The Clear and Present Danger Test in Anglo-American and European Law

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The Clear and Present Danger Test in Anglo-American and European Law

DAVID G. BARNUM*

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I. INTRODUCTION

The "clear and present danger test" is among the most famous doctrinal formulations in the history of American law. The test was originally proposed by the Supreme Court as a measure of the outer boundaries of the government's power to punish written or spoken advocacy of violence or other unlawful action. It has subsequently been

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invoked to address other kinds of problems, including some that are unrelated to the scope of First Amendment protection of freedom of speech and the press. Its principal continuing use in American law, however, is to define the constitutional limits of the government’s power to punish antigovernment speech, and, in particular, written or spoken advocacy of violence or other unlawful action.

In recent years, references to the danger test have appeared in the decisions of British courts and the institutions responsible for enforcing the European Convention on Human Rights. As in American law, those references occur most often in cases in which government is alleged to be exceeding constitutional limits on its power to punish antigovernment speech.

This article will examine the role that the danger test has played in the decisions of American courts and, more recently, in the decisions of British courts and the enforcement organs of the European Convention. Part I will briefly trace the immediate Anglo-American constitutional background from which the danger test emerged. It will examine the way in which the common law offense of seditious libel was defined by British judges and judicial commentators in the late nineteenth century. Part II will focus on the evolution in American law of judicial attempts to articulate both a “content-based” and an “effects-based” approach to imposing restrictions on the government’s power to punish antigovernment speech. A common theme of content-based approaches has been an insistence that government cannot punish speech unless it consists of “direct incitement” to unlawful action. The dominant but not exclusive effects-based approach to protecting speech has been the application of the “clear and present danger” test. Part III will explore the use by British and European judges of content-based and effects-based approaches to protecting speech. From its inception, the danger test has had a complex and uneasy relationship with judicial approaches to protecting speech that focus on the content of speech rather than its consequences or effects. As the test begins to find occasional adherents among non-American courts and judges, that relationship is once again attracting attention and generating controversy.

I. CONSTITUTIONAL DEVELOPMENTS PRECEDING THE DANGER TEST

The clear and present danger test did not emerge from a constitutional vacuum. Many of the twentieth century American cases in which the danger test is discussed were prosecutions for statutory offenses with roots in the English common law of seditious libel. In addition, about a decade after the adoption of the Constitution and the First Amendment, the U.S. Congress enacted anti-sedition legislation in the form of the
Sedition Act of 1798. The constitutional questions that arose during and immediately after World War I had therefore been considered by earlier generations of British and American judges and judicial commentators.

James Fitzjames Stephen's "codification" of the common law of seditious libel serves as the starting point of many discussions of the modern meaning of the offense. Stephen examined the history and current state of the common law in the second volume of his History of the Criminal Law of England, published in 1883. Quoting his earlier Digest entry on the subject, he defined a "seditious intention" as

an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty... or the Government and Constitution of the United Kingdom... or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State by law established, or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects.

Stephen's description of the multi-faceted offense of seditious libel had an earlier incarnation in the American Sedition Act of 1798. Section 2 of the Act made it a crime for any person to

write, print, utter or publish... any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame [them], or to bring them... into contempt or disrepute; or to excite against them... the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States...
From the perspective of modern understandings of the scope of freedom of speech, the offenses prohibited by the common law, like those prohibited by the Sedition Act of 1798, fell into two distinct categories. First, one could violate the law by “exciting” unlawful action. Thus, the common law prohibited “excit[ing] Her Majesty’s subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State,” while the Sedition Act prohibited “excit[ing] any unlawful combinations [for] opposing or resisting any law.” In principle, these components of the common law and the Sedition Act would be acceptable in a modern political system, because they define punishable speech not as “mere criticism” of the government or as dissemination among the population of antigovernment sentiments, but as incitement to the use of “unlawful combinations” or “unlawful means” for the purpose of bringing about social or political change.

By modern standards, the remaining offenses prohibited by the common law and the Sedition Act are more problematic. Thus, the common law prohibited words or writings that were intended to “raise discontent or disaffection” among the population or to “promote feelings of ill-will and hostility between different classes.” The Sedition Act outlawed bringing the government or its leaders into “contempt or disrepute” or exciting against them the “hatred of the good people of the United States.” Popular discontent or disaffection can, of course, lead eventually to antigovernment violence. At the same time, increased discontent is the inevitable by-product of the dissemination of critical comments about the government or its leaders. Defining seditious libel as the creation of “discontent or disaffection” therefore positioned government to punish the simple expression of antigovernment views and exempted government from the need to ascribe to speech any capacity to produce violence or other secondary unlawful consequences.

Stephen emphasized the antilibertarian implications of allowing government to punish not only incitement to unlawful action but also the creation of feelings of discontent or disaffection among the population.

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6. 2 Stephen, supra note 3, at 298 n.1.
7. Smith, supra note 5, at 442.
8. Id.
9. 2 Stephen, supra note 3, at 298 n.1.
10. Id.
11. Smith, supra note 5, at 442.
By the end of the eighteenth century, he argued, the practical effect of
the full spectrum of offenses that comprised the common law could be
succinctly described as conferring upon government the power to punish
“the intentional publication [of] written blame of any public man, or of
the law, or of any institution established by law.” It was “obvious,” he
said, that the “practical enforcement of this doctrine was wholly
inconsistent with any serious public discussion of political affairs.”

Stephen also argued, however, that during the course of the nineteenth
century, the meaning of seditious libel had narrowed. In particular, he
was confident that by the time he was writing, “nothing short of direct
incitement to disorder and violence [was] a seditious libel.” He also
famously argued that the scope of the offense of seditious libel depends
on whether the ruler is regarded as “the superior of the subject” or as the
subject’s “agent and servant.” “To those who hold [the latter] view fully
and carry it out to all its consequences,” he said,

there can be no such offence as sedition. There may indeed be breaches of the
peace which may destroy or endanger life, limb, or property, and there may be
incitements to such offences, but no imaginable censure of the government,
short of a censure which has an immediate tendency to produce such a breach of
the peace, ought to be regarded as criminal.

Stephen deftly blended objective historical scholarship and normative
assertions into a persuasive account of the content of the common law at
the end of the nineteenth century. To the extent that his conclusions
were sound, English law retained some but not all of the component
parts of the overall offense of seditious libel. On the one hand, it was no
longer a crime to intend, as an end in itself, to bring the officials or
institutions of government “into hatred or contempt” or to raise “discontent

13. 2 Stephen, supra note 3, at 353.
14. Id. at 348. Stephen traced the origins of this broad conception of seditious
libel to various sources, including Chief Justice Holt’s charge to the jury in Queen v.
Tutchin, 14 State Trials 1095 (Q.B. 1704). Tutchin was on trial for publishing articles
alleging that the government of the day was corrupt and that the navy was mismanaged.
Tutchin’s counsel argued, according to Holt, that the papers were “innocent.” Holt
responded that it was hardly innocent to “endeavor . . . to possess the people that the
government is mal-administered by corrupt persons,” because, he said, “[i]f people
should not be called to account for possessing the people with an ill opinion of the
government, no government can subsist. For it is very necessary for all governments that
the people should have a good opinion of it.” Id. at 1128.
15. 2 Stephen, supra note 3, at 375.
16. Id. at 299.
17. Id. at 300.
or disaffection" among the population. At the same time, some antigovernment expression could still be punished. In particular, government retained the power to punish "direct incitement to disorder and violence." In addition, "censure of the government" could still be a criminal offense, provided it had "an immediate tendency to produce . . . a breach of the peace."

Stephen's conclusions about seditious libel anticipate the discussion that commenced in the American legal community following America's entry into World War I. Judges focused on whether written or spoken words opposing the war or the draft consisted of "direct incitement" to unlawful action. Punishment of such incitement was generally held to be permitted by the First Amendment, but there was disagreement about whether other forms of incitement—including "indirect incitement"—could also be punished. Judges also focused on the circumstances in which speech was delivered and on the likelihood that it would produce unlawful action. Within this stream of cases, however, there was disagreement about whether speech could be punished because of its "natural and probable consequences" or only when it created a "clear and present danger" of bringing about unlawful action.

III. SPEECH CONTENT, SPEECH EFFECTS, AND THE FIRST AMENDMENT

In American law, judicial enunciation of both a content-based theory of protected speech and the effects-based "clear and present danger" test occurred in response to enforcement of the Espionage Act of 1917. The Act was passed by Congress on June 25, 1917, about two months after the United States entered World War I. Title I of the Act made it a criminal offense—"when the United States is at war"—(1) to "cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States," or (2) to "obstruct

18. Id. at 375.
19. Id. at 300. Stephen's understanding of the state of the law was incorporated into the summing up of Judge Cave in R. v. Burns, 16 Cox C.C. 355 (1886). Judge Cave informed the jury that "the right of free discussion is [perfectly] unlimited, with the exception, of course, that it must not be used for the purpose of inciting to a breach of the peace or to a violation of the law." Judge Cave then quoted Stephen's Digest entry and told the jury that it "stated very clearly" the law upon the question of what is seditious and what is not. Id. at 359; see also R. v. Aldred, 22 Cox C.C. 1, 3 (1909) (Judge Coleridge summed up, "[t]he test [in a prosecution for seditious libel] is this: was the language used calculated, or was it not, to promote public disorder or physical force or violence in a matter of State?")
20. See infra notes 25-39 and accompanying text.
21. See infra notes 40-48 and accompanying text.
the recruiting or enlistment service of the United States." An additional section of the law—Title XII—declared "nonmailable" any publication which violated the criminal prohibitions of the Act.

A. Speech Content and Government Power

The first sustained judicial scrutiny of the Espionage Act occurred within a month of its passage and involved invocation by the government of its Title XII powers to control access to the mails. The U.S. Postmaster General (Burleson) ordered the Postmaster of New York City (Patten) to exclude from the mails a forthcoming issue of a left-wing monthly journal called "The Masses." The editor of the journal brought suit to restrain Patten from executing the Postmaster General's order, and the case came before Judge Learned Hand of the U.S. District Court for the Southern District of New York.

The banned issue of "The Masses" included articles opposing conscription and praising two of the most prominent anarchists of the time—Alexander Berkman and Emma Goldman. Both had recently been arrested for conspiring to induce draft resistance in violation of the Selective Service Law, which Congress had passed on May 18, 1917. One article in "The Masses," entitled "Friends of American Freedom," argued that readers should admire the "courage and devotion" of the defendants.

Judge Hand granted The Masses' request for an injunction. He did so by narrowly construing those provisions of the Espionage Act that made it a crime to cause insubordination or obstruct recruitment. Hand conceded that incitement to unlawful action "may be accomplished as well by indirection as expressly, since words carry the meaning they impart." He also conceded that "[p]olitical agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law." He insisted, however, that

23. Id.
24. Id. The classic study of the Espionage Act and its implications for freedom of speech is ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES, supra note 2. See also STONE, supra note 5; PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES (1979); HARRY N. SCHEIBER, THE WILSON ADMINISTRATION AND CIVIL LIBERTIES 1917-1921 (1960).
25. Masses Publ'g Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917).
26. Id. at 544.
27. Id. at 540.
28. Id.
to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. . . If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation.  

Hand then examined the contents of *The Masses* and concluded that none of the articles could be thought "directly to counsel or advise insubordination or mutiny" or to constitute "direct advocacy of resistance to the recruiting and enlistment service." The only passages that gave him pause were those in which Goldman and Berkman had been praised for their illegal activities. "That such comments have a tendency to arouse emulation in others is clear enough," Hand said, but that they counsel others to follow [is] not so plain. Literally at least they do not. . . . One may admire and approve the course of a hero without feeling any duty to follow him. There is not the least implied intimation in these words that others are under a duty to follow. The most that can be said is that, if others do follow, they will get the same admiration and the same approval.

Hand's approach to the task he faced is noteworthy in three respects. First, he does not deny that "political agitation [may] stimulate men to the violation of law." Thus, he concedes that antigovernment speech can create a danger of bringing about unlawful consequences. Second, however, he insists that judges should focus on the content of written or spoken advocacy rather than its consequences. His own effort to do so yields the conclusion that only "direct incitement" to unlawful action should be punishable. Finally, he expresses some ambivalence about how to define "direct incitement." On the one hand, he argues that it consists solely of "urging upon others that it is their duty or their interest to resist the law." On the other hand, he concedes that "this may be accomplished as well by indirection as expressly, since words carry the meaning that they impart."

Hand's decision in *Masses* was an early and thoughtful effort to articulate a content-based approach to placing limits on the government's power to punish advocacy of unlawful action. It was not the law for very long, however, because shortly thereafter it was reversed by a three-judge panel of the U.S. Court of Appeals.

29. *Id.*
30. *Id.* at 540-41.
31. *Id.* at 541.
32. *Id.* at 541-42.
33. *Id.* at 540.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Masses* Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917).
Speaking for that court, Judge Rogers noted that Hand “thought no crime had been committed . . . because the publication did not in so many words directly advise or counsel a violation of the act.”38 “This court,” Rogers said,

does not agree that such is the law. If the natural and reasonable effect of what is said is to encourage resistance to a law . . . it is immaterial that the duty to resist is not mentioned. . . . That one may willfully obstruct the enlistment service, without advising in direct language against enlistments . . . seems to us too plain for controversy.39

Judge Rogers thus emphatically rejected Hand’s attempt to articulate a narrow, content-based definition of punishable advocacy of unlawful action. In addition—in his reference to the “natural and reasonable effect of what is said”—Rogers anticipated the shift in judicial focus that would occur a little over a year later when Justice Holmes handed down the Supreme Court’s unanimous decisions in *Schenck v. United States*40 and *Debs v. United States.*41

**B. Schenck and the Birth of Clear and Present Danger**

Holmes’ “danger test,” like Hand’s “incitement test,” came in response to the government’s decision to aggressively enforce the Espionage Act of 1917. Schenck and a second defendant were convicted of violating the Act by sending an antidraft leaflet to men who had been called for military service.42 As described by Holmes, the leaflet

intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street’s chosen few. It said “Do not submit to intimidation,” but in form at least confined itself to peaceful measures such as a petition for the repeal of the act.43

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38. *Id.* at 37-38.
39. *Id.* at 38. Elsewhere in his opinion, Rogers insisted that “[a]dmiration of conspirators convicted of [obstructing the draft] is equivalent to an approval of their crime and an encouragement to others to disobey the law in like manner.” *Id.* at 36. He reinforced this point by expressing full agreement with the statement of U.S. Circuit Judge Charles Hough, who, in an earlier procedural phase of the *Masses* litigation, had insisted that “[i]t is at least arguable whether there can be any more direct incitement to action than to hold up to admiration those who do act.” *Id.* at 38 (quoting the opinion of Judge Hough in *Masses*, 245 F. at 106).
42. *Schenck*, 249 U.S. at 49.
43. *Id.* at 51.
Schenck argued that the leaflet was protected by the First Amendment. Holmes responded that

in ordinary times the defendants . . . 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. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured. . . . It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. . . . If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.

In principle, Holmes’ opinion in Schenck was a major improvement on approaches to protecting speech that permitted the government to punish speech based on its “natural and reasonable consequences” or its “bad tendency” to produce unlawful action. By insisting that speech create a “clear and present danger” of bringing about unlawful action, Holmes appeared to tighten the required nexus between advocacy and unlawful action before advocacy could be punished. At the same time, the opinion presents numerous problems.

First, it is not clear whether Holmes actually used the danger test to decide Schenck. Within a few sentences of his enunciation of the “test,” he concludes that antidraft advocacy that is not successful can nevertheless be punished based on “its tendency and the intent with which it is done.” The speech-protective benefits of the danger test are of course obliterated if it is nothing more than a synonym for the “bad tendency” test of punishable speech.

Second, even if Holmes was using the danger test, it is unclear how assiduously he applied it. Apart from noting that a war was on and that the leaflet was sent to draftees, Holmes offers no evidence to support his conclusion that the leaflet created a “clear and present danger” of obstructing recruitment. Presumably the danger posed by such a leaflet could range all the way from the possibility that a single recruit would be moved to resist the draft to the possibility that the recruiting service itself would be seriously disrupted. Judicial predictions about whether speech will create a particular danger are by definition arbitrary—indeed, one of the most telling criticisms of the danger test is that invites pure acts of judicial speculation—but Holmes apparently felt little need even to speculate.

44. Id. at 52.
45. Id.
Third, the danger test invites judges in cases of alleged incitement to consider not only the "nature" of the defendant's words but also the "circumstances" in which they are delivered. Permitting judges to take into account the circumstances in which antigovernment speech occurs will provide them with an opportunity to uphold the punishment of speech whose content does not come close to constituting "direct incitement." This possibility will be most pronounced, of course, during time of war or other emergencies.

Finally, it can be argued that the danger test is inherently flawed because it protects antigovernment speech as long as no one is listening but authorizes punishment when such speech begins to find a receptive audience. In the case of antiwar speech, it means that constitutional protection vanishes at precisely the time when people have a reason to want to express themselves, that is, when a war has begun. 46

The clear and present danger test as proposed in Schenck, therefore, was not a particularly sturdy libertarian tool. The fragile status of the test was reinforced a week after Schenck when Holmes wrote a further unanimous opinion for the Court upholding the Espionage Act conviction of Eugene Debs. Debs was a long-time leader of the Socialist Party and a prominent antiwar activist. The charges against him were based on a public speech in which he condemned the war and lauded the courage of antiwar activists. Holmes concluded his opinion for the Court, in which the danger test is never even mentioned, by noting that "the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their

natural tendency and reasonably probable effect to obstruct the recruiting service . . .” 47

The significance of Holmes’ initial contributions to the jurisprudence of the First Amendment is therefore quite ambiguous. On the one hand, the danger test was a promising doctrinal mechanism for protecting all but a small portion of antigovernment speech from criminal punishment. On the other hand, by formally inviting judges to take into the account the “circumstances” in which speech is uttered when deciding whether it is likely to produce unlawful action, Holmes diverted attention from what is arguably the simpler and more relevant question of whether speech should only be punishable when it consists of “direct incitement” to unlawful action. 48 Finally, of course, Holmes substantially muddied the waters by failing to choose in his own opinions between requiring a “clear and present danger” and allowing government to punish speech based on its “natural tendency and reasonably probable effect.” 49

Over the next fifty years, the Supreme Court returned periodically to the question of the scope of the government’s power to punish advocacy of violence or other unlawful action. The principal cases involved prosecutions of political dissidents for violating state or federal laws aimed at the suppression of radical political ideologies such as anarchism, syndicalism, socialism, and communism. Given the notorious American cultural antipathy to such ideologies, it is not surprising that the free speech claims of defendants in these cases did not fare well in the courts.

C. The Danger Test from Schenck (1919) to Brandenburg (1919)

In Gitlow v. New York, the Supreme Court rejected a First Amendment challenge to the conviction of a member of the “Left Wing Section” of the Socialist Party. 50 The defendant had distributed a fervent but turgid “Manifesto” condemning not only capitalism, but also “moderate socialism,” and calling for “annihilation of the bourgeois parliamentary state.” 51 He was charged with violating New York’s “criminal anarchy” statute, which prohibited advocating “the doctrine that organized

48. See generally Gunther, supra note 46.
49. In Abrams v. United States, 250 U.S. 616 (1919), Holmes, in dissent, reiterated his belief that the United States may punish speech that produces “a clear and imminent danger” of bringing about substantive evils. He insisted, however, that on the facts of the case—which he described as “the surreptitious publishing of a silly leaflet by an unknown man”—there simply was no danger. Id. at 628.
51. Id. at 656 n.2.
government should be overthrown by force or violence."

The Court concluded that it could not "hold that the [statute was] an arbitrary or unreasonable exercise of the police power of the State warrantably infringing the freedom of speech or press."\(^{53}\)

Two years later, in *Whitney v. California*, the Court reviewed the conviction of a political activist who had participated in a convention called to organize a branch of the Communist Labor Party of America.\(^{54}\) She was convicted of violating California's "criminal syndicalism" statute, which made it a crime to advocate "the commission of crime, sabotage, or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."\(^{55}\) As it had in *Gitlow*, the Court concluded that the statute did not violate the First Amendment because it was not "an arbitrary or unreasonable attempt to exercise authority vested in the State in the public interest."\(^{56}\)

The Supreme Court in both *Gitlow* and *Whitney* concluded that it was irrelevant whether the defendants' expressive activities had created a clear and present danger of bringing about unlawful action. It reasoned that the state legislatures in each case had determined that advocacy of radical political doctrine "involve[s] such a danger of substantive evil that [it] may be punished [irrespective of] whether any specific utterance coming with the prohibited class is likely, in and of itself, to bring about the substantive evil."\(^{57}\)

Justice Holmes (joined by Justice Brandeis) dissented in *Gitlow*. He argued that "[e]very idea is an incitement. . . . But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration."\(^{58}\) Brandeis (joined by Holmes) wrote an opinion in *Whitney* that is widely regarded as a classic statement of the danger

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55. *Id.* at 359-60. Similar or identical laws were passed by about two-thirds of the states between 1917 and 1920. See ELDRI GHE FOSTER DOWELL, A HISTORY OF CRIMINAL SYNDICALISM LEGISLATION IN THE UNITED STATES (1939).


58. *Id.* at 673.
test in its most protective form. 59 “To justify suppression of free speech,” Brandeis said, “there must be reasonable ground to fear that serious evil will result” and that the “danger apprehended is imminent.” 60

There matters stood until the Supreme Court decided Dennis v. United States in 1951. 61 The case involved federal legislation—the Alien Registration Act, better known as the “Smith Act”—which, like the New York statute at issue in Gitlow, prohibited advocating the overthrow of the government by force or violence. The principal purpose of the legislation was to destroy the U.S. Communist Party, but the wartime alliance between the United States and the Soviet Union prevented the government from acting. Once the Cold War began, however, the Party became the target of an intense campaign of repression. 62 On July 20, 1948, the government brought Smith Act charges against twelve leaders of the Party. Following a tumultuous nine-month trial—“the longest criminal trial in American legal history” 63—eleven of the defendants were convicted.

When the case reached the Supreme Court, Chief Justice Vinson authored a plurality opinion in which he spoke for himself and three other justices. He conceded that courts should decide the danger issue even when the legislature has outlawed speech itself (as Congress had done in the Smith Act). As a result, he concluded, the Court in Dennis was “squarely presented with the application of the ‘clear and present danger’ test, and must decide what that phrase imports.” 64

Having accepted the need to apply the danger test, however, Vinson then invoked the facts of the Dennis case to articulate a fundamentally revised version of the test itself. The Communist Party, he said, was a well-disciplined group with the patience to refrain from attempting to overthrow the government until the time was right. An attempt to overthrow the government would therefore not necessarily occur immediately. Moreover, no matter when it occurred, it would not necessarily be successful. But even a futile attempt to overthrow the

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59. Brandeis’ opinion was technically a “concurrence,” because, he said, the existence of a danger could not be ruled out, and, in any case, Whitney had not properly raised the issue in the lower courts.
60. Whitney, 274 U.S. at 376.
63. Stone, supra note 5, at 396.
64. Dennis, 341 U.S. at 508.
government, Vinson said, would do great harm to the nation. As a result, he concluded, it is "impossible to measure the validity [of punishing Communist advocacy of violent overthrow of the government] in terms of the probability of success, or the immediacy of a successful attempt."\(^{55}\)

Vinson chose instead to adopt a version of the danger test that had been proposed by Judge Learned Hand, who by this time was Chief Judge of the Court of Appeals from which the *Dennis* case had been appealed. The question that courts must ask in cases such as *Dennis*, Hand had decided, is "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."\(^{56}\) The version of the danger test proposed by Hand allows the government to punish speech even when it is unlikely to bring about unlawful action, provided the unlawful action itself is sufficiently "grave." The effect of adoption by the *Dennis* Court of Hand’s version of the danger test was to deprive the type of advocacy with which the Communist Party was identified of all constitutional protection.\(^{67}\)

Within a few years of its decision in *Dennis*, however, the Court substantially stiffened its resistance the government’s use of the Smith Act to prosecute the Communist Party. In *Yates v. United States*, the Court reversed the convictions of fourteen “second-string” leaders of the Communist Party.\(^{68}\) Writing for the Court, Justice Harlan ruled that the trial judge had taken an overly broad view of the meaning of the Smith Act’s prohibition of advocacy of forcible overthrow of the government. The jury had been instructed that they were entitled to convict the defendants even though the evidence showed, at most, that they had engaged in advocacy of forcible overthrow of the government as an

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\(^{55}\) *Id.* at 509.

\(^{56}\) *Id.* at 510 (quoting *Dennis v. United States*, 183 F.2d 201, 212 (2d Cir. 1950)).

\(^{57}\) Justices Jackson and Frankfurter concurred in the Court’s decision, but neither was willing to rely on the danger test to reach his conclusion. Justices Douglas and Black not only applied the danger test but also concluded that no danger existed. As Justice Douglas put it,

> There comes time when even speech loses its constitutional immunity. . . . That is the meaning of the clear and present danger test . . . . This record, however, contains no evidence whatsoever showing that the acts charged *viz.*, the teaching of the Soviet theory of revolution with the hope that it will be realized, have created any clear and present danger to the Nation . . . . On this record no one can say that petitioners and their converts are in such a strategic position as to have even the slightest chance of achieving their aims.


“abstract doctrine.” According to Harlan, however, the defendants were correct to contend, as they had before the Supreme Court, that the Smith Act “proscrib[es] only the sort of advocacy which incites to illegal action.”

"The essential distinction," Harlan said, "is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something."

The Yates decision marked the first time in the twentieth century that the Supreme Court as an institution had been willing to rebuff the government’s efforts to punish alleged advocacy of violence or other unlawful action. It also represented an emphatic statement by the Supreme Court that government cannot punish antigovernment speech unless it consists of incitement to concrete unlawful action. Some forty years after the Masses decision, therefore, the Court appeared to endorse Judge Hand’s insistence that courts should rely on a narrow, content-based definition of punishable speech.

Yates made no attempt, however, to clarify the troubled status of the clear and present danger test itself. The test had been proposed in Schenck, overlooked in Debs, rejected in Gitlow and Whitney, and eventually revived, but in mangled form, in Dennis. Not until 1969—in Brandenburg v. Ohio—did the Court bring some closure to the question of the kinds of advocacy that government is entitled to punish and the circumstances in which punishment is constitutionally permissible.

D. The Brandenburg Synthesis

The defendant in Brandenburg was a Ku Klux Klan leader who notified a Cincinnati television station of an upcoming Klan rally. The station sent a reporter and a cameraman to the event, which included a brief speech by the defendant in which he said, among other things, that the Klan was "not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance [sic] taken."

Brandenburg was convicted under the Ohio Criminal Syndicalism statute of advocating "crime, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."

The Supreme Court in its per curiam opinion acknowledged that in Whitney the Court had upheld a similar statute “on the ground that, without more, ‘advocating’ violent means to effect political and economic

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69. Id. at 313 (emphasis in the original).
70. Id. at 324-25 (emphasis in the original).
72. Id. at 446.
73. Id. at 449 n.3.
change involves such danger to the security of the State that the State may outlaw it." 74 The Court insisted, however, that

*Whitney* has been thoroughly discredited by later decisions [which] have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. 75

*Brandenburg* represented the culmination of fifty years of Supreme Court consideration of the constitutional status of advocacy of unlawful action. The decision was hailed by civil libertarians as finally vindicating not only the wisdom of Hand’s insistence on confining government to the punishment of “direct incitement” but also the wisdom of Holmes’ promising but unfulfilled assertion that speech cannot be punished unless it creates a “clear and present danger” of bringing about unlawful action. 76

Ironically, however, a plausible reading of *Brandenburg* is that it did nothing more than restate the constitutional conclusions to which Stephen had come nearly one hundred years earlier. Stephen argued that at the time he wrote—1883—seditious libel consisted, at most, of “direct incitement to disorder and violence.” 77 He also argued that in English law “no imaginable censure of the government, short of a censure which has an immediate tendency to produce [a] breach of the peace, ought to be regarded as criminal.” 78 Viewed in this light, *Brandenburg* symbolized the fact that it had taken American law nearly a century to assimilate principles governing the punishment of advocacy of unlawful action that were recognized by British law by the end of the nineteenth century.

It is also important to note that *Brandenburg* failed to settle two important issues left open by the Court’s decision in *Yates*. First, Justice

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74. *Id.* at 447.
75. *Id.*
76. See, e.g., Gunther, *supra* note 46, at 754-55.
    *Brandenburg* combines the most protective ingredients of the *Masses* incitement emphasis with the most useful elements of the clear and present danger heritage . . . Under *Brandenburg*, probability of harm is no longer the central criterion for speech limitations. The inciting language of the speaker—the Hand focus on “objective” words—is the major consideration. And punishment of the harmless inciter is prevented by the *Schenck*-derived requirement of a likelihood of dangerous consequences.

77. 2 *STEPHEN*, *supra* note 3, at 375.
78. *Id.* at 300.
Harlan in his opinion in *Yates* affirmed the constitutional validity of punishing advocacy of future as well as immediate unlawful action. Innumerable judges and commentators, however, have insisted that inherent in the concept of "incitement" is the requirement that speech cannot be punished unless it is likely to incite immediate unlawful action. In *Brandenburg*, the Court seemed to agree with the latter view, but it also expressly preserved its own earlier decisions in *Dennis* and *Yates*, both of which had endorsed the punishment of incitement to future lawless action. In American law, therefore, it remains unclear whether government is entitled to punish incitement not only to immediate but also to future unlawful action.  

Second, neither *Brandenburg* nor any other Supreme Court decision has delved very deeply into the question of what kinds of messages should qualify as punishable "incitement." Even if judges permit government to punish only what is described as "direct incitement," the question immediately arises of what kinds of messages are subsumed under that label. In particular, if the only thing that constitutes "direct incitement" is a declarative sentence that others are commanded to take a particular action, government would be precluded from punishing a broad spectrum of messages that are intended to produce unlawful action and are highly likely to do so. Courts in the United States and other jurisdictions will therefore soon experience great pressure to examine the definition of punishable "incitement" and to consider including messages other than simple declarations to take immediate or future unlawful action.  

**IV. THE DANGER TEST IN BRITISH AND EUROPEAN LAW**

We turn now to the decisions of British courts and the decision-making organs of the European Convention on Human Rights, i.e., the European Commission of Human Rights and the European Court of Human Rights. In British and European human rights law, recent discussions of the scope of governmental power to punish advocacy of unlawful action—and of the relevance of factors such as the content of speech and its consequences—have occurred in two sets of cases. The first "set" is represented by a single reported case, that of Patricia

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79. For an argument that the danger test should not include a strict "imminence requirement," see Redish, *supra* note 46, at 1180-82.

80. See *id.* at 1176 ("A never-resolved question, first brought out in [the] battle between Learned Hand and Justice Holmes, was whether the first amendment ever allowed sanctions for indirect unlawful advocacy.").

Arrowsmith, whose conviction in the mid-1970s for violating the British Incitement to Disaffection Act 1934 was reviewed first by the Court of Appeal and then by the European Commission on Human Rights. The second set of cases has been more numerous. Beginning in the late 1990s, the European Commission and European Court have been receiving a large number of applications from vocal supporters of Kurdish independence who had been convicted of committing various offenses prohibited by Turkish anti-sedition and anti-terrorism laws.

A. R. v. Arrowsmith (1974) and Punishable Incitement

The facts of the Arrowsmith case closely resemble those with which the U.S. Supreme Court was faced in Schenck. Arrowsmith, a committed pacifist, was arrested while distributing a leaflet on an army base in England. The leaflet was directed at soldiers who might be posted to Northern Ireland, and, under the heading “Open refusal to be posted to Northern Ireland,” it said, in part, that

[a] soldier who publicly stated that he refused to serve in N. Ireland . . . would be taking a courageous stand. . . . Better still, if a group of soldiers made this announcement simultaneously it would make a great impact on public opinion . . . Such an action could lead to court martial and imprisonment. But soldiers who believe, as we do, that it is wrong for British troops to be in N. Ireland are asked to consider whether it is better to be killed for a cause you do not believe in or to be imprisoned by refusing to take part in the conflict. . . . WE WHO ARE DISTRIBUTING THIS FACT-SHEET TO YOU HOPE THAT, BY ONE MEANS OR ANOTHER, YOU WILL AVOID TAKING PART IN THE KILLING IN NORTHERN IRELAND.

Arrowsmith was convicted of violating the Incitement to Disaffection Act 1934, which prohibits “endeavor[ing] to seduce any member of His Majesty’s forces from his duty or allegiance.” She appealed to the Court of Appeal.

Speaking for the Court of Appeal, Lawton LJ concluded that the leaflet constituted “the clearest incitement to mutiny and to desertion.” Alluding to the possible consequences of the leaflet, Lawton said that the court was concerned with “the likely effects on young soldiers aged 18,
19, or 20, some of whom may be immature emotionally and of limited political understanding.\textsuperscript{86}

Arrowsmith appealed to the European Commission of Human Rights, which held, by a vote of 11 to 1, that the applicant's right to freedom of expression under Article 10 of the European Convention on Human Rights had not been violated.\textsuperscript{87} The Commission agreed with the Court of Appeal that the leaflet contained passages that "were to be understood, or could have been interpreted by soldiers, as an encouragement or incitement to disaffection."\textsuperscript{88} The Commission then noted that the applicant had "suggested that the 'clear and present danger doctrine,' as developed by the United States Supreme Court, be applied."\textsuperscript{89} The Commission did not explore this submission, except to say that the notion "necessary"—in the affirmation in Article 10(2) of restrictions on freedom of expression that are "necessary in a democratic society"—"implies a 'pressing social need' which may include the clear and present danger test and must be assessed in the light of circumstances of a given case."\textsuperscript{90} The Commission then noted that

the Director of Public Prosecutions took into account, when deciding to consent to prosecution, the difficult situation in Northern Ireland and the possible effect [of the leaflet] if this campaign was not stopped.\textsuperscript{91}

In a separate and partially dissenting opinion, Mr. Opsahl conceded that the applicant had engaged in "more or less explicit 'incitement'," but he argued that if others "make use of information which has been imparted to them with a view to influencing them, they do so mainly on

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\textsuperscript{86} \textit{Id.}  \\
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring licensing of broadcasting, television or cinema enterprises.  \\
2. The exercise of these freedom, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.  \\
\textsuperscript{89} \textit{Id.} at 233, para. 95.  \\
\textsuperscript{90} \textit{Id}.  \\
\textsuperscript{91} \textit{Id.} para. 96.
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their own responsibility." 92 He also argued that the applicant "did not in the circumstances actually endanger national security or undermine order in the army. . . . No link has been shown [between the applicant's] specific acts and actual dangers to these interests." 93

Mr. Klecker authored a full dissent. He concluded, as had Mr. Opsahl, that it was not clear that "national security would be endangered or crime engendered by the applicant and her small band of supporters. . . ." 94 He also disagreed with the majority that the leaflet itself constituted punishable incitement. The leaflet, he said,

could be considered as a passive form of encouragement or advocacy of the idea that soldiers should leave the army either by going absent without leave or refusing to serve in Northern Ireland. It is passive encouragement in the sense that at no point does it openly advocate in strong terms that soldiers should desert or disobey orders. 95

The opinions of various members of the European Commission in Arrowsmith suggest that, at the very least, it is possible for judges to disagree not only about whether speech creates a clear and present danger—a question to which, by definition, there will never be a conclusive answer—but also, and even in a rather straightforward case, about whether the content of speech constitutes punishable "incitement." 96 The cases from Turkey confirm that while one or both of these issues can sometimes elicit a consensual response from judges, they can also produce genuine disagreement.

B. Kurdish Separatism and Freedom of Speech

Since the early 1990s, the European Commission has been receiving a torrent of applications from persons who had been convicted of violating Turkish anti-sedition and anti-terrorism laws for expressing support for Kurdish independence or for the separatist activities of the Workers’ Party of Kurdistan (PKK). The applicants had been tried by a National

92. Id. at 236-37, para. 6 (Mr. Opsahl, separate opinion, dissenting in part).
93. Id. at 237, para. 7.
94. Id. at 241, para. 9 (Mr. Klecker, dissenting).
95. Id. at 240, para. 7. Mr. Klecker also agreed with Mr. Opsahl that "the aim of influencing others who are themselves responsible for their actions is a legitimate feature of the exercise of freedom of expression and that those who are persuaded to accept the views expressed must carry their own burden of responsibility." Id. at 243, para. 13.
96. Cf. Lustgarten & Leigh, supra note 2, at 210 (discussing the decision of the Court of Appeal: "It is hard to imagine material that fits within the [Incitement to Disaffection Act] more precisely, and [Arrowsmith’s] appeal was rejected.").
Security Court (branches of which operated in various parts of the country) and had appealed unsuccessfully to the Court of Cassation.\footnote{7} Most applicants had been convicted of violating Section 8 of the Prevention of Terrorism Act 1991, which prohibited "[w]ritten or spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation."\footnote{8}

The initial case to reach the European Court was \textit{Zana v. Turkey},\footnote{9} which had been filed with the European Commission in 1991 and was decided by the European Court in 1997. Eighteen additional cases were filed between 1993 and 1995 and decided in 1999 and 2000. We will look first at the \textit{Zana} decision and then, as a group, at the additional cases.\footnote{10}

\section{1. Zana v. Turkey}

Zana was a former mayor of Diyarbakir, the largest city in the Kurdish region of Turkey. In August of 1987, while incarcerated in Diyarbakir military prison, and on the same day that a number of civilians were killed by PKK militants, he made the following statement to journalists:

\begin{quote}
I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake.\ldots\footnote{101}
\end{quote}

The statement was published in a national daily newspaper, and Zana was subsequently convicted by the Diyarbakir National Security Court of violating Article 312 of the Turkish Criminal Code, which at the time went in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake.\ldots\footnote{101}

The statement was published in a national daily newspaper, and Zana was subsequently convicted by the Diyarbakir National Security Court of violating Article 312 of the Turkish Criminal Code, which at the time...
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made it an offense (1) “publicly to praise or defend an act punishable by
law as a serious crime” and (2) “publicly to incite hatred or hostility
between different classes in society, thereby creating discrimination
based on membership of a social class, race, religion, sect or region.”\textsuperscript{102}

The case reached the European Court via the European Commission,
which had decided that Zana’s conviction did not constitute a violation
of his Article 10 right to freedom of expression.\textsuperscript{103} In reviewing the
Commission’s decision, the Court indicated, as a preliminary matter, that
it would “look at the impugned interference [with Article 10 rights] in
light of the case as a whole, including the content of the remarks held
against the applicant, and the context in which he made them.”\textsuperscript{104} In the
\textit{Zana} case itself, the Court said, it would “analyse the content of the
applicant’s remarks in the light of the situation prevailing in south-east
Turkey at the time.”\textsuperscript{105}

The Court concluded that Zana’s remarks were “both contradictory
and ambiguous.”\textsuperscript{106} It also concluded, however, that it should not look at
the statement “in isolation” and noted that “the interview coincided with
murderous attacks carried out by the PKK on civilians in south-east
Turkey, where there was extreme tension at the material
time.”\textsuperscript{107} This
consideration led the Court to conclude that “the support given to the
PKK . . . by the former mayor of Diyarbakir, the most important city in
south-east Turkey . . . had to be regarded as likely to exacerbate an already
explosive situation in the region.”\textsuperscript{108} The Court concluded, by a vote of 12
to 8, that having regard to various factors “and to the margin of
appreciation which national authorities have in such a case,” there had
been no violation of Article 10.\textsuperscript{109}

The approach that the European Court took to the \textit{Zana} case would be
recognizable to anyone familiar with the Justice Holmes’ “clear and present
danger test.” Holmes had proposed that judges should be attentive both
to the “circumstances” in which words are used and to the “nature” of
the words themselves for the ultimate purpose of deciding whether they
create a “clear and present danger” of bringing about unlawful action.

\begin{thebibliography}{99}
\bibitem{102} Id. at 675, para. 31.
\bibitem{103} Id. at 667-75, para. 34.
\bibitem{104} Id. at 689, para. 51.
\bibitem{105} Id. at 690, para. 56.
\bibitem{106} Id. at 691, para. 58.
\bibitem{107} Id. at 691, para. 59.
\bibitem{108} Id. at 691, para. 60.
\bibitem{109} Id. at 691, para. 62.
\end{thebibliography}
The European Court stops short of declaring that Zana’s words created a “clear and present danger”—the Court concludes that the words were “likely to exacerbate an already explosive situation”—but the conclusion itself is based both on the content of the defendant’s words and on the circumstances surrounding their utterance.

2. The Post-Zana Decisions

The cases decided in the wake of Zana—eighteen in all in 1999 and 2000—can be divided into three groups. In most of the cases—fourteen of the eighteen—the European Court concluded—either by a unanimous vote,\(^\text{110}\) or by a vote from which only Judge Golcuklu of Turkey dissented\(^\text{111}\)—that Turkey had violated Article 10 of the European Convention. In two further cases, the Court reached the same conclusion—that Article 10 had been violated—but did so by divided votes of 12-5 and 11-6 respectively.\(^\text{112}\) In the final two cases the Court concluded, as it had in Zana, that Turkey had not violated Article 10. In both cases, however, the Court was divided, reaching its decisions by votes of 11-6 and 10-7 respectively.\(^\text{113}\)

The content and pattern of the Court’s unanimous decisions holding that there had been a violation of Article 10 were similar. In each case, the Court concluded that the impugned publication—e.g., a book, article, or published interview—did not “constitute” or did not “amount to” an “incitement to violence.” The Court also concluded—for various reasons, e.g., the literary character of a published work, the low circulation of a periodical—that it was unlikely that there would be any resulting violence or serious impact on national security or public order. In one formulation that appears in several decisions, the Court concluded that the views expressed in the book (or article or published interview)


The two cases of most interest for our purposes are those in which the European Court concluded—as it had in Zana—that Turkey had not violated Article 10. In Surek v. Turkey (No. 1),\textsuperscript{115} which involved two readers’ letters published in a weekly review, the Court concluded that “in the context of the security situation in south-east Turkey, [the] content of the letters must be seen as capable of inciting to further violence in the region.”\textsuperscript{116} In Surek v. Turkey (No. 3),\textsuperscript{117} which involved the publication of “news commentary” that proclaimed that the Kurdistan national liberation struggle now “embrace[d] 50 districts in 8 provinces in the active front of armed struggle,” the Court concluded that the article “expressed a call for the use of armed force” and that its content “must be seen as capable of inciting to further violence in the region.”\textsuperscript{118}

The foregoing pair of decisions elicited several dissents. All of the dissents took exception either to the Court’s conclusion that the impugned expression constituted “incitement” to violence or to its conclusion that, under the circumstances, the expression was likely to produce violence—or to both conclusions. In Surek (No. 1), for instance, Judge Palm questioned whether the Court had “attached too much weight to the harsh and vitriolic language used in the impugned letters” and too little to “the general context in which the words were used and their likely impact.”\textsuperscript{119} He concluded, after looking at a “combination of [factors],” that “there was no real or genuine risk of the speech at issue inciting to hatred or to violence.”\textsuperscript{120} In a second dissent, Judges Tulkens,

\footnotesize{
114. See, e.g., Erdogdu & Ince v. Turkey, 1999-IV Eur. Ct. H.R. 185, 188, para. 52; Baskaya & Okcuoglu v. Turkey, Apps. Nos. 23536/94 & 24408/94, 31 Eur. H.R. Rep. 10, 292, 396-97 (para. 64) (2001); Erdogdu v. Turkey, App. No. 25723/94, 3 Eur. H.R. Rep. 50, 1143, 1153 (para. 70) (2002). In the cases in which there was only one dissent from the Court’s conclusion that the government of Turkey had violated Article 10, the dissenting judge—Judge Golcuklu of Turkey—emphasized either that there had been incitement to violence, or that the circumstances were conducive to violence, or both.


118. \textit{Id.} para. 40.


120. \textit{Id.}
}
Casadevall and Greve emphasized that freedom of expression "may be curtailed only when there is direct provocation to commit serious criminal offences," and they doubted whether the published letters met this standard.\footnote{\textit{Id.} (Tulkens, J., Casadevall, J. and Greve, J., partly dissenting).} In a third dissent, Judge Fischbach said he could not "detect in the remarks made in the two letters [an] incitement to violence."\footnote{\textit{Id.} (Fischbach, J., partly dissenting).}

In \textit{Surek} (No. 1), one dissenter—Judge Bonello—relied explicitly on the "clear and present danger test."\footnote{\textit{Id.} (Bonello, J., partly dissenting).} Quoting extensively from U.S. Supreme Court decisions—and in particular from Justice Brandeis’ concurring opinion in \textit{Whitney v. California} (1927)—Bonello concluded that applicant’s words “created no peril, let alone a clear and present one.”\footnote{\textit{Id.} Judge Bonello’s dissent is reiterated verbatim in \textit{Surek v. Turkey} (No. 3), App. No. 24735/94, http://www.echr.coe.int/echr, and, as a concurrence, in most of the unanimous or near-unanimous decisions of the Court in which it concluded that Turkey had violated Article 10. \textit{See supra} notes 112, 113.} In \textit{Surek} (No. 3), Judge Maruste authored a separate dissent in which he also invoked the danger test. “I share the opinion of those colleagues,” he said, “who consider that the danger flowing from the speech must be deemed clear and present. This was not the case here.”\footnote{\textit{Surek v. Turkey} (No. 3), App. No. 24735/94, http://www.echr.coe.int/echr (Maruste, J., partly dissenting).}

In sum, the outcome in fourteen of the foregoing cases was that all or all but one of the members of the European Court ruled against Turkey because they concluded that the content of impugned expression did not qualify as “incitement to violence” and/or that its utterance or publication was not likely to lead to violence. In the two cases in which the Court ruled in Turkey’s favor—\textit{Surek} (No. 1) and \textit{Surek} (No. 3)—the majority concluded that in the context of the security situation in south-east Turkey, the impugned expression was capable of inciting further violence. The dissenters asserted, however, that it was unlikely, under the circumstances, that violence would result.

\section*{V. CONCLUSION}

The clear and present danger test will soon be one hundred years old. From its inception in \textit{Schenck} through its invocation in recent decisions of the European Court of Human Rights, it has served as a persistent but erratic touchstone for judicial efforts to define the outer boundaries of government power to punish advocacy of violence or other unlawful action. What conclusions can be drawn about the role that the danger test has played—and may yet play—in determining whether and when
advocacy of unlawful action should be entitled to constitutional protection from government interference?

First, it seems reasonable to conclude that the formulation of the danger test was an "inevitable" judicial event. Had the test not been proposed by Justice Holmes in *Schenck* in 1919, it—or something very close to it—would almost certainly have appeared, sooner or later, in some case somewhere in which a judge or court was asked define how much discretion government should have to punish political dissent. Unless we decide to exempt all speech from punishment, judges will need to determine when and why it is constitutionally permissible to punish some speech. Judicial insistence on the proposition that speech can only be punished when it creates a "clear and present danger" of bringing about unlawful action is a plausible way of narrowly defining the category of speech that government should be allowed to punish.

Once we agree on this proposition, however, it becomes necessary to identify the factors on which to base the conclusion that a danger does or does not exist. The two obvious candidates are the content of the speaker's message and the circumstances in which it is expressed. Not every court that has addressed the question of the constitutional status of advocacy of unlawful action has described the required connection between speech and action in terms of the necessity of a "clear and present danger." Indeed, even the U.S. Supreme Court in *Brandenburg* took pains to avoid using the phrase itself. Beginning at least with Stephen's ruminations on the content of the common law of seditious libel, however, all judicial commentary on the power of government to punish antigovernment speech has insisted that before speech can be punished there should be some connection between speech and unlawful action. In recent years, moreover, most judges have insisted that speech must be clearly and perhaps also immediately likely to produce such action. Finally, judicial commentary has almost universally endorsed the wisdom of taking into account both the content of speech and the circumstances in which it is uttered before reaching a conclusion about whether the specified connection between speech and action has been established.

A second conclusion about the danger test derives from its structure and seems to be substantiated by the foregoing account of its use in various jurisdictions. As originally proposed, the test defined punishable speech as that which creates a "clear and present danger" of bringing about violence or other unlawful action. To determine whether such a danger existed, judges were invited to take into account both the content
of speech and the circumstances in which it was uttered. As a mechanism for protecting freedom of speech, the test was therefore a double-edged sword. On the one hand, it was far more demanding than tests that permitted government to punish antigovernment speech because it prevented the people from having a “good opinion” of their government,\footnote{Cf. Queen v. Tutchin, 14 State Trials 1095, 1128 (Q.B. 1704) (Chief Justice Holt’s charge to the jury in Queen v. Tutchin).} because it raised “discontent or disaffection” among the population,\footnote{Cf. 2 Stephen, supra note 3 and accompanying text (Stephen’s description of one component of the common law of seditious libel the end of the eighteenth century).} or because unlawful action was the “natural and reasonable effect” of its utterance.\footnote{Cf. Masses Publ’g Co. v. Patten, 246 F. 24, 38 (2d Cir. 1917), and accompanying text (per Judge Rogers of the Court of Appeal).} On the other hand, by formally inviting judges to take into account the “circumstances” in which written or spoken words were uttered, the danger test enabled judges to uphold the punishment of antigovernment speech that fell far short of direct incitement to unlawful action. Certainly one lesson from the American experience is that the danger test gave judges who were sympathetic to the government’s view of the dangers of speech an excuse to put to one side any doubts they might otherwise have had about the inciteful content of the speech itself.

If the last point is valid, however, there is some irony in the fact that in the cases from Turkey, it is the European Court judges who are most supportive of freedom of speech who invoke the danger test to justify their conclusions. Objectively speaking, the “security situation” facing the government of Turkey in connection with the struggle for Kurdish independence is almost certainly more serious than, say, the threat to military recruitment or discipline in the U.S. army during World War I, the threat to political stability in the United States in the 1920s or the 1950s, or the threat to discipline in the British army in connection with its deployment to Northern Ireland. The symbolic significance of requiring that speech must create a danger that is both “clear” and “present” before it can be punished is evidently still highly attractive to judges who are inclined to extend to antigovernment speech as much constitutional protection as possible. Even in the context of a violent struggle for independence, it leads such judges to downplay the possibility that the “circumstances” in which separatist speech is expressed are particularly conducive to violence and to conclude that the likelihood of violence has been exaggerated by the authorities.

Of course, it is also true that the European Court is participating, along with other European institutions, in an important campaign to encourage Turkey to understand that ideas that “offend, shock or disturb” are nevertheless entitled to constitutional protection and to pressure Turkey...
to build into its legal system respect for the values of "pluralism, tolerance and broadmindedness without which there is no 'democratic society'." It is nevertheless striking that the danger test and an emphasis on the "circumstances" or "context" in which speech occurs are rallying cries primarily for those judges who most consistently reject the decisions of the Turkish government to punish vocal supporters of Kurdish independence.

Finally, it is important to remember that whatever approach future courts take to the constitutional status of advocacy of unlawful action, they will need to address two questions that were never resolved by American courts and have yet to be explored in detail in other jurisdictions. First, while the concept of "incitement" suggests that the punishment of advocacy of violence or other unlawful action should be restricted to messages that urge immediate action, there is clearly a need to accommodate within the category of punishable speech messages that incite future action. Judicial emphasis on the need for immediate unlawful action may have served a useful constitutional purpose when governments were prepared to punish the expression of a broad spectrum of antigovernment speech, including purely abstract calls for revolutionary political action. The dangers posed by advocacy of terrorist violence are real, however, and the fact that a particular message advocates violence at some unspecified future time should not necessarily exempt it from punishment.

Second, courts will need to address the question of what kinds of messages qualify as "incitement," or, if the preferred term is "direct incitement," what spectrum of messages is encompassed within that term. Again, the emphasis in judicial decisions on the need for direct incitement may have served a useful purpose when governments were prepared to punish antiwar activists for describing the draft as "a monstrous wrong against humanity in the interests of Wall Street’s chosen few," or to punish left-wing political dissidents who called colorfully but abstractly for "annihilation of the bourgeois parliamentary

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129. These are among the "fundamental principles" that the European Court consistently reiterates as a preface to its Article 10 decisions relating to punishment of antigovernment speech. See, e.g., Zana v. Turkey, App. No. 18954/91, 27 Eur. H.R. Rep. 667, 689, para. 51 (1997).

130. Schenck v. United States, 249 U.S. 47, 50, 51 (1919) (Justice Holmes paraphrasing the content of the defendant’s leaflet).
In the times in which we live, however, calling directly for participation in a particular unlawful act is no longer the only effective means of inducing large numbers of individuals to consider resorting to violence. Judge Hand conceded years ago that inciting others to take action "may be accomplished as well by indirection as expressly, since words carry the meaning that they impart." He went on to insist that only the purest form of "direct incitement" should be punishable, but his colleague Judge Hough may have had the better of the argument when he wondered "whether there can be any more direct incitement to action than to hold up to admiration those who do act." Effective incitement can take many forms other than a straightforward call to take a particular unlawful action. Deciding what kinds messages should qualify as punishable incitement to unlawful action in an open society will therefore constitute one of the most urgent and perplexing challenges facing lawmakers and judges in the years ahead.

132. Masses Publ'g Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917).
133. Masses Publ'g Co. v. Patten, 245 F. 102, 106 (2d Cir. 1917).
134. On March 22, 2006, after six months of intensive debate, the United Kingdom Parliament passed the Terrorism Act 2006. Section 1 of the Act outlawed any "statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission . . . of acts of terrorism." Section 1 goes on to specify that "statements that are likely to be understood . . . as indirectly encouraging . . . acts of terrorism . . . include every statement which—(a) glorifies the commission . . . of such acts . . . and (b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances."