2011

Remarks of William Van Alstyne on the Brandenburg Panel

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The question that members of this panel were asked to address is whether the *Brandenburg* First Amendment test should be appropriately modified or qualified in a "post-9/11" world. The latter reference, of course, is to those organized acts of terrorism that brought down the twin Trade Towers, blasted a section of the Pentagon, and took more lives than any previous similar event in American history. And the reference to "the *Brandenburg* test," in turn, is to the case of *Brandenburg v. Ohio* in which, in a per curiam decision, the Supreme Court declared:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[1]

The rigor of the *Brandenburg* test is made more apparent, moreover, if one inserts a bracketed word within this quotable sentence. The word to be inserted is this: "even." So supplied, the crucial sentence thus provides effectively that:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy [*even*] of the use of force or of law violation except where [the following two elements are present, namely that (a) the] advocacy is *directed* to inciting or producing imminent lawless action and [(b)] is likely to incite or produce such action.[2]

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* These Remarks are based on the author's participation in the 2011 Criminal Law Symposium: *Criminal Law and the First Amendment*, held at Texas Tech University School of Law on April 8, 2011.

1. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam). Implicit references here are, of course, to the First Amendment (applicable to the national government) and to the Fourteenth Amendment (applicable to the states and, under the liberty/due process clause, regarded by the Court as incorporating the provisions of the First Amendment to limit the states on the same terms as the First Amendment directly limits the national government). *See* Gitlow v. New York, 268 U.S. 652, 666 (1925). Thus, a heightened scienter requirement of *specific intent*—mere awareness that one's rhetoric may in fact supply the catalyst for lawless action—is insufficient for purposes of speech criminalization, according to *Brandenburg*. *See Brandenburg*, 395 U.S. at 447-48. What must also be proved, rather, is that the defendant acted (i.e., spoke) *in order to incite* the lawless action as such and not merely whether, under the circumstances, it was likely that, moved by the speaker's impassioned remarks, one or more of those hearing them may indeed be so moved as at once to be inclined to take some unlawful action or, indeed, that such lawless action ensued. *See id.* at 448-49.

2. *See Brandenburg*, 395 U.S. at 447 (emphasis added).

Thus, under *Brandenburg*, one dissatisfied with some feature of the legal status quo may inveigh against it—even in intemperate, strident, and ostensibly highly reckless ways, and not merely likely to, but foreseeably *actually producing* lawless action in point of fact—and nonetheless be shielded by the First Amendment.[3] And, combined with the Court's earlier holding that unless the lawless action is of a major, rather than of a minor, sort, even the direct incitement of particular lawless action may be protected, just as Justices Brandeis and Holmes had maintained in their compelling First Amendment opinions in the 1920s.[4]

The *Brandenburg* test thus became the central First Amendment test in respect to political advocacy and criminal law, federal and state, more than a half-century ago. It arrived almost exactly a half-century after the Supreme Court's first utterances on this fraught subject.[5] And to be sure, more than a half-century later, it remains the current central First Amendment test in respect to political advocacy and criminal law, federal and state.

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3. *See also, e.g.*, Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam). In *Hess*, the Court applied *Brandenburg* to Hess's disorderly conduct conviction for declaiming "[w]e'll take the [flicking] street again," and the conviction was reversed on grounds that the evidence was insufficient to prove a specific intent to incite "imminent" lawless action, as distinct from some uncertain subsequent time. *Id.* at 107 (6-3 decision) (Burger, C.J., Rehnquist, J., & Blackmun, J., dissenting).

4. *See, e.g.*, Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring), *overruled in part by Brandenburg*, 395 U.S. 444. Justice Brandeis explained:

> [E]ven imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. . . . Thus, a state might . . . make any trespass upon the land of another a crime . . . . But it is hardly conceivable that this court would hold constitutional a statute which punished . . . the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross uninclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass.

Id. at 377-78. The dictum bore fruit in *Bridges v. California*, 314 U.S. 252, 263 (1941) (Black, J.) (majority opinion) ("[T]he *substantive evil must be extremely serious* and the degree of imminence extremely high before utterances can be punished." (emphasis added)).

5. Virtually the first Supreme Court opinion squarely addressing the First Amendment (and, even then, technically addressing it as applied to the states via the Fourteenth Amendment, rather than to any federal source of restriction) is *Patterson v. Colorado*, 205 U.S. 454 (1907). At that time, the Court regarded the First Amendment as imposing restrictions almost exclusively in the form of some "prior restraint" (for example, press licensing laws and, perhaps, injunctions as well). *Id.* at 461-62. Thus, in sustaining a Colorado statute and a state court judgment imposing heavy fines upon a local publisher pursuant to the law of "criminal contempt" as a substantive offense, Justice Holmes, after first observing that it was an open question as to whether "there *is* to be found in the 14th Amendment a prohibition similar to that in the 1st[,]" then went on to observe that, in any case: "[T]he main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practised by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." *Id.* at 462 (emphasis in first quotation added) (quoting in second quotation Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 313 (1825)). The uneven trail—from *Patterson* to *Brandenburg*—is traced out in WILLIAM VAN ALSTYNE, THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY: CASES AND MATERIALS 7-138 (4th ed., Foundation Press 2010).

Do the events of 9/11 suggest that *Brandenburg* ought now to be abandoned? That in an age of "terrorism," it is simply unreasonable? If so, what then ought to replace it?

We have had a long, antecedent history in considering that question. Prior to *Brandenburg*, softer tests abounded. In addition to Holmes's "early" identification of "the bad tendency" tests,[6] there was the original, "softer" version of the "clear-and-present danger" test,[7] the "original Learned Hand" test,[8] and the subsequent "later-in-time Learned Hand" test, as adopted and as applied by the Supreme Court prior to *Brandenburg* in *Dennis v. United States*.[9] *Brandenburg* is "stronger" than any of these and, short of the "absolute" views associated with Justice Black, the *Brandenburg* standard is the strongest version of the First (and Fourteenth) Amendment "we" have had.

It has now endured for somewhat more than a half-century, and I frankly feel professionally reassured that this is so. Although it is not the only test the Court employs in mediating *other* kinds of collisions between "the freedom of speech" or "the freedom of the press," with various legitimate public concerns[10]

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6. *See supra* note 5 and accompanying text (elaborating Holmes's opinion in *Patterson v. Colorado*, 205 U.S. at 462, in which he suggested that as long as prior restraints were not involved, neither the First nor the Fourteenth Amendment would "prevent the . . . punishment of [publications] as may be deemed contrary to the public welfare"). Holmes's position in this respect and at this time was little different from his position, in dissent, in *Lochner v. New York*. *See* Lochner v. New York, 198 U.S. 45, 75 (1908) (Holmes, J., dissenting).

7. First appearing in *Schenck v. United States*, the Court construed the First Amendment to confine Congress to the punishment of utterances or publications creating "a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent," without further distinguishing among the types of "evils" thus involved (i.e., whether major or minor), as Justices Holmes and Brandeis subsequently brought to bear in *Whitney v. California*, and as ultimately integrated in *Bridges v. California* and in *Brandenburg* itself. Schenck v. United States, 249 U.S. 47, 52 (1919); *see Whitney*, 274 U.S. at 372-80 (Brandeis, J., concurring); *Bridges*, 314 U.S. at 262-63; *Brandenburg*, 375 U.S. at 447; *see also supra* note 4 and accompanying text (discussing *Whitney* and *Bridges*).

8. Masses Publ'g Co. v. Patten, 244 F. 535, 542-43 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917). In *Masses Publishing Co.*, in granting an injunction against the postmaster of New York City for refusing to accept copies of *The Masses* for delivery via the U.S. mail, Judge Hand formulated the "test" in terms of whether the rejected material directly counseled ignoring the law, as distinct from merely inveighing against it (albeit in hyperbolic prose), and concluding that a law may validly forbid the former, but not the latter, per se. *See id.*

9. *See* Dennis v. United States, 341 U.S. 494, 510 (1951). The "test" as now rephrased by Judge Hand and as quoted and applied in the Supreme Court, sustaining the conviction of Eugene Dennis under pertinent provisions of the Smith Act, is this: "'In 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.' We adopt this statement of the rule." *Id.* (alteration in original) (citation omitted) (quoting Dennis v. United States, 183 F.2d 201, 212 (2d Cir. 1950)).

10. For example, in respect to civil libel actions, a maligned individual may not recover damages unless, as a public official or public figure, the individual is able to overcome the First Amendment barriers as set out in *New York Times v. Sullivan*, 376 U.S. 254 (1964), albeit a nonpublic figure may at least recover provable compensatory (if not punitive) damages upon a significantly easier basis still. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-50 (1974). And likewise, where the law at issue is not one that criminalizes what was said or published, but simply regulates the time, place, or manner of its presentation, here as well, the *Brandenburg* test may not apply. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). Rather, regulations of this more limited sort are generally reviewed by the "four-part" test as first specifically described in *Ward v. Rock Against*

inside the field of its central application, I frankly have seen nothing, including the terrorism acts of 9/11 and its aftermath, that should cause one to regard it as less appropriate for our time than the very troubled time it finally came of age.

Rather than take this occasion to argue that it is obsolete in some measure and therefore frankly needs now to be reconsidered (and replaced by something else), I mean, rather, to *celebrate its emergence in the twentieth century*, and to share with you the hope that it will endure in the twenty-first as well. And I do maintain with you that its emergence (and now standard application in our shared years together) has provided this fractious nation of ours with the single strongest "first amendment" in the world today.

Racism, 491 U.S. 781, 790-803 (1989). But to extend this footnote further, even as one might easily presume to do, risks diverting us from the central importance of *Brandenburg* itself, as it remains of that same importance today. And this, I respectfully decline to do.