Further Steps Toward a General Theory of Freedom of Expression

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FURTHER STEPS TOWARD A GENERAL THEORY OF FREEDOM OF EXPRESSION

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The fundamental problem in the specification and justification of our right of free expression is the determination of the proper extent of that right. What is the point beyond which the individual may not go without his acts of expression becoming susceptible to societal or governmental restriction? Is it possible to specify any class of human activities that should be protected absolutely from the regulation of societal authority, or should society merely recognize free expression as desirable activity that ceteris paribus ought to be permitted but always is liable to suppression when and if it conflicts with other legitimate personal and social interests?

Professor Thomas Emerson’s TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT1 presents the most stimulating and influential recent attempt to answer these questions. In this duly famous essay and in his subsequent elaboration and application of his theory in THE SYSTEM OF FREEDOM OF EXPRESSION,2 Emerson presents a theoretical defense of our system of freedom of expression and a critique of past attempts to specify the proper limits on free expression. Most importantly, Emerson proposes a theory according to which “expressions” are distinguished from “actions” and “full protection” is to be afforded to all “expressions.”

The first section of this Article critically examines Emerson’s proposed “expression”—“action” dichotomy and the theory it supports. After presenting an interpretation of his views, I argue, in the second and third sections, that Emerson’s proposal is substantially equivalent to the most plausible interpretation of the traditional “clear and present danger” test, which the United States Supreme Court at times has applied in first amendment cases. The fourth section is a discussion of the reasons Emerson proffers in criticism of the clear and present danger test and an examination of the extent to which these arguments are telling against that formula

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and consequently damaging to his own theory. It is argued there that most of his arguments are not destructive of a sympathetic interpretation of the Holmes-Brandeis formula, and that even when defective, the traditional test can be salvaged by an improved specification of the "dangers" against which the government rightfully may protect by suppression of expression. The final section briefly suggests how this reconstructed theory might be developed. It is argued that the concept of a protected right and the reasons for establishing that right confine the permissible "dangers" that can be used as excuses for a limitation of that right to the equally protected rights of others or to the enhancement of the total system of rights of the society. No merely disutilitarian harm can serve in this view as the basis of governmental restriction.

This critique proceeds from the assumption that first amendment rights of freedom of speech and freedom of the press are the legal codifications of our underlying moral right of free expression, which is to say that all people living in a society roughly comparable to our own ought to have these rights whether or not their legal system actually establishes or protects them. Thus, a critical examination of the rules for interpretation and application of the first amendment requires making normative proposals as to how these constitutional rights ideally ought to be recognized. It need not be claimed that a suggested rule was consciously intended by the framers of the Constitution, nor need it be asserted that the reasons offered in its support are the ones the drafters utilized or necessarily would have accepted if they were presented with them. 3

3. If, for example, a previously unknown letter from Madison to Hamilton should be discovered expressing his contention that the first amendment would not cover fictional works but only explicitly political treatises, it would not affect the conclusion that the first amendment, in most cases, protects all literary and political expression. Nor does my methodology blindly disregard obvious historical truths, for in this area there are none. Despite exhaustive research, the authorities have failed to assert, with any confidence, the founding fathers' theoretical reasoning on these questions. No one can say for certain what the Framers had in mind, for although the evidence all points in one direction there is not enough of it to justify cocksure conclusions. It is not even certain that the Framers themselves knew what they had in mind; that is, at the time of the drafting and ratification of the First Amendment, few among them if any at all clearly understood what they meant by the free speech-and-press clause, and it is perhaps doubtful that those few agreed except in a generalized way and equally doubtful that they represented a consensus.


Even Zechariah Chafee, Jr., who sometimes is cited in support of the contrary position, writes in his review of Meiklejohn's Free Speech and Its Relationship to Self-Government
less, I do maintain that the interpretation proposed by this Article accurately captures the manner in which the first amendment, as law, actually functions within our system of freedom of expression, the complexities of which Professor Emerson so effectively has described. It further is maintained that most of the justifications presented by Emerson and other modern commentators in defense of their interpretations of the first amendment would support equally the interpretation proposed here because the reasons given in these classic arguments for their readings of the first amendment effectively function as moral reasons for having these rights as well as provide purely legal arguments as grounds for constitutional interpretation. Thus, although the arguments presented here will be primarily philosophical and moral, they will serve equally within most modern legal theories of constitutional interpretation.

I. THE EXPRESSION-ACTION DISTINCTION

Emerson attempts to reconcile the rights of the individual with the rights of others not by weighing the value or strength of the one against the others but by carefully delimiting a class of individual or group activities that are to be given absolute, or, in his terms, “full protection.” Emerson designates this realm of conduct “expression”; if an utterance or writing is purely or primarily “expression” it falls within the protected class and the government may not suppress it for any reason. Other conduct constitutes “action” and is amenable to governmental regulation.

This dichotomy and the theory of freedom of speech based on it is deceptively simple, for not all that intuitively would be regarded as expressions are “expressions” in Emerson’s sense, nor are all of his “expressions” ordinarily classified as such. Emerson clearly does not wish to confine or extend “expression” to all verbal conduct, (1948): “The truth is, I think, that the Framers had no very clear idea as to what they meant by ‘the freedom of speech or of the press.’” Chafee, Book Review, 62 Harv. L. Rev. 891, 898 (1949). See also Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971).

4. I follow Emerson in using the term “conduct” to cover all activity, verbal and non-verbal. Thus, the term covers both “expression” and “action” though, as noted in the text, this is not the same distinction as verbal—non-verbal nor is it the same as the “speech”—“conduct,” “speech”—“Speech-plus” or “speech”—“non-speech” distinctions often used by the Court. See System, supra note 2, at 295.

In opposition to the idea of making a coherent separation between speech and conduct see Scanlon, A Theory of Freedom of Expression, 1 Phil. & Public Affairs 204, 207-08 (1972); A. Bickel, Domesticated Civil Disobedience: The First Amendment From Sullivan to the Pentagon Papers, in The Morality of Consent 55, 63-64, 74 (1975).
speech, or publications. "Expression" for him includes, in addition to ordinary utterances or publications, "singing, dramatic performances, the shouting of slogans, . . . the holding of a meeting, marching, carrying signs, gestures, display of symbols, door-to-door canvassing," most picketing, joining a political association, burning a draft card or flag, and holding a religious or political belief. Emerson correctly observes that a viable system of free expression must use these means, and many others as well, to serve its vital function effectively. On the other hand, some verbal and written communications are not classified as expressions: directions or orders for acts of violence, disruptive noise-making in a meeting, publicly uttered obscenities, military information conveyed to a wartime enemy, wartime propaganda broadcasting for an enemy, certain attacks upon a person's honor, dignity, or standing in the community, prejudicial pretrial publicity, or undesired publicity about private individuals. Emerson clearly does not wish to afford these and similar types of communication absolute protection from legal regulation.

If a simplistic distinction between activities that are to be protected and those that are not cannot be made on the basis of their ordinary-language categorization (by contrasting, for example, verbal utterances with physical activities), how is the fundamental expression-action classification to be made? Although his entire theory is formulated in terms of this distinction and although he claims that the great virtue of his theory, as opposed to its more traditional rivals, is its greater clarity and precision, Emerson devotes surprisingly little discussion to the abstract categorization of the two concepts. Therefore his sketchy theoretical remarks must be

5. System, supra note 2, at 293.
6. Id. at 445.
7. Id. at 173.
8. Id. at 84.
9. Id. at 88.
10. Theory, supra note 1, at 64.
11. Id. at 82.
12. System, supra note 2, at 293.
13. Id. at 18.
14. Id. at 58.
15. Id. at 61.
16. Theory, supra note 1, at 68.
17. Id. at 72. This is retracted, however, in System, supra note 2, at 462-63, in which such publicity is reclassified as "expression."
18. Theory, supra note 1, at 75.
interpreted and his actual use of the distinction observed to provide usable general criteria. Two major tests emerge. The first distinguishes expression from action by relying upon the more or less ordinary meaning of the term "expression." "The theory rests upon a fundamental distinction between belief, opinion, and communication of ideas on the one hand, and different forms of conduct on the other. For shorthand purposes we refer to this distinction hereafter as one between 'expression' and 'action.'" Thus, the essential element in an "expression" emerges as the manifestation, representation, or conveyance of beliefs, ideas, feelings, or attitudes by means of words or some other medium. "Actions" apparently lack this communicative force. Writing a political editorial or presenting a campaign speech are obviously classifiable as "expressions," whereas robbing a liquor store or murdering an uncle to inherit his estate are "actions," for the former clearly are performed to promulgate ideas and the latter are not.

But this test alone will not suffice for Emerson's purposes. Incitements to violent crime, acts of espionage, utterances of obscenities, and uses of "symbolic speech," such as wearing a black armband, tempt authorities to abridge freedom of speech or freedom of the press. In these cases the questionable conduct admittedly has some communicative or expressive purpose but also has intrinsic or consequential elements regarded by society as harmful or otherwise undesirable that do not serve to communicate or express ideas. Emerson readily grants this and he urges an examination of these cases to determine "whether expression or action is the dominant element." But no general guidelines are given for determining whether the expression function or active function (any function that is not expressive) is dominant. In examining test cases, however, Emerson tends to use the agent's intention as a decisive criterion. Thus, for example, burning an American flag is classified as "expression" when the facts support the claim that it was intended as a protest gesture. Likewise, the agent's intention is cited as the

19. Id. at 6. The identical words also appear in System, supra note 2, at 8. See also id. at 81, in which Emerson argues that to receive full protection "conduct must of course be intended as a communication and capable of being understood by others as such."

20. This is basically the first entry for "expression" in Webster's Third International Dictionary, somewhat augmented to capture the full scope of ordinary usage. Scanlon similarly defines "act of expression" as "any act that is intended by its agent to communicate to one or more persons some proposition or attitude." Scanlon, supra note 4, at 204. See also Henkin, On Drawing Lines, 82 Harv. L. Rev. 63, 80 (1968).


determining factor for urging protection for burning a draft card or for most cases of non-labor picketing.

Emerson cannot use this criterion consistently, however, for there are many activities the primary and dominant purpose of which, as intended by the agent, is the expression of an idea or attitude, but which Emerson nevertheless feels ought to be prohibited even in a system of freedom of expression. He explicitly consigns these activities to the regulable realm of "action." During the Vietnam War university buildings were bombed and banks were burned to protest the government's policies; police officers, viewed as symbols of a repressive social order, were shot; courts and schools were shut down forcibly by "sit-ins" protesting militarism, racism, and capitalism; and speakers were silenced by disruptive crowds angered by the content of the promised speech. The primacy of the agent's intention to communicate therefore cannot serve as the test for conduct to be protected by the right of free expression. That is to say, this test alone cannot be used as a sufficient condition for such protection. It can serve, however, as a necessary condition, according to which no conduct can claim protection of the system of freedom of expression unless it manifests to a significant degree the essential qualities of expression in this sense. Burning one's house for the insurance money obviously is not entitled to the protection of the first amendment, but burning one's draft card at an anti-war rally is at least a prima facie candidate for such immunity.

What more is needed for a sufficient condition? Emerson's second explanation of the "expression"-"action" distinction provides an answer. In Toward a General Theory of the First Amendment, Emerson once again says that his fundamental classification is to be "guided by consideration of whether the conduct partakes of the essential qualities of expression or action." Here, however, he says that "in the main this is a question of whether the harm attributable to the conduct is immediate and instantaneous, and whether it is irremediable except by punishing and thereby preventing the conduct." Subsequently, he notes that certain speech-acts that directly harm individuals such as libel, "fighting words," or obscenity that confronts an unwilling listener are "actions" because the harm they cause "to the individual interest is more likely to be

24. Id. at 445-48.
25. Theory, supra note 1, at 61 (emphasis supplied).
direct and *immediate* in its impact, and *irremediable* by [recourse] to regulation of the subsequent conduct stimulated by the expres-

sion.”

In a slanderous attack upon someone’s reputation, the speech is “action” because the harm is “*direct* and *instantaneous* and *not remediable* by longer-range social processes which can pre-

vent the injury... [T]he injury is *immediate.*” Similarly, prejudicial pretrial publicity is “action” because its harm is “*immediate* and *irremediable,*” and forcing an obscene communi-

cation upon an unwilling recipient is proscribable because the harmful shock that such an action may produce is “*direct, immediate* and *not controllable* by regulating subsequent action.”

In his discussion of sedition laws such as the Smith Act, Emerson urges that advocacy of the use of force and violence “at some time in the future is fully protected ‘expression.’ As the communication approached the point of urging *immediate* and particular acts of violence it would come closer to being classifiable as action.” He deems group libel laws invalid, for the conduct prohibited by such laws is to be classed as “expression.” “Indeed the relation between the proscribed communication and any possible ensuing action is more *uncertain* and *remote* here than in any other field of First Amendment law, with the possible exception of obscenity.” Finally, in his discussion of alleged solicitations to crime, as in the imputed advocacy of adultery, draft-resistance, or even riot, Emerson makes the distinction in the following manner: “The issue should be resolved in terms of the usual rules for determining what is expression and what is action. Under these doctrines solicitation can constitutionally be punished only when the communication is *so close, direct, effective,* and *instantaneous* in its impact that it is part of the action.”

In summarizing these general and particular statements, three criteria for classifying an utterance or publication as “expression” can be abstracted. Either (1) the harm that is feared to result from the questionable conduct is neither certain nor even likely or (2) the undesired consequences are expected sufficiently far in the future, such that (3) the imputed danger is separable from the initial con-

26. *Id.* at 67 (emphasis supplied).
27. *Id.* at 69 (emphasis supplied).
28. *Id.* at 72 (emphasis supplied). *But see System, supra* note 2, at 462-63.
29. *Theory, supra* note 1, at 91 (emphasis supplied).
32. *Id.* at 397 (emphasis supplied).
33. *Id.* at 404 (emphasis supplied).
duct and therefore can be prevented independently by means other than the suppression of the initial speech. Combining these elements with the results of Emerson's first test produces the complete criterion: Conduct is to be regarded as "expression" and therefore fully protected if it purports to manifest, reflect, or communicate an idea, belief, feeling, or attitude, and if it does not probably and immediately unlawfully harm important interests of others. If this is a valid statement of the essence of Emerson's full protection theory, and I believe that it is, then it follows that he has presented an apparently plausible theory for many if not most areas of freedom of expression. The test, however, bears a striking resemblance to the clear and present danger test, a test that Emerson frequently and forcefully criticizes. Indeed, it now will be argued that the full protection theory is the functional equivalent of a reasonable and consistent interpretation of the clear and present danger test. Therefore, if Emerson reveals any major defects in that traditional test they equally will infect his own theory.  

II. THE PHILOSOPHICAL BASIS FOR THE CLEAR AND PRESENT DANGER TEST

I do not propose to rehearse the tortured history of the clear and present danger test. It is a well-known tale. Originating in the
inspired opinions of Holmes and Brandeis,\textsuperscript{36} pausing to acquire status as majority dictum in Roberts' \textit{Herndon} opinion,\textsuperscript{37} flourishing as a reasonably effective guardian of free speech in the forties,\textsuperscript{38} and more or less disappearing from the judicial scene in the following two decades\textsuperscript{39} (severely, some say mortally, wounded by \textit{Dennis v. United States}),\textsuperscript{40} the test is now often considered moribund.\textsuperscript{41} The

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\textit{FREEDOM OF EXPRESSION} 355

\textit{FREEDOM OF EXPRESSION} 355

complete account of the origin and use of the clear and present danger test in the pre-World War II years. Chafee's enthusiastic support for the test contributed to its popularity in the forties. \textit{See also} \textit{Strong, Fifty Years of 'Clear and Present Danger': From Schenck to Brandenburg — and Beyond, 1969 Sup. Ct. Rev. 41; McKay, The Preference for Freedom, 34 N.Y.U.L. Rev. 1182, 1203-12 (1959).


\textit{38.} \textit{See McKay, supra} note 35, at 1207 for a listing of each of the cases during this period that explicitly utilized the "clear and present danger" formula. In his dissent to \textit{Dennis v. United States}, 341 U.S. 494, 591-92 (1951), Justice Douglas gives a more inclusive enumeration that includes cases only implicitly using the test (by, for example, discussing the "imminence" of a reputed danger).

\textit{39.} A noteworthy exception is \textit{Wood v. Georgia}, 370 U.S. 375 (1962), in which the Court reversed the contempt of court conviction of a Georgia sheriff who had criticized a local judge by finding that the sheriff's statements did not present a danger to the administration of justice.


I shall not attempt to examine the test's current status as a functioning constitutional rule, though I believe that the reports of its death, like those of Mark Twain's, are greatly exaggerated. The test still is used sporadically. \textit{See Nebraska Press Ass'n v. Stuart}, 94 S. Ct. 2791 (1976) (gag order case). Chief Justice Burger's majority opinion explicitly used the test in its \textit{Dennis} formulation. Justice Powell concurred, arguing that "a prior restraint properly may issue only when it is shown" that the prejudicial pretrial publicity poses "a high likelihood of preventing, directly or irreparably" a fair trial. There must be "a clear threat to the fairness of the trial." 96 S. Ct. at 2808 (emphasis supplied).

Justice Brennan referred to the barriers placed in front of any prior restraint of the press. The harm to be prevented by the censorship must be not only grave, but also "direct, immediate and irreparable." \textit{Note, however, Brennan's} dissent in \textit{Greer v. Spock}, 424 U.S. 828 (1976), commenting that the Court had "long ago departed from 'clear and present danger' as a test for limiting free expression." \textit{Id.} at _____, 96 S. Ct. at 1230. He refers to \textit{Hess v. Indiana}, 414 U.S. 105 (1973) and \textit{Brandenburg v. Ohio}, 395 U.S. 444 (1969) in support of these claims. The majority opinions in both cases, however, can be read to support the vitality of the essential elements of the Holmes-Brandeis formula. In \textit{Brandenburg}, the Court declared: "[T]he constitutional guarantees of free speech and free press do not permit a
present discussion is limited to a brief examination of several state-
ments of the test in an attempt to interpret them reasonably thereby
supplying part of a philosophically sound explication of our right of
free expression. This hopefully will provide the basis for a theoreti-
cally defensible principle for the adjudication of first amendment
cases. First, however, it is necessary to examine briefly the philo-
sophical theory supporting the first amendment and, consequently,
any test purporting to define first amendment rights.

The analysis can begin, as Emerson's does, with the premise that
there are sound philosophical grounds for the ascription of a group
of rights comprising a concept of freedom of expression. The basic
right, as noted above,\(^2\) is the liberty to express or communicate
beliefs and feelings. Additionally, other associated liberties include
the right to hold beliefs, to receive information and opinions from
others, to associate with persons of like opinion, and to join with
them corporately to express shared views.\(^4\) Furthermore, a system
of freedom of expression necessarily requires principles that deter-
mine the manner in which these rights are to be reconciled with
other personal and social interests. To understand fully the rules,
such as the clear and present danger test, that have been offered to
effect this reconciliation, it is necessary to examine the underlying
arguments that present a justification of the very ascription of such
rights to individuals.

Emerson helpfully notes that there are at least four different cate-
gories of values that a society protects by the establishment and
preservation of the right to freedom of expression:

Maintenance of a system of free expression is necessary (1) as a
method of assuring individual self-fulfillment, (2) as a means of
attaining the truth, (3) as a method of securing participation by
the members of the society in social, including political, decision-
making, and (4) as a means of maintaining the balance between
stability and change in the society.\(^4\)

\(^2\) 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 \textit{imminent} lawless action and is \textit{likely} to incite
or produce such action." 385 U.S. at 447 (emphasis supplied). In \textit{Hess}, the Court used similar
language: "[S]ince there was no evidence, or rational inference from the import of the
language, that his words were intended to produce, and likely to produce, \textit{imminent} disorder,
those words could not be punished by the State on the ground that they had a 'tendency to
violence.'" 414 U.S. at 109.
\(^3\) See note 20 \textit{supra} & accompanying text.
\(^4\) \textit{System}, \textit{supra} note 2, at 3.
\(^4\) \textit{Theory}, \textit{supra} note 1, at 3.
Rather than examining each of these in depth, it suffices to stress one argument that appears in each of the four groups of reasons: a society benefits in the long run from the toleration, and indeed the encouragement, of the free expression of diverse opinions even if the active exercise of this freedom occasionally will produce some harmful consequences. This assertion is stated most fully and eloquently in John Stuart Mill's *On Liberty*, but it is a common theme in most classic defenses of free speech. An example of the use of this argument in Emerson's first group of values is Mill's assertion that people must be allowed the unfettered pursuit of truth in all areas of life if they are to achieve the realization of their characteristically human talents, the free exercise of which constitutes happiness in the fullest sense. Another example, drawn from the second category, is Mill's avowal that society must have the freest possible exchange and critical examination of all ideas to enjoy the benefits of increased knowledge of scientific, social, political, and religious truths. This is obviously true when a useful or true idea is offered in place of a previously held harmful or false one. But it is equally correct, Mill contends, when the newly expressed opinion is false or even dangerous, for he claims that society benefits more by defeating this false idea in rational combat than by silently suppressing it to avoid its possible ill effects. Moreover, Mill claims that the true and valuable ideas will triumph on the testing ground of argument and discourse provided only that there is sufficient time for this difficult process to work.

45. Emerson gives a full, though not necessarily critical, discussion of these four values. *Id.* at 4-15.

46. This is basically an "ideal-rule-utilitarian" argument, according to which the moral rules of a society are the set of principles that, if consistently followed, would produce the greatest possible amount of human happiness. See Brandt, *Toward a Credible Form of Utilitarianism*, in *Morality and the Language of Conduct* 107 (H. Castaneda and G. Nakhnikian ed. 1963). For a shorter account see W. Frankena, *Ethics* 39-41 (2d ed. 1973). This, and other forms of rule-utilitarianism should be contrasted with act-utilitarianism according to which the moral correctness of each particular action is determined by its consequences for human happiness. *Frankena, supra* at 35-37.

The importance of rule-utilitarianism for this discussion is in its claim that an action may have disutilitarian consequences and nevertheless be rightfully done because it was prescribed by a moral rule. The rule, in turn, is validated by showing that the consequences of following that rule are, in the long run, optimal. For the difference between justifying specific actions and validating general rules see Rawls, *Two Concepts of Rules*, 63 Phil. Rev. 3 (1955).


48. Mill stipulated a further condition in the rule for setting the limit to the scope of free activity. *Our right to act is curtailable, he stated, if it directly interferes with the life rights*
Society's goal is the maximum well-being of its members, and rules are to be determined with that end in view. This normative ideal, coupled with the facts as described by Mill and apparently accepted by Emerson, yields a principle of fully protected free expression. The permissible exceptions to this otherwise imprescriptible right occur when the acts of expression are likely to have extremely grave consequences and when there is insufficient time between the performances of the actions and the onset of the expected evils either to allow the process of rational discourse to avert the dangers, which would be the most desirable course, or to permit society to prevent independently and directly the harmful consequences. The reason for this exception is that in these exceptional cases, and presumably only in these cases, the factual assumptions supporting the rule of absolute freedom no longer hold. Following a rule of unlimited free speech therefore would yield a far less desirable outcome in the long run than would adherence to the limited rule just examined. In the former instance the ascendency of true and useful beliefs could not be relied upon. Rather, society would certainly suffer serious immediate and irreparable harm.

Freedom of speech is therefore not absolute in scope. It does not extend to every human act of attempted expression. Literally every commentator on the subject agrees with the view that one cannot say anything one pleases at any time or at any place. Nevertheless, this view does hold that within the scope delimited by the above-mentioned considerations, the principle of free speech and freedom of the press must remain exceptionless if society is to derive the long term benefits of their consistent application. If an action falls within the protected class, no further consideration of its offensiveness or potential harmfulness can be offered as a ground for opposing its untrammeled performance. It is in this sense, and only this sense, that our rights are absolute.49

of others. Mill, supra note 47, at 76, 91, 95. This suggestion forms the basis for my recommended test.

49. The notion of a right being absolute in weight though limited in "scope" is attributable to Joel Feinberg. See J. Feinberg, Social Philosophy 68-83 (1973). For the general justification of a strictly applied rule that has a limited class of built-in exceptions see Rawls, supra note 46, at 3.

50. This treatment has not exhausted all of Emerson's justifications for freedom of expression. The most important omission is Meiklejohn's influential argument that these rights must be maintained to provide the necessary background conditions for a democratic and autonomous society. An argument, however, easily could be produced to parallel the one given above that would support a principle with a nonsuppressible right of free expression, limited in scope by the likelihood of the act's causing immediate and grave danger, designed
Finally, this position is supported by analysis of the concept of a "right" itself.\textsuperscript{51} To say that a person has a right to do $X$\textsuperscript{52} is to say that he may do $X$ and, importantly, that others have a duty not to interfere in his doing of $X$.\textsuperscript{53} If this right is a political or legal right, moreover, the government must protect one's freedom to perform the actions specified and protected by the right in question by preventing others from interfering with that conduct. The government, of course, may not itself interfere with any personal activities designated as rights. The ascription of a right is distinguished therefore from ascription of a mere claim or of a mere privilege. The possession of only a claim to a right does not entail the duty of others to desist from the interference with the rightful activity; a privilege, unlike a right, is forfeitable at the pleasure of the state. Thus, those jurists who treat a first amendment right, such as freedom of expression, as merely another personal or social interest that can be weighed or balanced against other personal or social interests when the exercise of the right conflicts with those other concerns actually are abrogating or at least abridging that right. That abridgment, however, is what the Constitution explicitly prohibits.\textsuperscript{54}

III. JUDICIAL STATEMENTS OF THE CLEAR AND PRESENT DANGER TEST

The familiar and frequently quoted statements of the clear and present danger test present both the substance of and the philosophical rationale for an "absolute" theory such as the one just sketched. Quotations from four opinions illustrate this.

to achieve the maximum democratic value of a self-rulled society. Indeed, this is the essence of the theory Meiklejohn actually presents. See A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960), especially at 20-21 and 48-49, where he accepts the limiting conditions on the scope of his otherwise absolute right. See also note 65 infra.

51. See, e.g., FEINBERG, supra note 49, at 55, 57, 66-67; RAWLS, supra note 34, at 201-03. See also W. HOFFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923); Corbin, Legal Analysis and Terminology, 24 Yale L.J. 163-73 (1919).

52. The right also may be to forbear doing $X$, or to be $X$, or to have or possess $X$.

53. For example, if an individual has a right to enjoy his property, others may not trespass upon it or even make a political speech on the grounds without the owner's permission.

A right may be limited in its scope by explicitly granted or otherwise understood exceptions (such as the encumbrances that limit property rights). Nevertheless, a right with encumbrances is an unconditionally binding enjoinderment against the interference of others when those explicitly enumerated exceptions do not apply. Encumbrances are not rights that are balanced or weighed against other more general rights, but rather are methods for the precise specification and delineation of the boundaries between abutting but not necessarily conflicting claims. FEINBERG, supra note 49, at 78-79.

Writing for the majority in *Schenck v. United States* Holmes states:

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. 6

The majority opinion in *Frohwerk v. United States*, again by Holmes, follows *Schenck*:

With regard to [the constitutional] argument we think it necessary to add to what has been said in *Schenck v. United States* . . . only that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. . . . We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech. 58

Holmes' next formulation is found in his dissent in *Abrams v. United States*:

But as against dangers peculiar to war, as against others, the principle of the *right* to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a *limit* to the expression of opinion where private rights are not concerned. 60

Brandeis' concurring opinion in *Whitney v. California*, in which Holmes joined, provides a final example:

The *right* of free speech, the right to teach and the right to assem-
bly are, of course, fundamental rights. . . . These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled. 62

These early explications of the test, particularly the last, demonstrate that it was designed to limit an otherwise fully protected right of free expression that could not be denied or abridged. Holmes and Brandeis faced the problem of justifying the restrictions that they felt properly prohibited certain potentially harmful forms of expression while recognizing a constitutional amendment that explicitly states that "Congress shall make no law . . . abridging the freedom of speech." Their answer was to delimit carefully the areas in which the constitutionally guaranteed freedom existed. That right does not have absolute scope; its reach, though not its weight, is abridgable.

Interestingly, the two jurists resolved their paradox by using the same arguments that functioned for them as justifications for the enactment of the first amendment as the tools for the interpretation of the amendment's scope or reach:

This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the dan-

62. Id. at 373 (emphasis supplied). Chief Justice Hughes expressed the same conception of the nature of permissible limits of first amendment rights and the same rationale for these limits in DeJonge v. Oregon:

These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

ger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection. To reach sound conclusions on these matters, we must bear in mind why a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequences.63

The values supporting the presumption for unfettered speech also indicate where to erect the barriers to mark off the realm of fully protected expression from that of permissible, and often required, governmental regulation.

Justice Brandeis followed this formulation of his approach to the problem with one of the most eloquent yet concise statements of those values that provide the grounds for a right to freedom of expression:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine.... They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction... that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law.... Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.64

Brandeis reasoned that reflection on these and similar arguments reveals that the rule that provides society with the greatest possible degree of happiness is one that limits the scope of absolutely pro-

64. Id. at 375-76. Compare Theory, supra note 1, at 3.
tected speech to those utterances that do not bring about dangers that are simultaneously clear, present, and serious. This is in effect a rule-utilitarian argument for the specification of a right, requiring demonstration of the utility of each part of the rule.

Why, first of all, proscribe only against clear dangers? Why should the high probability of a foreseen harm be a necessary condition for the regulation of speech? The proferred argument notes that much social and political expression causes some possibility of disruption, lawlessness, and agitation, or at least creates the possibility that some people are likely to think that it does.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.\(^6\)

If suppression were allowed on the mere possibility of serious harm vast areas of political speech would have to be foreclosed. This would deprive society of the enormous benefits that it is assumed flow from this type of expression. A long term loss of utility would result from the excessive curtailment of the reach of freely permitted expression.\(^6\) In dealing with expectations of future benefit the calculations are uncertain. Although it is a gamble, it is a rational choice because the expected benefits outweigh any likely risks. If the "clear danger" requirement were abandoned and a general rule that permitted speech with a high probability of causing immediate and serious harm were maintained, the expected consequences would be different. The gamble now would be irrational, for the chances of the benefits exceeding the highly likely costs are minimal.

[Our Constitution . . . is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of

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66. For examples of the implied use of this test see Cox v. Louisiana, 379 U.S. 536 (1965) and Edwards v. South Carolina, 372 U.S. 229 (1963), in which provocative assemblies were suppressed on the grounds that they were likely to lead to civil disturbances. The Court reversed both by finding insufficient probability of the dangers ensuing in the actual circumstances.
opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.67

This passage from Holmes's stirring dissent in Abrams also invokes the "present danger" condition. Even if an expression seems likely to start a process that would culminate in a national catastrophe, it should not be suppressed as long as the expected danger is not imminent. No danger in the remote future ever can justify limitation of the right to speak freely. This is the most distinctive feature of the clear and present danger formula, and although the judicial effect of the condition has been discussed frequently, the supportive argument for this provision has not received sufficient attention. Its importance is apparent in light of the underlying philosophical justification for the test. The great value of free speech derives, in part, from its power to eventually suppress pernicious doctrines and opinions. Moreover, the process by which it does so, the rational examination of conflicting ideas and opinions, is itself a useful process in that it develops the intellectual and autonomous capacities of both those who engage in and those who observe the dialectical conflict. Free speech also heightens appreciation and understanding of the victorious and presumably correct position, thereby increasing that idea's vitality. In Whitney, Brandeis writes:

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.68

68. 274 U.S. at 377 (Brandeis, J., concurring) (emphasis supplied). Examples of later statements of the rationale given for the "present" requirement include:
This process will not work in every instance, but it is necessary nevertheless to preserve the liberty that enables it to succeed in the long run in the form of an inviolable rule. Again, the calculation of expected utilities justifying the principle predicts a net benefit from the minimally hampered expression of ideas. The only cases excluded from the rule's protection are those in which the above-mentioned process cannot work because the expression is almost certain (the "clear" condition also must be satisfied) to produce an extremely harmful consequence in the immediate future, before the dialectical functioning of reason can have its salutary effect.\(^69\)

The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to pre-

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This nation relies upon public discussion as one of the indispensable means to attain correct solutions of problems of social welfare. Curtailment of free speech limits this open discussion. Our whole history teaches that adjustment of social relations through reason is possible while free speech is maintained. This Court has the solemn duty of determining when acts of legislation or decrees of courts infringe that right guaranteed to all citizens. Free speech may be absolutely prohibited only under the most pressing national emergencies.


Speech may be fought with speech. Falsehoods and fallacies must be exposed, not suppressed, unless there is not sufficient time to avert the evil consequences of noxious doctrine by argument and education. That is the command of the First Amendment.

American Communications Ass'n v. Douds, 399 U.S. 382, 396 (1950).

Talk about the desirability of revolution has a long and honorable history, not only in other parts of the world, but in our own country. This kind of talk, like any other, can be used at the wrong time and for the wrong purpose. But, under our system of Government, the remedy for this danger must be the same remedy that is applied to the danger that comes from any other erroneous talk — education and contrary argument.


69. As already observed, even Meiklejohn, a self-proclaimed "absolutist," recognizes that the imprescriptible right of free speech ought not to obtain in certain circumstances. He cites, with approbation, Brandeis' remark, quoted above, characterizing such limiting occasions as "emergencies." MEIKLEJOHN, supra note 50, at 49. He asserts, however, that this constitutes the abandonment of the "clear and present danger" formula, apparently discounting the major importance of the "present" test and its philosophical rationale and also surprisingly forgetting Holmes' similar use of the same term, "emergency," in his Abrams dissent to specify the only circumstances that would permit the suppression of speech: "Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law . . . abridging the freedom of speech.'" 250 U.S. at 630-31.
In this selection from his concurring opinion in *Whitney*, Brandeis suggests that a further consequentialist reason for the exemption of speech that produces imminent danger is that in these cases an important alternative, usually present, is absent. If an expected and dreaded result from an expression is separated temporally from the act of expression, society almost always will have alternate independent means of averting the danger while nevertheless permitting the speech. This provides the benefits of the latter while avoiding the costs of the former. We can allow an inflammatory speech and use the police to prevent the expected riot. A radical can be allowed to urge violation of the draft laws yet the administrative forces of the Selective Service and the usual coercive penalties of the law can be used to ensure an adequate standing army. Only when the gap between instigatory speech and harmful result is bridged temporally to preclude this recourse by society and the danger is thus irremediable do the expected long run dangers outweigh the foreseen benefits, thus justifying the exclusion of this type of expression from the right of free speech. The value to society of free speech is so great that it outweighs even the considerable expense of taking those measures necessary for the preservation of the lawful peace.

The final element in the Holmes-Brandeis rule is the degree of immediately expected "danger" that suffices to permit governmental regulation of expression. Not any danger, even though likely to occur immediately, qualifies as a basis for the denial of the right to free speech. "The evil apprehended" must be "relatively serious." "The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state." Some supporters of the test have even gone beyond Brandeis in their emphasis of the severity of the harm necessary for the drastic measure of


71. In 1951 the Court abandoned the "present" condition in the "clear and present danger" test by taking Justice Learned Hand's interpretation of the formula as dictum: "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." *Dennis v. United States*, 341 U.S. 494, 510 (1951). See also *Scales v. United States*, 367 U.S. 203, 251 (1961). This effectively emasculated the formula and led its defenders to desert it. See note 40 *supra*. The essence of the imminence condition, however, retains some vitality. See note 41 *supra*. 
limiting a constitutional right.\textsuperscript{72}

The philosophical rationale for this condition in the test is obvious. Given the enormous value to be accrued from the maintenance of the right of free expression, it would be irrational (and immoral from a utilitarian point of view) to sacrifice those benefits merely to avert insubstantial dangers. It must be remembered that we are comparing the expected consequences of the establishment and enforcement of alternative rules, not calculating the cost and benefits of particular actions. From this perspective it seems reasonable to assume that the rule that gives a wide berth to free speech but cuts it off when it becomes extremely dangerous will yield greater benefits than either a rule that allows anything to be said or one that curtails speech as soon as it presents the slightest danger.

In summary, an examination of the Supreme Court's statements of the clear and present danger test reveals a rule that is substantially identical to Emerson's full protection theory. Both theories maintain that expressions are to be given full protection unless they present both a clear and a present danger of producing serious harm or violations of law.\textsuperscript{73} Moreover, the philosophical basis

\textsuperscript{72} "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious... before utterances can be punished." Bridges v. California, 314 U.S. 252, 263 (1941) (Black, J.).

"Free speech may be absolutely prohibited only under the most pressing national emergencies. Those emergencies must be of the kind that justify the suspension of the writ of habeas corpus or the suppression of the right of trial by jury." Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 320 (1941) (Reed, J., dissenting).

"[F]reedom of speech... is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (Douglas, J.).

"[W]hatsoever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." Thomas v. Collins, 323 U.S. 516, 530 (1945) (Rutledge, J.).

\textsuperscript{73} Emerson of course recognizes that his specification of the "expression"—"action" distinction resembles the clear and present danger test and he therefore tries to distinguish the two approaches:

In formulating the distinction between "expression" and "action" some of the concepts embodied in the clear and present danger test are utilized. But the approach here differs materially from the clear and present danger approach. It is designed to protect the whole general area of expression, regardless of whether that expression creates a danger of subsequent harm. In borderline cases, however, the determination of whether the conduct is to be treated as expression or action rests upon whether the harm is immediate, whether it is irremediable, and whether regulation of the conduct is administratively consistent with maintaining a system of freedom of expression.
for the Holmes-Brandeis formula closely resembles the basic rationale presented in support of Emerson's theory. Given this congruence of the two views, it is interesting to review the reasons Emerson gives for his vehement denunciation of "clear and present danger" as a reliable principle for the interpretation and application of the first amendment.

IV. Emerson's Objections to the Clear and Present Danger Test

Emerson raises four serious objections to the clear and present danger test. The test, he charges, is (1) overly restrictive, (2) excessively vague, (3) difficult or impossible to apply, and (4) of doubtful applicability in several areas of importance. Let us briefly examine each objection.

Theory, supra note 1, at 61 n.21. This, however, does not distinguish the two theories. An advocate of the clear and present danger test would extend the realm of freedom of speech as widely as Emerson. Surely the holder of the traditional test would not deny first amendment protection to a poet's reading of his verses about daffodils merely because the verses did not threaten the peace or raise the spectre of lawlessness. The theory, as interpreted here, would give full protection to all expression that was obviously free from harmful consequences. It is only when the possibility of danger exists that the test is to be employed; that is, it is only to be used for Emerson's "borderline cases." There, he admits, the elements of the clear and present danger test should determine the case. Therefore, his theory would yield the same result as the clear and present danger test in all cases, both innocuous and "borderline." Emerson further explicitly uses "clear and present danger" to separate "expression" from "action" in cases of publicity that potentially abridge the rights of defendants to a fair trial. The overall standard under the First Amendment should be one that would preserve the right of communication so far as possible but allow the court to protect the rights of the individual in situations demanding it. For such purposes a "reasonable tendency" test is probably too restrictive. The accommodation is perhaps better expressed in terms of a "clear and present danger" test or a "probable danger" test.

Id. at 73. Here he merely observes that his employment of the formula does not "imply a wholesale adoption of the test," id., though he fails to explain why it is immune in this area to the infirmities that infect it elsewhere.

74. Emerson actually makes a fifth charge. The formula, he attests, has been expanded or altered so as to be indistinguishable at times from the "bad-tendency" or the "ad-hoc balancing" tests, both of which are severely defective in their own right. This is indeed true. I do not consider this objection, however, because it is irrelevant to our objective of evaluating the proposed theories as normatively ideal (though realistic) statements of the right to freedom of expression. That a given test has been misused by a court or even abandoned by its former sponsors does not discredit it unless that misuse can be shown to have followed inevitably from the intrinsic nature of the theory. Some critics do make this charge against the "clear and present danger" test. E.g., Strong, supra note 35, at 56. They tend to interpret the formula as a balancing test from the start. But if the test is viewed as giving absolute weight to expression within its admittedly limited scope, as I have argued it should be, this criticism is unfounded.
Overly Restrictive

"The formula assumes that once expression immediately threatens the attainment of some valid social objective, the expression can be prohibited." The test, he charges, is overly restrictive. It permits only impotent, innocuous, and therefore worthless speech, and consequently it subverts the entire purpose of the system of freedom of expression. Emerson details this charge by claiming that the test would overly restrict expression of opposition to the draft, advocacy of revolutionary activity, labor picketing, publication of pre-trial publicity, and the display or publication of obscene materials.

This criticism is invalid both in general and in particular. It misinterprets the basic meaning of the test and it misapplies it in the areas discussed. Emerson first distorts the formula by charging that expression would be suppressed by "clear and present danger" whenever "some valid social objective" was threatened. This blatantly disregards the condition that the expected evil must be extremely serious. Given the theory's strong presumption for the maximum possible scope for the right of protected speech, the averted dangers would have to be extremely grave to demonstrate the long run net utility of preventing them by restriction of expression.

More importantly, this objection slights the importance of the "clear" and "present" conditions, particularly the latter. Some defenses of the test do seem to suggest that any publication of opinions that might be efficacious in bringing about fundamental social changes always are suppressible, thus restricting freedom of expression only to blatantly ineffectual statements. Unfortunately, Holmes' discussion of the defendant's revolutionary exhortations in Abrams falls in this group: "Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, with-

75. Theory, supra note 1, at 51.
76. System, supra note 2, at 74-75.
77. Id. at 108, 124.
78. Id. at 438, 447-48.
79. Id. at 461.
80. Id. at 494.
81. In the "Pentagon Papers" case, New York Times Co. v. United States, 403 U.S. 713 (1971), the Court highlighted the enormous burden the government faces in demonstrating the inevitability of consequences sufficiently dire to justify a prior restraint upon the press. See especially the concurring opinions by Justices Brennan, id. at 724, Stewart, id. at 727, and White, id. at 730, which explicitly used the three key elements of the clear and present danger test.
out more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so." But the theory as interpreted here, and as it clearly was intended by Holmes and Brandeis, has no such import. No threatened consequence, including a revolutionary change in the structure of government, constitutes grounds for the abridgment of freedom of speech if that change will come about only after there has been some reasonable amount of time for the rational examination of the proposal. Holmes seems to have anticipated Emerson's reaction to his Abrams opinions:

To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

If, on the other hand, a revolutionary speech were certain to instigate an immediate violent upheaval, the Holmes-Brandeis formula would prohibit that speech. But surely Emerson would classify this type of political utterance as an "action" and therefore also would permit the government to suppress it. The two views would make identical decisions in this type of case.

Another example of Emerson's failure to heed the importance of

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82. 250 U.S. at 628 (Holmes, J., dissenting).
83. Id. at 630. Holmes also appears to respond explicitly to Emerson's criticism in his dissent in Gitlow v. New York, 268 U.S. 652 (1925):

Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given that chance and have their way.

Id. at 673.
the "present" condition is his criticism of the treatment of obscenity under the clear and present danger test:

Assuming obscene material could be proved to create a clear and present danger of illegal behavior, it would not follow that the expression should be suppressed. Rather, the basic principles of a system of freedom of expression would require that society deal directly with the subsequent action and leave the expression alone.84

But this is to misconstrue the "present" requirement. As argued above, the test would not suppress an expression, such as an obscenity, unless the important danger that it allegedly causes, such as child-molestation or rape, follows so immediately and so directly from the expression that it is impossible to change the potential criminal's intentions by persuasion or, failing that, to provide police protection for the potential victims. The situation Emerson envisions approximates an incitement to rape, directly analogous to that of incitement to riot. In both types of cases, the clear and present danger test would fully protect the threatening speech unless there were no other way to prevent the serious harm to which the speech irremediably leads. Because it is extremely unlikely that the government could ever reasonably demonstrate such a connection between the expression and the feared behavior, expression of sexual material under the clear and present danger rule would enjoy the wide protection that Emerson favors. Again, the two theories would result in similar judicial determinations.

**Excessively Vague**

Emerson's second objection is more damaging. "The clear and present danger test," he claims, "is excessively vague."85 The Supreme Court's use of the test has led to differing results. Police, prosecutors, and citizens alike lack sufficient advance knowledge concerning the lawfulness of any particular controversial action prior to its judicial determination. Emerson enumerates situations in which the purported vagueness of the formula is most apparent. He argues that the test has no precise or consistent stance on symbolic protests such as the burning of draft cards,86 the toleration of

84. *System*, supra note 2, at 494.
85. *Theory*, supra note 1, at 52.
86. *System*, supra note 2, at 85.
revolutionary political parties,87 the slandering of groups,88 or the publication of prejudicial material prior to criminal trials.89

Several points mitigate this objection. First, Emerson may be subjecting the test to an unreasonable standard of precision. Any judicial test that hopes to provide a unified and coherent approach to the protean range of freedom of expression issues necessarily must be stated in somewhat abstract and broad terms. As Brandeis notes:

This is a rule of reason. . . . Like many other rules for human conduct, it can be applied correctly only by the exercise of good judgment; and to the exercise of good judgment, calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty. The question whether in a particular instance the words spoken or written fall within the permissible curtailment of free speech is, under the rule enunciated by this court, one of degree. And because it is a question of degree the field in which the jury may exercise its judgment is, necessarily, a wide one. But its field is not unlimited.90

Does Brandeis' recognition of this inevitable imprecision in a rule of this sort differ appreciably from Emerson's own observation that "it is true that the ['expression'—'action'] distinction does not offer automatic solutions and that courts could easily disagree on any particular set of facts"?91

Secondly, Emerson concedes that in some of the particular areas of expression listed above, the results of the clear and present danger rule will not be particularly problematic. Immediately after declaring that Dennis could have gone either way even if the clear and present danger test had been used in its original form, Emerson admits that "most observers would have had a difficult time to find a 'clear and present danger' of overthrow of the government arising from the teachings of the Communist Party in 1948 or 1951."92 Likewise, having claimed that the test allows "great leeway" in the area of group libel, he acknowledges that "it is doubtful that any immediate danger of a breach of the peace could be proved in most cases."93

87. Id. at 115.
88. Id. at 397.
89. Id. at 461.
90. Schaefer v. United States, 251 U.S. 466, 482-83 (1920) (Brandeis, J., dissenting).
91. System, supra note 2, at 75 (emphasis supplied).
92. Id. at 115.
93. Id. at 397.
Finally, the essential similarity observed between Emerson's "expression"—"action" distinction and the clear and present danger test leads inevitably to the conclusion that the former theory will suffer from vagueness and indefiniteness to the same degree as the latter. Lack of space precludes an example by example demonstration of this claim, but we can observe the difficulty Emerson himself had in determining the manner in which his test ruled on the issue of potentially prejudicial journalistic coverage of criminal trials. In his earlier essay Emerson thought that such reporting was equivalent to "action" because of its immediate impact on the interests and rights of the defendant. Now, however, he classifies it as protected "expression." Surely newsmen engaged in reporting on major crimes would have been even more likely (prior to Nebraska Press Association) to experience difficulty in ascertaining the limits of their first amendment protection if they had had to rely on Emerson's test.

This line of criticism does, however, point to a significant problem in both the Holmes-Brandeis and the Emerson theories. Both suffer from uncertain specification of the kinds of adverse consequences that are relevant to the respective tests. For example, what sorts of evil consequences are relevant in deciding a draft card burning case: the danger of registrants not having draft cards; the increased administrative problems for the Selective Service; the fire hazard to our parks; the possibility of the government's failure to raise an army and thereby the threat of a takeover and enslavement of the country by a foreign power? What were the dangers averted by the prosecution of the Communists in Dennis? What "harms" are caused by unwanted publicity, exposure to obscenity, a subtle coercion to pray in a public school? Although I think that both the clear and present danger and the full protection theories could provide answers to these questions — somewhat artifically perhaps — a more satisfactory response may be to question the usefulness of concentrating solely on the avoidance of harms, and to consider a theory that pays more direct attention to the interaction of potentially conflicting rights. The possibility of such a theory is discussed at the conclusion of this paper.

94. See note 17 supra.
95. 96 S. Ct. 2791.
Difficult To Apply

The third criticism is related to the second and some remarks in response to that objection therefore are appropriate here. Emerson charges that "in all but the simplest situations the factual judgment demanded of the court by the 'clear and present danger' test is difficult or impossible to make through the use of judicial procedures." Consider, he urges, the enormous complexity of the empirical facts that were relevant in Dennis. The findings of history, sociology, group psychology, political science, and even the philosophical examination of ideologies would seem to have been necessary for a complete and reliable estimation of the likelihood of a Communist revolution in the United States during the 1950's. He claims that such encyclopedic knowledge is not available to the courts, and that even if it were available, the collection of such data would be unmanageably burdensome.

But it is arguably unfair for Emerson to take the most difficult imaginable case for the clear and present danger test as if it were paradigmatic of all freedom of expression issues. One could ascertain more readily the probable consequences of permitting labor-picketing at a shopping center, advertising the prices of prescription drugs, or exhibiting a motion picture in which "female buttocks and bare breasts were shown." Even Dennis is amenable to a judicial analysis of the facts, especially if the issue were limited narrowly to the question of predicting the precise effects of permitting particular instances or particular forms of expression, such as the teaching of specific books or even the advocacy of entire theories. This is especially true if, as our reading of the clear and present danger test requires, the government has the burden of proving a sufficiently serious danger. Moreover, as already noted, Emerson admits that almost unanimous agreement on the facts of cases such as Dennis could have been secured, though he equivocates on this point.¹⁰¹

96. Theory, supra note 1, at 52.
100. Justice Douglas does this in his dissenting opinion in Dennis, 341 U.S. at 587-89.
101. System, supra note 2, at 115. But compare id. at 120.
Of Doubtful Applicability in Important Areas

The clear and present danger test was developed initially to deal with the attempted suppression of speech that directly threatened some clear social interest. Granting that it might function in those cases, Emerson faults the test as simply inapplicable or irrelevant in other important areas in which freedom of expression is threatened. He charges that it is irrelevant, for example, in the numerous cases in which membership and participation in the Communist Party was the threatened form of "expression"-like activity. Additionally, he argues, the test is not useful in instances of forced testimony before legislative investigating committees because the committee is not directly concerned with the specific consequences of the communication of the witness' opinions or of his refusal to testify. Its activity only indirectly touches his freedom of expression.

This is not a telling objection. It seems reasonable to apply the clear and present danger test directly to these questions. For example, what general rule should be followed as an explication of the extent of the right of the witness to remain silent before a congressional investigating committee? According to the present interpretation of the test, the committee, in order to force testimony, would have to prove that the witness' silence was likely to lead to an immediate and nonpreventable danger of great magnitude. No congressional committee in recent history has been able to do that. Therefore, the proper application of the clear and present danger test would afford the same protection in this area as would Emerson's theory.

An examination of Emerson's other cases shows that the registration requirements of the Smith Act and the exclusion of Communists from labor union leadership positions cannot be justified. It is unlikely that the government could demonstrate that some immediate, irrevocable, and serious harm would accrue to society from allowing mere membership in the Communist Party or from permitting Communists to hold offices in labor unions.

V. Conclusion and a Forward Glance

The major portion of this Article has been devoted to the critical exposition of Emerson's full protection theory and the Holmes-
Brandeis version of the clear and present danger theory. Particu-
larly by reflection on the philosophical bases for each view, I argued
that the two theories are substantially equivalent. Emerson's cri-
tique of the clear and present danger formula as a test for the settle-
ment of first amendment controversies then was examined.

I partially endorsed only one of Emerson's criticisms, and noted
that the problem raised there apparently would apply as well to his
own view. That objection revealed the artificiality of discussing cer-
tain first amendment adjudication questions as cases of averting
harms or dangers. Frequently the issue more accurately is analyzed
as the mutual accommodation or reconciliation of individual rights.
When, for example, the press publishes personal details about a
well-known, nonpolitical, socially prominent personality, has the
exercise of the fourth estate's freedom of the press necessarily
harmed that person? Or has the press instead ventured into an
area where it no longer has the right to go — into the realm of the
unwillingly publicized person's right to privacy?

The following discussion briefly suggests the possibility of a
theory of moral rights that in turn might support a refined theory
of first amendment legal rights that would build upon this sugges-
tion. Given my discussion of the concept of a right as an unen-
croachable claim to noninterference from others that society has the
duty to enforce, the problem becomes that of establishing the
boundaries between potentially conflicting individual rights or be-
tween packages of rights, such as a "right-to-life," "privacy," or "a
right to know". This theory does not balance or weigh these rights
on some nonexistent common value scale but rather seeks a harmo-
niously integrated system of mutually limiting liberties. In this
theory, an individual's rights would be limited only by the necessity
of accommodating other rights, never by considerations of social
convenience or even accommodations to the popular will. For exam-
ple, an individual's right to private property would limit, not out-
weigh, the range of others' rights of assembly. One person's right to
be free from being shocked by "indecent displays" in a public park
limits, but does not outweigh, another's right to exhibit hardcore
pornographic photographs there, though it does not curtail the lat-
ter's right to view them in his own home.

The rights mentioned above suggest situations in which one indi-

105. This proposal derives from Rawls, supra note 34, and Dworkin, supra note 54.
individual's right sets limits on the scope of the set of abutting individual rights. The complete theory obviously would require analytical procedures, perhaps principles, for drawing the boundaries between the adjacent zones in which each right has its own absolute dominion. The theory also would have to contain principles that would curtail the enjoyment of particular individual rights when that would contribute to the enhancement of the total system. Zoning ordinances, mandatory health standards, and compulsory education laws would be examples of these rules. The preservation of the entire system likewise might require specific restrictions on individual rights. Examples of these necessary abridgments of liberty would include the imposition of a curfew in a riot-torn city or the establishment of military censorship if the nation were fighting a defensive war against a tyrannical enemy.

Both the establishment of the rights themselves and the derivation of the principles used to coordinate and delimit them would be prescriptive procedures. The enterprise would attempt to deduce the rights and their associated rules from a viable normative moral theory such as the ideal-rule-utilitarianism used in this Article. The results that already have been obtained from such an approach therefore can comprise an important part of the projected complete theory of rights. Sound arguments have been presented in support of the maintenance of freedom of expression. It has also been shown that important values are advanced if that right is given the widest possible range, limited only when its exercise presents an inescapable and immediate danger.

The stipulation of the degree and kind of danger requisite for that limitation, however, remains uncomfortably vague. Perhaps the difficulty derives from the attempt to fashion a rule for the limitation of a right out of elements from different conceptual categories such as personal interests, the security of nations, and other moral and legal rights. Perhaps these "dangers" should be limited only to the abridgment of rights.

Combining the strengths of Emerson's theory, the clear and present danger test, and the notion of a mutually limiting system of rights, a theory emerges under which freedom of expression can be given full protection unless it presents a clear and present threat to the equally protected rights of others or to the total system of rights. Because rights can be restricted only for the sake of another equally protected right or for the enhancement of the total complex of rights, a legal code based on this theory could adhere literally to the rule: "Congress shall make no law . . . abridging the freedom of speech."