the likelihood that the message will be disseminated. Some critics of "clear and present danger" have blurred the distinction, however, and have contended that the quoted phrase "substantive evils that Congress has a right to prevent" is not a limitation, but merely a statement asserting Congressional power in any area relating to the general welfare. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 47-48 (1948). But again, if this language was not meant to recognize limitations on the power of Congress (*i.e.*, there must be substantive evils which Congress does not have the right to prevent) then the need for the

clearly preventable, such as insubordination in the military. This part of the "clear and present danger" test tends to be given short shrift in favor of extensive analysis of the second, more murky component: the proximity (the clarity and immediacy) of the danger.

During the same term, Holmes shed some light on just what he meant by "clear and present danger" in his opinion in *Debs v. United States*,[27] upholding the defendant's conviction for attempting to incite insubordination. Holmes felt it was important to determine if the "natural and intended" effect of the defendant's speech was to bring about the "substantive evil."

> Evidence [of the defendant's views] is evidence that if in the speech he used words tending to obstruct the recruiting service he meant that they should have that effect. The principle is too well established and too manifestly good sense to need citation of the books. We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, etc., and unless the defendant had the specific intent to do so in his mind.[28]

The phrase "clear and present danger" is absent from the opinion; instead, Holmes provides what appears to be a functional definition of the test. *Schenck* and *Debs* together make clear that Holmes' concept of punishable speech is that which (1) has a "natural tendency and reasonably probable effect" of (2) bringing about a "substantive" (noncommunicative) evil that Congress has power to prevent, and (3) is uttered with the specific intent to cause the substantive evil.

A. *"Clear and Present Danger" and the Common Law of Criminal Attempt*

The above analysis of what constitutes punishable speech follows quite naturally from Holmes' views on the subject of criminal attempt in general. At common law there were two elements of criminal attempt: (1) specific intent to commit the ultimate act and (2) sufficient likelihood that the ultimate act will, in fact, be carried out.[29] These two elements have been incorporated into statutory definitions of attempt.[30]

---

phrase completely disappears. Holmes could have simply said, but did not, that words were punishable when they created a clear and present danger "that they will bring about (substantive) evils."

27. 249 U.S. 211 (1919). Holmes also authored the opinion of the Court in *Frohwerk v. United States*, 249 U.S. 204 (1919), affirming yet another conviction for attempting to incite insubordination. *Frohwerk* adds little or nothing to the language of *Schenck*, however.

28. 249 U.S. at 216.

29. *See* Holmes, *supra* note 21, at 65-70.

30. *See, e.g.*, GA. CODE ANN. § 26-1001 (1981): "A person commits criminal attempt when,

These elements are the same as two of the three elements of punishable speech in *Schenck* and *Debs*.

The most difficult question in applying this formula is just how close to a complete crime the preliminary act must come to be deemed an attempt. The answer to this question will depend to a great extent on whether the primary focus of the criminal law is to be on the preliminary act or on the moral blameworthiness of the actor. If primary focus is placed upon the latter, then it seems logical to require only sufficient action on the part of the defendant to corroborate his intent, and to indicate that it is more than a passing whim.[31] But if primary focus is placed upon the act, then the law will disregard any attempt which does not come very close to completion of the substantive crime.[32]

The two elements are closely related. The proximity of the attempt to the complete crime can be seen as the best evidence of the actor's intent to commit the offense. Conversely, if the actor does not have such an intent, it is difficult to assert that the crime is likely to occur, no matter how many preliminary steps have been taken. For this reason, regardless of whether primary emphasis is placed on the dangerous act or the dangerous actor, both elements are necessary to support a conviction for attempt.

Holmes was quite clear that it was the prevention of the act, not the moral blameworthiness of the actor, which was in his mind the central and proper concern of the criminal law.[33] And as a judge, he consistently required that an attempt be "very near to the accomplishment of the act"[34] before it was deemed punishable. The combination of specific intent and proximity of the ultimate result called for in *Schenck* and *Debs*, then, does not appear to be a unique test created for use in first amendment cases; it is merely an extention of Holmes' approach to all cases of criminal attempt, regardless of the particular circumstances.[35] Yet, despite the fact that it was not specifically created

---

with intent to commit a specific crime, he performs any act which constitutes a substantial step toward the commission of that crime."; N.Y. PENAL LAW § 110.00 (McKinney 1975): "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime."

31. *See, e.g.*, MODEL PENAL CODE § 5.01(2) (Proposed Official Draft 1962), which states in part: [c]onduct shall not be held to constitute a substantial step . . . unless it is strongly corroborative of the actor's criminal purpose."

32. *See, e.g.*, People v. Rizzo, 246 N.Y. 334, 158 N.E. 888 (1927).

33. Holmes, *supra* note 21, at 44-45.

34. Commonwealth v. Peaslee, 177 Mass. 267, 272, 59 N.E. 55, 56 (1901). *See also* Commonwealth v. Kennedy, 170 Mass. 18, 48 N.E. 770 (1897) and Hyde v. United States, 225 U.S. 347, 387 (1912) (Holmes, J., dissenting).

35. It is unsurprising, for instance, that the opinion in the leading case defining the elements

as a tool of first amendment analysis, it seems very well suited to such a task. Under the common law definition of attempt and the clear and present danger test which grew from it, the primary focus must be on the defendant's overt acts, not on his state of mind. This viewpoint is similar to Justice Black's later insistence on keeping the inquiry focused on the defendant's conduct, rather than his words.

The third element of "clear and present danger," added to those which clearly have their origin in the common law of criminal attempt, limits just what the "substantive evil" can be. It must be an evil which "Congress has a right to prevent." The source of the "rights" of Congress and the express limitation on those "rights" is, of course, the Constitution. Since the first amendment is clearly intended to limit the right of Congress to prevent speech, the following standard suggests itself. Congress may not, as an end in itself, directly prohibit speech. A statute which is framed in such terms is invalid. This rule is clear and consistent with Black's absolutism. Congress may, however, punish speech as an attempt (under strict common law standards of proximity and intent) to commit that which in itself is a non-speech crime. This second part of the rule satisfies the need for a limiting principle to any absolute rule, and, as will be seen, does so in a far more satisfactory way than Black's speech/conduct distinction.

B. *The Retreat from the Original "Clear and Present Danger" Test*

Unfortunately, almost as soon as the "clear and present danger" test was set forth in *Schenck*, the Supreme Court began to retreat from it; Holmes subsequently found himself as the author of dissenting opinions calling for the application of his test.

Abrams v. United States[36] is the first of a series of cases in which the Court began to elaborate on the "clear and present danger" test. This elaboration, however, so stripped away the elements of the test as originally set forth that it seems more accurate to say that an entirely new test was substituted; only the original label was retained. In *Abrams*, the defendants had advocated a general strike in protest of United States intervention against the Russian revolutionary government. They were charged with violation of the Espionage Act as amended in 1918,[37] for using language that was "intended to incite, provoke and encourage" resistance to United States efforts against Ger-

---

of an attempt to monopolize under section 2 of the Sherman Act, 15 U.S.C. §§ 1-7 (1982), was written by Holmes, in Swift & Co. v. United States, 196 U.S. 375 (1905).

36. 250 U.S. 616 (1919).

37. Ch. 75, 40 Stat. 553.

many.[38] In upholding the convictions, the court abandoned the requirement of specific intent. The fact that the defendants' purpose may not have been to aid Germany (their leaflets, in fact, denounced "German militarism")[39] was not determinative:

> Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States . . . .[40]

Holmes' dissent has been often cited for its contention that there was not sufficient proximity between the defendants' acts and possible achievement of the substantive evil.[41] But his opinion centers on the failure of the Court to require evidence of a specific intent to interfere with the war effort against Germany—the substantive evil prohibited by the statute.[42]

Gitlow v. New York[43] removed a second element of the "clear and present danger" test—the necessity that the legislature's ultimate concern be with a "substantive" evil. Gitlow had distributed a "manifesto" advocating the violent overthrow of organized government. The statute under which he was convicted, however, did not speak in terms of attempt or incitement. New York law made anyone who "[b]y word of mouth or writing advocates, advises or teaches the duty, necessity, and propriety of overthrowing or overturning organized government by force or violence . . ."[44] guilty of a complete offense. There was no need to weigh the likelihood that the speech might bring about a "substantive" evil beyond the communication; the communication was itself deemed an evil subject to prohibition. Just as legislatures had determined that attempted larceny might alone constitute the complete crime of burglary;[45] so they could push criminal responsibility one step back from the noncommunicative evil and make the communication

38. 250 U.S. at 617.

39. *Id.* at 625 (Holmes, J., dissenting).

40. *Id.* at 621.

41. "Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government aims or have any appreciable tendency to do so." *Id.* at 628 (Holmes, J., dissenting). This phrase has been seized upon by critics of any sort of "clear and present danger" test as supporting the obviously troubling conclusion that under such a test only ineffective speech is protected. The criticism disregards, however, Holmes' insistence on specific intent.

42. *Id.* at 626-29.

43. 268 U.S. 652 (1925).

44. Act of Apr. 3, 1902, ch. 371, 1902 N.Y. Laws 959.

45. *See infra* note 52 and accompanying text.

itself a complete crime. The court thus gave legislatures the power to render questions of the imminence of the harm and the specific intent of the actor irrelevant:

> It is clear that the question in [cases such as *Gitlow*] is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results . . . . And the general statement in the Schenck Case . . . that the "question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils,"—upon which great reliance is placed in the defendant's argument—was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.[46]

It is certainly true that there is a clear difference between cases involving a statute which itself prohibits speech and those involving a statute prohibiting a non-speech outcome which may have been achieved by speech. The possibility that only statutes of the latter type are constitutionally permissible was not considered by the Court. Holmes' dissent, in addition to expressing the opinion that the activity at issue did not satisfy the "proximity" test, also contains language which indicates that he not only considered but accepted the contention that delivery of a message could not itself be treated as a complete crime: "[i]f the publication of this document had been laid as an attempt to induce an uprising against government at once . . . it would have presented a different question. *The object would have been one with which the law might deal* . . . . But the indictment alleges the publication and nothing more."[47]

Gitlow, along with the subsequent decision in *Whitney v. California*,[48] gave enormous leeway to legislative judgment in areas of speech-related crimes. The facts in *Whitney* were very similar to those in *Gitlow*. The defendant in *Whitney* was convicted of criminal syndication for knowingly becoming a member of an organization formed to advocate the doctrine that unlawful acts were justified to bring about polit-

46. 268 U.S. at 670-71 (footnote omitted) (quoting Schenck v. United States, 249 U.S. 47, 52 (1919)).

47. 268 U.S. at 673 (Holmes, J., dissenting) (emphasis added).

48. 274 U.S. 357 (1927).

ical changes.[49] The Court's analysis adds little to the *Gitlow* decision. The most interesting aspect of the *Whitney* case is the concurring opinion of Justice Brandeis, in which he was joined by Justice Holmes. Brandeis, quite oblivious of the *Gitlow* distinction between a situation where speech is itself a complete crime and one where speech is an attempt at a non-speech crime, advocates application of the "clear and present danger" standards developed in cases dealing with the latter to both types of cases.

> To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.[50]

Brandeis and Holmes thus implicitly concede the right of the legislature to frame statutes which are directly aimed at speech. They fall back to the position that such a statute may apply only when there is proximity to a serious (substantive) evil.[51]

Apparently Brandeis (and certainly the majority of the Court) had incorporated into first amendment analysis yet another aspect of the law of criminal attempt. Over the years, legislatures have reacted to the difficulty of convicting under the common law requirements for attempt by simply declaring the acts likely to be part of a chain of activity leading up to a complete crime to be a complete crime in and of themselves. The classic example, as previously mentioned, is burglary, which is itself a complete crime, the elements of which are intent to commit another crime and some defined act towards that end (*e.g.* breaking and entering).[52] Similarly, assault is an attempted battery. By prohibiting such conduct, the point at which the law might intervene is advanced. Not only, for example, is burglary now a crime without the need to prove close proximity to another felony, but there is now the possibility of conviction for attempted burglary.[53] Where the conduct in question is assault or burglary, there can be no quarrel with

---

49. *Id.* at 360. Whitney was convicted of violating section 2 of the California Criminal Syndicalism Act which provided that "[a]ny person who . . . [o]rganizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism . . . [i]s guilty of a felony and punishable by imprisonment." 1919 Cal. Stat. 281.

50. 274 U.S. at 376 (Brandeis, J., concurring).

51. In his *Gitlow* dissent, Holmes maintained that his views in *Schenck* were too deeply held "to believe that [*Abrams* has] settled the law." 286 U.S. at 673 (Holmes, J., dissenting) (citation omitted). Perhaps by the time of *Whitney* Holmes had decided to bow to *stare decisis* and attempt to at least retain as much of the *Schenck* test as he (and Brandeis) could, by using the test even when the statute was directly aimed at speech.

52. *See* MODEL PENAL CODE § 221.1 comment (1980).

53. *Id.*

the right of the state to intervene at this early point. There is no arguable interference with an individual's rights in preventing him from breaking and entering. But where the activity is speech, it should be clear that the first amendment poses serious problems when a legislature proposes to make that activity, in and of itself, a complete crime.

In conceding to the legislature the authority to make speech alone a complete crime, Brandeis is forced to construct an entirely new standard for protection of speech. The specific intent required to establish an attempt at common law (and in *Schenck* and *Debs*) is now unnecessary; general intent with respect to the "substantive evil" will now suffice.[54] Also absent is that part of the *Schenck* test arising not from common law, but rather from the constitutional requirement that the statute directly address a "substantive evil that Congress has a right to prevent." All that remains of the *Schenck* test is the requirement that evil be "imminent," but now the question is no longer whether that evil is "substantive" (not itself communication) but whether it is "serious"—a test which gives the courts and legislatures a great deal of discretion, and a test which simply does not appear in *Schenck* or *Debs*.[55]

After *Gitlow* and *Whitney*, there are two "clear and present danger" tests. The first applies where the defendant is charged with an attempt to commit a substantive crime by means of speech. In such a case, the government must prove specific intent on the part of the defendant to bring about the substantive evil, and sufficient proximity of that evil. The second test (which might be called the "neo-clear and present danger" or even "pseudo-clear and present danger" test) applies where the defendant is charged with a complete crime which consists solely of speech. Here, the defendant can be convicted only if a "serious" evil was "imminent."

This extension of the scope of the prohibitions of speech that are permissible under the revised "clear and present danger" test significantly weakened the original test. The expanded legislative power to prohibit pure speech also conflicts with a literal reading of the first amendment and, of course, with Black's absolutism. The "plain" language of the amendment suggests that the terms of the statute in question, rather than the particular factual background against which it is enforced, should be the primary question addressed by a court assess-

54. Specific intent is the desire to bring about a specific consequence. General intent is merely the intent to act, and cause any consequences which naturally flow from that act. *See, e.g.*, Merritt v. Commonwealth, 164 Va. 653, 180 S.E. 395 (1935).

55. Brandeis argues that a state may not prohibit advocacy of trespass, for instance, since the evil is not sufficiently serious. It may, however, prohibit an attempt or incitement to trespass carried out by words. 274 U.S. at 377-78.

ing its constitutionality.[56] As Black contended, where a statute on its face prohibits pure speech, it should be found constitutionally invalid. In such a case, when there is no requirement of imminence of a substantive evil or even specific intent on the part of the defendant, the state is trying to punish for what is actually an attempt without establishing the essential elements of an attempt. While this may be permissible in the case of attempted robbery (*i.e.* burglary) or attempted battery (*i.e.* assault), in neither of those cases is the substance of the attempt protected by a constitutional provision. In contrast, the first amendment prohibits the legislature from regarding pure speech as a substantive evil. But in failing to see this and incorporate such a rule into "clear and present danger," the Supreme Court was able to render decisions in the name of "clear and present danger" which seem to be clearly contrary to what Holmes originally intended. It is little wonder that Black rejected such a "clear and present danger" test.

IV. Application of the Two "Clear and Present Danger" Tests

A. *Application of the Modified "Clear and Present Danger" Test*

As might be expected in light of *Gitlow* and *Whitney*, legislatures did not hesitate to create crimes which consisted entirely of speech. The most significant first amendment cases of the 1930s and 1940s dealt with such statutes, and although several of those decisions struck down convictions, they never challenged the right of the state to make speech a complete crime, without the necessity of demonstrating, as a matter of fact in each case, that a non-speech evil was imminent.

In *Stromberg v. California*,[57] for example, the defendant's conviction was reversed on the grounds that it might have been erroneously based on a California statute which prohibited the display of a red flag "as a sign, symbol or emblem of opposition to organized govern-

56. That the facial validity of legislation is the primary focus of constitutional inquiry is convincingly argued in Linde, *Clear and Present Danger Revisited: Dissonance in the Brandenburg Concerto*, 22 Stan. L. Rev. 1163, 1174 (1970). Linde recognizes the important distinction between statutes directed against speech and those directed against something other than speech, and argues that statutes of the former type are invalid, while those of the latter type may be subject to the "clear and present danger" test. While Judge Linde is correct as to the invalidity of statutes directed solely against speech, his statement that such statutes are not subject to the "clear and present danger" test is not precisely accurate. As discussed above, since part of the original "clear and present danger" test is that the statute be aimed at a "substantive evil," it can be said that a statute which is aimed directly at speech will always fail the test. This discussion may be more fruitful, however, if left for the Conclusion section of this Article. *See also infra* note 89 and accompanying text.

57. 283 U.S. 359 (1931).

ment."[58] The Court, however, stated that it had "no reason to doubt the validity" of the balance of the statute, which prohibited such a display "as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious nature."[59] The vagueness of the "sign . . . of opposition" language could, presumably, be read to allow enforcement where there was no "serious" evil threatened at all (*e.g.*, where the "opposition" was intended to be entirely peaceful and aimed only at winning an election).[60] But the dictim with respect to the "invitation . . . to anarchistic action" language indicates that the Court was not objecting to the concept of a statute specifically prohibiting speech, but rather to the California Legislature's attempt to ban speech which threatened an insufficiently serious evil. This aspect of the prevailing "clear and present danger" test—the analysis of the "seriousness" of the threatened harm and the need to weigh that against the value of the communication—made the test completely unreliable, not only as a safeguard for first amendment rights, but also as a guide for predicting just what activity was within the protection of the amendment.

Not infrequently, this balancing test would be used to protect speech, as in *Lovell v. City of Griffin*[61] and *Schneider v. Irvington*.[62] In each case, an ordinance prohibiting the distribution of literature in public places was struck down, not on the ground that the ordinance failed to describe a particular activity which generally heightened the danger of a substantive evil (littering), but rather on the ground that the evil was insufficiently serious to support an infringement of speech. While the outcome in each of these cases was protective of speech, the rationale was at best a double-edged sword. If the Court must determine the gravity of the evil, then the decision turns upon the values or fears of society (or the judiciary) at the time of the decision. The fact that society does not place a relatively high value on clean streets is a weak basis for the defense of free speech. The most effective way to resolve this problem would be to require the state to prohibit only the non-speech result by making attempted littering a crime. The state may then clearly protect its legitimate interest (without a court having to second-guess its importance); yet neither Lovell's nor Schneider's conviction could stand under common law attempt principles. In the first place, it seems absurd to contend that defendants had the specific intent to litter, and second, the proximity of the evil is at least question-

58. Act of May 3, 1919, ch. 101, 1919 Cal. Stat. 142.
59. 283 U.S. at 369 (quoting 1919 Cal. Stat. 142).
60. 283 U.S. at 369.
61. 303 U.S. 444 (1938).
62. 308 U.S. 147 (1939).

able, since the intervention of a third party (the recipient of the leaflet) is necessary to bring about the crime.[63]

As might be expected, this balancing process could also result in decisions in which the seriousness of the evil was held to be sufficient. In *Chaplinsky v. New Hampshire*[64] the defendant's conviction was affirmed under a statute making it illegal to "address any offensive, derisive or annoying word to any other person . . . with intent to deride, offend or annoy him . . . ."[65] The Court focused its analysis on the words spoken (that a police officer was a "damned Fascist" and a "God damned racketeer") and their tendency to incite an immediate breach of the peace.[66] By focusing on the speech rather than the statute involved, the court failed to adequately explain why New Hampshire's statutory formulation ("with intent to . . . annoy") was any less vague and therefore impermissible than the California statute at issue in *Stromberg*. Had the Court focused on the statute itself, it might have realized that the government's legitimate interest could have been adequately protected by a statute prohibiting actual or attempted incitement. It is entirely possible that Chaplinsky could have been convicted under such a statute without the need to classify his speech as either being worthy of protection or being among those incendiary and unworthy "fighting words."[67] The state's true interest is in prohibiting consequences, not words themselves. But where a legislature may frame a prohibition in terms of the type of speech which is forbidden, analysis and evaluation of that speech becomes an inevitable part of the task of any court reviewing a conviction pursuant to that statute.

The defects of the prevailing "clear and present danger" test became most evident in *Dennis v. United States*.[68] Defendants were prosecuted under the Smith Act, which makes it illegal "to knowingly or

63. In *Snyder v. Milwaukee*, one of the cases consolidated for appeal with *Schneider*, the Court mentioned that the leaflets which had been thrown on the ground were thrown not by the defendant, but by the persons to whom they were given. Still, "[t]he police officers who arrested the petitioner . . . did not arrest any of those who received the bills and threw them away." 308 U.S. at 155-56. This is, of course, a rather clear indication that prohibiting the act of littering was not the real purpose of the ordinance. The Court specifically stated that the first amendment does not "deprive a municipality of power to enact regulations against throwing literature broadcast in the streets." *Id.* at 160-61.

64. 315 U.S. 568 (1942).

65. 1926 Pub. Laws of N.H., ch. 378, § 2.

66. 315 U.S. at 571-72.

67. *Id.* at 572. Evaluating and classifying speech were activities which Justice Black would later strongly criticize. *See* Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549, 559 (1962). Interestingly enough, Black did not dissent in *Chaplinsky*; perhaps he felt that Chaplinsky was engaged in "conduct" or perhaps his absolutism had not yet evolved. *See supra* note 20.

68. 341 U.S. 494 (1951).

wilfully advocate, abet, advise, or teach the duty, necessity, desirability or propriety of overthrowing or destroying any government in the United States by force or violence."[69] The indictment charged a conspiracy to form an organization (the Communist Party) that would advocate such overthrow. The Supreme Court in affirming the defendant's conviction, claimed to adhere to the "clear and present danger" test, but clearly indicated that that standard meant, to the majority, a balancing test. Rather than asking, in Holmesian terms, whether the attempt was "very near" the accomplishment of the substantive evil, the Court adopted Learned Hand's formula that "[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 danger."[70]

The enormous gravity of the foreseen evil here—the overthrow of the government—could justify government intervention very early in the process, despite the evidently low probability of success, and despite the fact that defendants had hardly progressed in their actual organization beyond the point at which they would be comparable to what Holmes in his dissent in *Abrams v. United States* had called "unknown men" publishing "a silly leaflet."[71]

By 1951, then, the standard which the "clear and present danger" test had become had proven itself utterly unreliable in protecting the interests which Holmes had meant the test to protect. It is unsurprising that Justice Black, or any other judge who accorded a special place to first amendment rights, would completely reject it.

B. *Application of the Original "Clear and Present Danger" Test*

While the balancing test which "clear and present danger" had become was proving itself to be at best a very vulnerable defense of free speech, the original "clear and present danger" test was faring much better. Although the Court had allowed legislatures to avoid this more stringent test by merely making speech a complete crime, the *Schenck* test was still applied when the statute in question addressed conduct, and speech was merely a method of attempting such conduct.

The Espionage Act of 1917[72] remained on the books during these years and was at issue during World War II in *Hartzell v. United States*.[73] Defendant, who had distributed pamphlets advocating

69. 18 U.S.C. § 2385 (1982).
70. 341 U.S. at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).
71. Abrams v. United States, 250 U.S. 616, 627 (1919); *see supra* note 41.
72. Ch. 30, 40 Stat. 217.
73. 322 U.S. 680 (1944).

United States abandonment of the Allies and conversion of the war into a racial conflict, was charged with attempting to cause military insubordination, and the jury returned a verdict of guilty.[74] Drawing on the language and reasoning of *Schenck*, the Supreme Court reversed defendant's conviction, holding that the record was insufficient to support the necessary specific intent to cause insubordination. Hartzell's conduct proved no more than a purpose "to propagate his ideas."[75]

Possibly the most striking aspect of this case is that it was decided during the war. Commentators analyzing cases decided in wartime have often concluded that courts simply cannot be expected to reach proper conclusions in first amendment cases in such an atmosphere;[76] yet using the original "clear and present danger" test of *Schenck*, the Supreme Court was able to properly reverse this conviction on first amendment grounds during wartime.[77] A few years later, ignoring the *Schenck* test, the Court would provide far less protection to the defendant in *Dennis* during peacetime. If the balancing test has failed the test of time as a shield for civil liberties, the original "clear and present danger" test has passed with flying colors. In light of this, it might be expected that the original test, or at least part of it, would reappear, and eighteen years after *Dennis*, it did.

C. *Brandenburg v. Ohio: Back to (Some) Holmesian Basics*

The reasoning of the Court in its 1969 decision in *Brandenburg v. Ohio*[78] generated much comment and no little surprise. Defendant, a leader of the Ku Klux Klan, had been convicted of "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[79] At a rally attended by a dozen Klansmen and some reporters, a cross was burned, and defendant delivered a speech with

74. *Id.* at 681-82.

75. *Id.* at 688.

76. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST, 107-08 (1980).

77. We are not unmindful of the fact that the United States is now engaged in a total war for national survival and that total war of the modern variety cannot be won by a doubtful, disunited nation in which any appreciable sector is disloyal . . . . Much of this type of warfare takes the form of insidious propaganda in the manner and tenor displayed by petitioner's three pamphlets . . . . But the mere fact that such ideas are enunciated by a citizen is not enough by itself to warrant a finding of criminal intent to violate § 3 of the Espionage Act. Unless there is sufficient evidence from which a jury could infer beyond a reasonable doubt that he intended to bring about the specific consequences prohibited by the Act, an American citizen has the right to discuss these matters either by temperate reasoning or by immoderate and vicious invective . . . .

322 U.S. at 689. The contrast to the reasoning of *Dennis* could hardly be more striking.

78. 395 U.S. 444 (1969).

79. *Id.* at 444-45. The language is from 1919 Ohio Laws 189.

derogatory references to blacks and Jews. The speech suggested that if government officials continued "to suppress the white Caucasian race, it's possible that there might have to be some revengeance taken."[80] In reversing the conviction, the Court stated that a review of its prior decisions established

> 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.[81]

The Court cited *Dennis*, and far from repudiating that holding, stated that it was completely consistent with the decision in *Brandenburg*. The *Dennis* decision, said the Court, had shown that the *Whitney* rule that mere advocacy was punishable, had been abandoned (and was now explicity overruled); the trial judge in *Brandenburg* had thus erroneously failed to instruct the jury to apply the *Dennis* test and weigh the likelihood and seriousness of the danger.[82]

But the attempt to reconcile *Brandenburg* with *Dennis* does not succeed, particularly when analysis centers on the key language set forth above. There was clearly no "imminence" required in *Dennis*; conversely there was no indication whatsoever in *Brandenburg* that the lack of proximity of the evil might be discounted by its gravity. While the principle announced by the Court has been called "astonishing" in light of prior authority,[83] it is one with which Holmes would be comfortable. By substituting the word "attempt" for "advocacy" in the latter half of the sentence quoted above, one simply restates hornbook law at the time of Holmes.[84] *Brandenburg* restores most of Holmes' original position that both specific intent and imminence with respect to a non-speech evil are required in order to punish speech.

Brandenburg and later cases adhering to its reasoning[85] indicate that Holmes' original position has been largely restored—speech may be punished only when it constitutes a common law attempt at a non-speech (substantive) evil. But the continued adherence of the *Brandenburg* Court to *Dennis* should indicate that one final and important step has not yet been taken. Although *Brandenburg* restored the requirements of specific intent and imminence of a non-speech evil, the Court

80. 395 U.S. at 446.

81. *Id.* at 447.

82. *Id.* at 448-49.

83. Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND, RESEARCH J. 645, 723 (1980).

84. Holmes, *supra* note 21, at 65-70.

85. *See, e.g.*, Hess v. Indiana, 414 U.S. 105 (1973) (reversing a conviction for disorderly conduct on the grounds that intent and likelihood of imminent danger were absent).

has not taken the logical step of holding that statutes must not, by their terms, call for punishment of speech itself (as does the Smith Act),[86] but rather may provide only for the punishment of an attempt at a non-speech evil, which might be carried out by speech (in the manner of the Espionage Act of 1917).[87]

It would seem clear that this conclusion follows from *Brandenburg*. Since that decision holds, in effect, that no statute can be enforced beyond the extent to which it prohibits an attempt at a non-speech crime, it serves absolutely no purpose to allow the statute to be framed more broadly. If such broadly drafted statutes serve any purpose at all, it is to chill protected speech.[88]

V. The Proposed Rule and Its Application

The history of "clear and present danger," in both its original and diluted forms, suggests the following restatement of the rule as it should be: the legislature may make no law which, by its terms, makes speech itself a crime. It may, however, criminalize an attempt to carry out a non-speech evil, and courts may convict for such an attempt even if it is carried out by speech, provided that the common law requirements of specific intent and imminence of the substantive evil are satisfied. Such a rule has been suggested in the past.[89] It would give legislatures and courts a clear and, in fact, absolute rule. Yet it is an absolute rule which is accompanied by a limiting principle which is far more workable than that advocated by Justice Black. In short, the view that the first amendment stands as an absolute bar to legislation di-

86. 18 U.S.C. § 2385 (1982); *see supra* text accompanying notes 68-70.

87. Ch. 30, 40 Stat. 217; *see supra* text accompanying notes 72-75.

88. To the extent that a statute goes beyond the point at which it may be enforced, it is constitutionally infirm as either "overbroad" or "vague." Dombrowski v. Pfister, 380 U.S. 479 (1965).

89. Linde, *Clear and Present Danger Reexamined: Dissonance in the Brandenburg Concerto*, 22 Stan. L. Rev. 1163 (1970). Linde states his proposed rule as follows: "The first amendment invalidates any law directed in terms against some communicative content of speech or of the press, irrespective of extrinsic circumstances either at the time of the enactment or at the time of enforcement, if the proscribed content is of a kind which falls under any circumstances within the meaning of the first amendment." *Id.* at 1183. The latter part of this formulation is a bit troubling; it leaves the door open for the designation of types of "content" which do not fall within the meaning of the first amendment "under any circumstances," which seems to beg the question. For example, under current law, obscenity does not fall within the protection of the first amendment. Putting aside the obvious question-begging nature of any law prohibiting "obscenity," Linde's formulation seems to permit such a prohibition. It is unclear why the proviso is put forth; the tenor of the article as a whole seems to support the simpler formulation proposed here. And Linde himself is critical of mere prohibitions of "obscenity." *Id.* at 1184. Perhaps he is merely being cautious, and perhaps his caution is justified (see *infra*, text accompanying notes 112-133, for the discussion of national security problems), but it still seems as if this is a loophole which could easily devour the rule.

rected at speech is not at war with the "clear and present danger" test as originally set down in *Schenck*. The two rules are complementary; permitting the government to achieve its legitimate objectives by satisfying the latter test, pursuant to a statute not directed at speech itself, is the only way to preserve the absolute prohibition on legislation that is directed at speech. Unfortunately, there has been little indication that courts are prepared to adopt this rule. It would require re-examination of current first amendment doctrine in a number of specific areas, and serious changes would be necessary in some of these.

A. *Obscenity*

Possibly the most drastic effect would be felt in the field of obscenity. By their very nature, obscenity statutes make speech itself a crime. In *Roth v. United States*[90] the Supreme Court rejected defendants' contention that literature could only be banned when it created a clear and present danger of antisocial conduct. For the first time the Court explicitly stated what had been assumed for many years, that obscenity was a form of speech not protected by the first amendment.[91] Justice Black naturally dissented, insisting with Justice Douglas that only speech having "some relation to action which could be penalized by government" could be punished.[92]

Although this basic premise of *Roth* has never been abandoned, the Court has failed to articulate a rationale which satisfactorily explains why obscenity is, independent of any non-speech activity, a proper concern of government.[93] This failure has been accompanied by over twenty-five years of confusion among courts, prosecutors, publishers, and the general public as the Supreme Court has attempted to create a workable rule governing obscenity cases which builds on the basic premise that there are types of speech which are, in and of themselves, properly classified as crimes.[94]

---

90. 354 U.S. 476 (1957).

91. *Id.* at 485. The Court noted that all states and the federal government had acted to prohibit obscenity. This history, said the Court, indicated that obscene speech was never intended to be protected by the first amendment. The dissenters denied the significance of this, pointing out that there was no reported court decision on obscenity in the United States until 1821, more than a generation after the drafting of the amendment. *Id.* at 514 (Douglas and Black, JJ., dissenting).

92. *Id.* at 509 (Douglas and Black, JJ., dissenting).

93. It is interesting to note that the first reported English "obscenity" case, though later interpreted to hold that obscenity itself was criminal, arose in a situation where the defendant had used obscene speech to cause a breach of the peace. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 657 (1978).

94. Significant redefinitions of the permissible scope of the obscenity prohibition came in Memoirs v. Massachusetts, 383 U.S. 413 (1966), and in Miller v. California, 413 U.S. 15 (1973). Five-to-four decisions in obscenity cases remain common even after three attempts at redefinition. *See, e.g.*, Marks v. United States, 430 U.S. 188 (1977). Justice Harlan commented on the diversity

But occasionally, a Supreme Court opinion which does not challenge the proposition that obscenity may be prohibited merely upon a showing that the material is obscene has suggested that the state's real concern is with the activity which might be induced by the material, rather than with obscenity itself. In *Paris Adult Theatre I v. Slaton*,[95] Chief Justice Burger, in upholding the right of a community to enjoin the exhibition of obscene motion pictures, relied upon the legitimate state interest in public safety to partially justify the Court's decision:

> The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime . . . . Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist.[96]

This language quite accurately identifies the type of concern which might justify punishment of obscenity—a demonstrated link with antisocial, non-speech behavior. Application of the proposed rule would make this connection explicit. Obscenity, in and of itself, could not be banned; no longer would judges be allowed to make evaluations of the content of literature or films (a process which appalled Justice Black).[97] Rather, the state would be required to define specific "antisocial behavior," criminalize it, and also criminalize attempts, incitements or solicitations of that behavior. The distribution or exhibition of pornographic material would then be examined to determine whether the intent of the defendant and the proximity of substantive harm satisfied the common law requirements for an attempt conviction. All of this would be achieved without the necessity of evaluating and classifying the material itself as worthy or unworthy of constitutional protection; the focus of the inquiry would be properly shifted to the actions of the defendant and away from the content of the message.[98] Black's

---

of views among justices on this issue in Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 707 (1968) (Harlan, J., concurring and dissenting). In short, Justice Stewart's famous "I know it when I see it" statement, Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), may most accurately sum up first amendment jurisprudence in the area of obscenity.

95. 413 U.S. 49 (1973).

96. *Id.* at 58, 60-61.

97. "I can imagine no more distasteful, useless and time-consuming task for the members of this Court than perusing this material to determine whether it has 'redeeming social value.' This absurd spectacle could be avoided if we would adhere to the literal command of the First Amendment . . . ." United States v. Thirty-Seven Photographs, 402 U.S. 363, 380 (1971) (Black, J., dissenting).

98. See the concurring opinion of Chief Justice Warren in *Roth*: "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture." 354 U.S. at 495.

absolutism would prevail, and yet the legitimate state concerns referred to by Burger in *Paris Adult Theatre* would still be addressed.

The Supreme Court has recently considered a statute which would satisfy the proposed rule in the area of obscenity. *New York v. Ferber*[99] presented a clear illustration of the effectiveness of such a statute in protecting legitimate government interests without infringing upon the individual's right to free speech.

To address the problem of child pornography, New York enacted Article 263 of its Penal Law.[100] Although one section of this article bans the knowing distribution of obscene material,[101] that provision was not before the Supreme Court. Defendant had been convicted of violating the following section: "[a] person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age."[102]

The statute does not require that the performance be obscene, merely that it include "sexual conduct"[103] by a child under sixteen. Courts need not evaluate the performance in order to classify it as obscene or as worthy of constitutional protection.[104] In short, the quoted section does not directly criminalize speech. The "substantive evil" addressed by the New York Legislature is the exploitation of children; there is no doubt that protection of children from dangerous work environments is a legitimate state concern.[105] New York has addressed a substantive, noncommunicative evil and has done so in a way which does not by its terms prohibit the transmission of any message.[106]

The Supreme Court upheld the statute despite defendant's argument that it could not constitutionally be applied to a performance

99. 102 S. Ct. 3348 (1982).

100. N.Y. PENAL LAW § 263.00-263.25 (McKinney Supp. 1981).

101. *Id.* § 263.10.

102. *Id.* § 263.15.

103. " 'Sexual conduct' means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." *Id.* at 263.00.

104. 102 S. Ct. at 3358. The obscenity of the material under the prevailing standard is irrelevant to a determination of whether a child has been misused.

105. As early as 1918, the Supreme Court noted with approval that "every state in the Union has a law . . . limiting the right to . . . employ children." Hammer v. Dagenhart, 247 U.S. 251, 275 (1918).

106. As the trial court in this case observed, if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative. Nor is there any question here of censoring a particular literary theme or portrayal of sexual activity.

102 S. Ct. at 3357 (footnote omitted).

which had not been found to be obscene.[107] The content of the performance was not at issue, simply the use of children in it. Unfortunately, the Supreme Court did not suggest that this approach was the only proper way to deal with the substantive evils linked to obscenity. Instead, the Court reaffirmed that obscenity is beyond constitutional protection; statutes such as the one used to convict Ferber may now coexist with typical statutes banning obscenity.[108]

But even though the Court has not insisted that the *Ferber* statutory approach is the only one permissible, its virtues should be obvious, and should commend it to legislators. This approach effectively addresses a problem of legitimate concern. It does so directly, without impairing any message which a speaker, writer, or filmmaker wishes to send, since it concerns itself only with the defendant's use of minors. And its prohibitions are crystal clear and easy to apply; liability will not turn on any *post hoc* evaluation of the merits of the speech. A properly defined absolutism, as Black would argue, has no place for statutes directed against "obscenity" *per se*. That does not mean that the substantive evils associated with obscenity cannot be prohibited. The proper way to do this is to define that substantive evil and directly prohibit it, along with solicitation, incitement, and other common law annexes to it.

B. *Breach of Peace*

Although the proposed rule would require a clear change in judicial attitudes in the area of obscenity, little reconsideration would be necessary in those cases where speech is sought to be suppressed on the basis of its threat to public order. Currently, statutes which are directly addressed to speech are permissible where the prohibited speech consists of "fighting words."[109] As in the field of obscenity, courts must

107. Ferber had been acquitted of two counts of promoting an obscene sexual performance, but the sale of films served as the basis for his conviction under section 263.15. *Id.* at 3352.

108. The two provisions address different interests; section 263.15 concerns the protection of children from harm, section 263.10 promotes the "interest" in prohibiting obscenity. *See id.* at 1134 (O'Connor, J., concurring). Yet to some of the Justices, it is still necessary to classify and evaluate the material in question even where the statute is aimed at protecting children. *See id.* at 1135 (Brennan, J., concurring). If the rule proposed in this article were adopted, that need would vanish, as would the concept of an independent state interest in prohibiting obscenity *per se*. Questions of whether a facially valid statute was being impermissibly applied would be framed around an inquiry into whether the particular case posed a danger to children. *See id.* at 1337-38 (Stevens, J., concurring).

109. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), applying 1926 Pub. Laws of N.H., ch. 378, § 2, which stated that "[n]o person shall address any offensive, derisive or annoying word to any other person . . . with intent to deride, offend or annoy him. . . ." While the statute can be seen to make the specific intent of the actor the central matter of concern, the Supreme Court turned its attention to whether the speech at issue fell within the category of

engage in the process of evaluation and categorization of speech.

Yet the Supreme Court has made it clear that these statutes, unlike those addressed to obscenity, may be constitutionally applied only where both specific intent and imminence of a nonverbal breach of the peace are present.[110] If the only instances in which these statutes may be enforced are those in which, in essence, a common law attempt at or incitement to a non-speech crime has been shown, there would seem to be no legitimate reason to permit such statutes to be drafted more broadly. Such broad drafting can only serve to chill legitimate expression.[111]

So while adoption of the proposed rule would require that a number of statutes in this area be redrawn, it would have little effect on the actual enforcement of this type of prohibition. Activity which is currently punishable will continue to be punishable; that which is currently protected will continue to be protected. Statutes, however, will more accurately signal what conduct they actually prohibit, and this can only be beneficial.

C. *National Security*

It is unsurprising that perceived threats to national security would present the most difficult test for the application of any first amendment theory. Here the fundamental personal right of expression may clash with the most basic interest of any state—its self-preservation. And to the extent that a state is sincerely concerned with protecting the rights of its citizens, the preservation of the state can itself be seen as the most important step toward the effective preservation of individual rights. While the negative consequences of under-protecting expression are equally serious whether the issue is obscenity, breach of the peace, or national security, the consequences of improvidently over-protecting expression are far greater in the latter situation. Any proposed first amendment test with "absolutist" overtones must prove itself capable of dealing with these dangers. Application of the test proposed here may be measured against the performance of prevailing first amendment doctrine in the two most significant recent cases in-

"fighting words," *i.e.*, those whose very utterance inflict harm and which are therefore not entitled to first amendment protection. The Court specifically rejected the argument that demonstrating the likelihood of a breach of the peace (*i.e.* imminence of a substantive harm) was required. 315 U.S. at 574.

110. This is clear after *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *see supra* text accompanying notes 78-88. Long before *Brandenburg*, the Supreme Court had handed down opinions that clearly indicated some retreat from *Chaplinsky*. *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1 (1949).

111. *See supra* note 88 and accompanying text.

volving national security issues and the first amendment: *New York Times v. United States*[112] (*Pentagon Papers*) and *United States v. Progressive, Inc.*[113]

In the *Pentagon Papers* case the government sought to enjoin publication of government documents relating to the Vietnam War which had been leaked to the New York Times and the Washington Post.[114] The government relied on no statutory authority,[115] but asked for a court-made rule which would allow the suppression of information posing a serious threat to national security. The Court apparently held[116] that, at least in the absence of a statute, no prior restraint is permissible unless the information "must inevitably, directly, and immediately" cause the occurrence of serious and irreparable damage to the nation.[117] Unlike all of the cases previously discussed, *Pentagon Papers* does not speak to the authority of a legislature to criminalize speech. Rather, it addresses the separate (although certainly related) question of the authority of a court to bar speech apart from any statutory authority. The proposed rule, framed to deal with the power of legislatures and of courts only insofar as they are evaluating legislation, would not affect the rule in *Pentagon Papers*. The question remains, however, of the validity of a Congressional authorization of a prior restraint based on considerations of national security.

In *United States v. Progressive, Inc.*, the government sought to restrain publication of information concerning nuclear weapons which the government contended would increase the risk of thermonuclear proliferation.[118] Unlike in *Pentagon Papers*, the government was able to rely on a statute, section 2274 of the Atomic Energy Act,[119] which authorizes an injunction against anyone disclosing restricted information "with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation."[120] The District Court granted the injunction, noting that the government, in

112. 403 U.S. 713 (1971) (per curiam).

113. 467 F. Supp. 990 (W.D. Wis. 1979), *motion for leave to file petition for writ of mandamus den. sub. nom.* Morland v. Sprecher, 443 U.S. 709 (1979) (per curiam), *appeal dismissed*, 610 F.2d 819 (1979).

114. 403 U.S. at 714.

115. *Id.* at 720 (Douglas, J., concurring).

116. The holding of the case is elusive, since the justices in the majority wrote no less than five separate opinions.

117. *Id.* at 726-27 (Brennan, J., concurring). Justices Black and Douglas would go further and hold that prior restraint is never permissible, *id.* at 715, (Black, J., concurring), but all other opinions allow for prior restraint in some instances.

118. 467 F. Supp. at 995.

119. 42 U.S.C. § 2274 (1976).

120. *Id.* § 2274(b).

addition to proving the conduct set forth in the statute, had also met the *Pentagon Papers* test by showing "grave, direct, immediate and irreparable harm to the United States."[121] The implication is clear that a statute authorizing prior restraint in national security cases will be enforceable only in cases in which the *Pentagon Papers* test is met. With its requirement that the harm be direct and immediate, the test incorporates the proximity element of the proposed rule. It does not, however, require specific intent to bring about such a result. The *mens rea* required in section 2274 ("reason to believe") is more easily demonstrated; it would seem almost certain that under a requirement of specific intent of the defendant to bring about the evil (nuclear proliferation), the Progressive could not have been enjoined.[122]

The proposed rule would call for a different approach than the one taken by Congress in section 2274. A statute addressed not directly to speech, but rather to the ultimate evil (*e.g.*, "assisting or attempting to assist any private party or foreign nation in the development of nuclear weapons") could be enforced, provided that the requirements of proximity (already present in the *Pentagon Papers* test) and specific intent were present. The specific intent requirement is of great significance; it would protect the activity of legitimate journalists while allowing punishment of those who actually seek to further nuclear proliferation.

The conflict between the right of free speech and considerations of national security was starkly evident in recent Congressional debates with respect to the disclosure of identities of agents of the Central Intelligence Agency. In 1982, Congress enacted the Intelligence Identities Protection Act.[123] This legislation was prompted by the activities of some Americans, including former intelligence agents, which involved disclosing names of agents involved in covert activities in foreign countries.[124] Following these disclosures, one agent was assassinated, another was the target of an unsuccessful assassination attempt, and others were expelled from the country in which they were stationed.[125] Congressional reaction took the form of proposals which would pro-

121. 467 F. Supp. at 994-95.

122. The purpose of the magazine in deciding to publish the article was to spark interest in controlling nuclear weapons by demonstrating the ease with which information about nuclear technology could be gathered and used. The magazine intented to "provide the people with needed information to make informed decisions on an urgent issue of public concern." *Id.* at 994.

123. 50 U.S.C.A. §§ 421-426 (Supp. 1983).

124. Former CIA agent Phillip Agee had revealed over 1,000 names of alleged CIA agents in two books: DIRTY WORK: THE CIA IN WESTERN EUROPE and DIRTY WORK 2: THE CIA IN AFRICA. Louis Wolf, editor of the Covert Action Information Bulletin, claimed that that journal had "revealed the name of over 2,000 CIA officers" in recent years. S. REP. No. 201, 97th Cong., 2d Sess. 7-8, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 151-52.

125. *Id.*

hibit the disclosure of the names of intelligence officers engaged in covert operations. The problems involved in framing such a statute within constitutional bounds are obvious; disclosure of the identity of covert intelligence agents could obviously be part of a legitimate journalistic effort with respect to current operations, a legitimate scholarly effort with respect to past operations, or even a legitimate effort by a private organization to learn if it or any of its employees have connections with the CIA.[126] At the same time, the government has an obvious and legitimate interest in protecting the safety of its employees.

The balance struck by Congress in the 1982 Act takes three separate approaches. The first two provisions limit themselves to preventing those with access to classified information from revealing that information or the identity of agents derived from that information.[127] These violations depend on a breach of trust more than they do on the mere publication of information, and so are relatively uncontroversial.[128] The third prohibition, however, is more general. It prohibits disclosure of "any information that identifies an individual as a covert agent" by anyone acting "in the course of a pattern of activities intended to identify and expose covert agents" and who acts "with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States. . . ."[129]

This prohibition is troublesome when considered under the proposed test. First of all, the prohibited activity is the disclosure of information itself, rather than the attempt to impede foreign intelligence operations. While active interference with such operations is a substantive evil which Congress presumably has a right to prohibit, it would seem that the distribution of information itself is at most an attempt at such interference, and under the proposed test, should not be punishable as a complete crime. A statute prohibiting an attempt to interfere with undercover intelligence operations would differ from the current statute in two ways: first, it would require specific intent to interfere, rather than "reason to believe" that such interference would follow,[130] and second, the imminence of actual harm to such operations would

126. Congress was aware of the need to protect such legitimate activity. *See* S. REP. NO. 201, *supra* note 124, at 21.

127. 50 U.S.C. § 421(a) & (b).

128. The greater the degree of such access [to classified information], the greater is the duty of trust assumed by the defendant and the greater the penalty for breach of such duty." S. REP. NO. 201, *supra* note 124, at 18. It is clear that the government may impose a fiduciary duty not to disclose confidential information upon its employees. *See* Snepp v. United States, 444 U.S. 507 (1980).

129. 50 U.S.C. § 421(c).

130. Interestingly, the version of the Act initially approved by the House Permanent Select Committee on Intelligence would punish only one who disclosed with intent to impede intelli-

have to be shown. It seems clear that the legitimate disclosure of information by journalists and others would be better protected under the proposed test.[131] At the same time, the activities of those whose disclosures prompted Congress to enact the Intelligence Identities Protection Act would seem to be clearly punishable under the new test. Those disclosures were for the avowed purpose of disrupting intelligence operations, at least in some instances.[132]

Still, it remains true that the proposed test is most troubling when applied to speech that threatens national security, in light of the serious consequences which may flow from the dissemination of information with respect to military matters, matters of nuclear proliferation, and matters relating to foreign intelligence operations. Yet at the same time, it is clear that the government interest in subsequently punishing the person who discloses such information is of far less importance than the right of the government to enjoin the disclosure. The proposed test speaks only of the power of the legislature to impose criminal sanctions, by its nature a question which would arise only subsequent to the disclosure in question. When the issue before the court is prior restraint rather than punishment, the *Pentagon Papers* test might well continue to be applied as it is now. To some extent this would make the standard for imposing prior restraint less stringent than that for imposing subsequent punishment, since in the case of prior restraint, no specific intent beyond dissemination of the information would be necessary. While it would be quite novel to conceive of prior restraint as in any way being easier to obtain than subsequent punishment, adoption of the proposed rule would in no way make prior restraint easier to obtain; it merely makes subsequent punishment more difficult to justify. And when compared to the great controversy surrounding the decisions of the Supreme Court with respect to subsequent punishment, the rules created by the Court with respect to prior restraint have worked remarkably well. As history has shown, the instances in which prior restraint may be justified under the present test

---

gence activities. The Senate amended this to require only "reason to believe." S. REP. No. 201, *supra* note 124, at 3.

131. None of the examples cited as legitimate types of disclosures by the Judiciary Committee (*see supra* note 126 and accompanying text) could satisfy the test of specific intent. It is entirely possible, however, that in such cases the disclosing party could have "reason to know" that the disclosure could impede intelligence operations. The Judiciary Committee noted, however, that since the disclosing party would not be acting in the course of a pattern of activity intended to identify and expose covert agents, conviction in such cases would not be possible. S. REP. No. 201, *supra* note 124, at 21.

132. The authors most prominent in the minds of Congress, Phillip Agee and Louis Wolf, were both engaged in activity quite explicitly designed to impair undercover intelligence operations. *Id.* at 7-8.

are so rare as to be almost non-existent.[133] The fact that the proposed rule would deal only with the far more common and troublesome area of subsequent punishment should be no reason to reject it.

D. *Symbolic Speech*

In light of the fact that Justice Black's absolutism and speech/conduct distinction proved least satisfactory (at least to civil libertarians) in cases involving symbolic speech, a brief look at the application of the proposed rule in such cases is appropriate. It has long been recognized that first amendment protection should sometimes be extended to actions used to express ideas which, if expressed verbally, would be entitled to such protection.[134] In the last twenty years, first amendment analysis has been applied to the destruction of draft cards,[135] the wearing of armbands or other symbols,[136] and the desecration of the United States flag.[137]

This type of case involves prohibition of conduct which is not inherently and necessarily communication of a message (unless the message is defined, as for instance, "I am burning my draft card," or "I am wearing an armband;" such nonverbal "messages" which merely describe the conduct itself cannot be considered, without more, to be communication entitled to first amendment protection under the proposed test). Yet the conduct in this type of case can be used as the medium of communication. If the conduct is properly viewed as no more than speech in a different medium, then such activity should have absolute protection under the proposed test. In other words, such "speech" may not be the direct object of a statutory prohibition.[138] At the same time, if such activity satisfies the common law test for being considered an attempt at a non-speech crime, the conduct may be punished under a statute prohibiting such an attempt. Whether the conduct in question can properly be viewed as speech should not be judged by a mechanical test of whether the activity involves words as opposed

133. The *United States v. Progressive, Inc.* case was "the first instance of prior restraint against a publication in this fashion in the history of this country." 467 F. Supp. at 996.

134. *See* Stromberg v. California, 283 U.S. 359 (1931).

135. United States v. O'Brien, 391 U.S. 367 (1968).

136. Tinker v. Des Moines School District, 393 U.S. 503 (1969).

137. Smith v. Goguen, 415 U.S. 566 (1974); Spence v. Washington, 418 U.S. 405 (1974).

138. Most of the cases cited in footnotes 134-137 dealt with statutes prohibiting the allegedly symbolic act itself rather than as an attempt at some further result. *See* Stromberg v. California, 283 U.S. 359, 361 (1931) (display of a red flag); United States v. O'Brien, 391 U.S. 367, 370 (1968) (destruction of a draft card); Smith v. Goguen, 415 U.S. 566, 568-69 (1974) (flag desecration). Tinker v. Des Moines School District, 393 U.S. 503 (1969) dealt with a school district regulation rather than a statute, but that regulation was also aimed directly at the allegedly symbolic conduct, *i.e.*, wearing black armbands. *Id.* at 504.

to solely nonverbal activity. The proper question is whether the state has a legitimate interest in prohibiting the activity, stripped of all communicative content. In other words, whether the activity, aside from any message conveyed, is a "substantive evil" which the legislature has the right to prevent. If it is, then a statutory prohibition of the attempted conduct is valid. If it is not, then the symbolic speech must be given the same protection from direct statutory prohibition as "pure speech."

This approach is largely consistent with the approach traditionally used by the Supreme Court in deciding cases involving symbolic speech. Where the court has found that the act itself is a substantive evil (such as the destruction of draft cards and its disruptive effect on the selective service system), convictions under a statute directly prohibiting the act have been upheld.[139] Where such a finding has been absent, however, the defendant has prevailed.[140] This type of inquiry should lead to the invalidation of a number of statutes prohibiting conduct such as the wearing of armbands in a public school or the desecration of the flag. When the legislature prohibits the wearing of armbands by students, it is clear that the armbands themselves are not the problem. The state is concerned with one of two things. Either the state seeks to bar the message conveyed by the armbands, or it desires to avoid the disruption of classes and school routine. The first of these concerns is illegitimate under the first amendment; the second can be addressed directly by prohibiting the noncommunicative evil (disruption or attempted disruption) itself, without going so far as to label one possible way of attempting disruption as itself a separate and complete offense. Precisely the same analysis can be applied to cases involving flag desecration; precisely the same conclusions can be drawn. Desecrating a flag may be an attempt to incite violence, or it may occur without any intent or likelihood that any such reaction will follow.

It would seem that the proposed test is quite effective in resolving disputes involving symbolic speech. Application of the test would resolve such disputes without either the need for evaluating the communication involved or of classifying nonverbal activity as "conduct" not entitled to first amendment protection. And finally, applying the test would not require a radical departure from the holdings of past Supreme Court decisions; rather, a coherent theory would be provided to justify the approach which seems implicit in those decisions regard-

139. United States v. O'Brien, 391 U.S. 367, 376-82 (1968).

140. *E.g.*, Tinker v. Des Moines School District, 393 U.S. 503, 509 (1969); Spence v. Washington, 418 U.S. 404, 409-15 (1974).

ing the proper manner in which to review legislative attempts to interfere with symbolic speech.

VI. CONCLUSION

As all theorists, including Justice Black, have realized, no defensible first amendment tests, not even an "absolute" one, can protect all utterances from punishment. The challenge facing the courts is to create a standard which will reconcile the clear and concise mandate of the first amendment with the need to allow government to protect its citizens from harm. The formula for doing this exists in the opinions of the Supreme Court; articulating that formula requires, however, the synthesis of two concepts usually thought of as at war with each other. From absolutism we learn that legislatures may not punish speech itself. Any statute which attempts to do so should be ruled invalid. From the original "clear and present danger" test we learn that legislatures may punish evils which are in themselves noncommunicative, from murder to littering. They may also punish, under strict common law standards, those who attempt, aid or incite those evils, even though the attempt is made or the aid is given verbally. In *Brandenburg*, the Supreme Court has demonstrated that only where the common law attempt elements of specific intent and imminence of a further (substantive) evil exist can a statute prohibiting speech be validly applied. This being so, to allow statutes to be drafted in terms which do not include these restrictions serves no legitimate purpose. The only workable form of absolutism is one which absolutely forbids the legislature from drafting statutes directly prohibiting speech. The most effective limiting principle is the *Schenck* "clear and present danger" test allowing punishment of speech as a common law attempt to accomplish a substantive evil.

The most likely criticism of the proposed rule by civil libertarians would be that the key questions of proximity and intent would be left to the jury as questions of fact. Some commentators have shown little faith in the ability of juries, particularly in time of war or national emergency, to remain dispassionate in their analysis of unpopular speech.[141] While this may be true, it does not require rejection of the rule. This criticism ignores the power of a trial court to direct a verdict for defendant and the ability of an appellate court to overturn jury verdicts not justified by the evidence. While it might be said that appellate judges are unlikely to reverse convictions in times of national emer-

141. *See, e.g.*, Freund, *The Debs Case and Freedom of Speech*, THE NEW REPUBLIC, May 3, 1919 at 13, reprinted in 40 U. CHI. L. REV. 239 (1973).

gency, during World War II the Supreme Court, using Holmes' original framework for analysis, did overturn such a conviction in *Hartzell v. United States*.[142] There certainly is nothing in the proposed rule which gives judges any less flexibility than they have had under alternative formulas (such as determining whether an evil was "substantial"). Leaving important matters in criminal prosecutions to a jury, subject to appellate review, is certainly not inconsistent with the way in which the law deals with most, if not all, criminal defendants. Such consistency clearly commended itself to Justice Holmes.[143]

Of course, the proposed test might be criticized in a quite different way. There has been great reluctance to declare that speech as an end in itself cannot be punished, even where the speech is, for example, obscene. To answer this criticism, it is necessary to leave the thought of Justice Holmes and to draw on that of Justice Black. The first amendment is a clear statement that government may not prohibit speech itself. It may be that this was not a wise decision, and that in an ideal society, some types of speech should be prohibited simply because of what they express. But the decision to protect speech from such prohibition was made by the framers of the first amendment, and that decision should be respected.

142. 322 U.S. 680 (1944). *See supra* notes 72-75 and accompanying text.

143. "Freund's objection to a jury 'guessing at motive, tendency and possible effect' is an objection to pretty much the whole body of the law, which for thirty years I have made my brethren smile by insisting to be everywhere a matter degree." Letter from Oliver Wendell Holmes to Harold Laski, *reprinted in* 1 HOLMES-LASKI LETTERS 152-53 (M. Howe ed. abr. 1963).