DOES THE CLEAR AND PRESENT DANGER TEST SURVIVE COST-BENEFIT ANALYSIS?

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Under American regulatory law, the dominant contemporary test involves cost-benefit analysis. The benefits of regulation must justify the costs; if they do, regulation is permissible and even mandatory. Under American free speech law, in sharp contrast, an important contemporary test for the regulation of speech involves "clear and present danger." In general, officials cannot censor or regulate political speech on the ground that the benefits of regulation justify the costs. They may proceed only if the speech is likely to produce imminent lawless action. In principle, it is not simple to explain why the free speech test does not involve cost-benefit analysis, as indeed both Judge Learned Hand and the Supreme Court insisted that it should in the early 1950s. An initial explanation points to the difficulty of quantifying both costs and benefits in the context of speech. That is indeed a serious challenge, but it does not justify the clear and present danger test, because some form of cost-benefit balancing is possible on a more informal, intuitive basis. A second and more plausible explanation points to the serious risk of institutional bias in any assessment of the costs and benefits of speech. This explanation has considerable force, but it rests on uncertain foundations, because institutional safeguards could be introduced to reduce any such bias. The third and best justification of the clear and present danger test is that in practice, it does not impose high costs, because the speech that ends up being immunized from regulation has not, in practice, turned out to be especially harmful. On this view, the benefits of the clear and present danger test turn out to justify its costs, and the test is not inferior to an approach that would allow regulation of political speech if the benefits of regulation justifies the costs. From 1960 until 2001, this assessment was probably correct for the United States, but fair questions can be raised about whether it is correct today, especially in the context of recruitment to commit terrorist acts, pro-terrorist speech, and certain kinds of "fake news."

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

> "[E]ach agency must . . . propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs . . . ."[2]

I
THE COST-BENEFIT STATE

Imagine that coal companies are emitting harmful pollutants—particulate matter, greenhouse gases, ozone. Imagine, too, that if public officials direct them to reduce their emissions, they will face high costs, perhaps in the hundreds of millions of dollars. Imagine that the benefits of emissions reductions would be mostly felt in the future, in the form of reductions in premature mortality in a decade or more, and a small (but not zero) reduction in climate change. Finally, imagine that the monetized benefits of emissions reductions, with the appropriate discount rate, would dwarf the costs. On those assumptions, is there any doubt that regulation would be a good idea, even though the principal benefits would not be enjoyed for years? (This is not meant to be a difficult question. There is no such doubt.)

Now, suppose that the Department of Homeland Security and the Federal Aviation Administration are considering a new policy to reduce the risk of successful terrorist attacks at airports. They are contemplating the use of a new security scan-

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1 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
2 Exec. Order No. 13,563, 3 C.F.R. 215 (2012).

ner that will (according to experts) prove effective in detecting potential weapons, including small or novel kinds that terrorists might use in the future.[3] The economic cost of the new scanner is high—at least $2 million for each. Federal officials concede that they cannot say, with confidence, that the new scanner will save lives; they cannot even say that it is more likely than not to do so. But they believe that it will reduce the risk of a successful terrorist attack. Would it be a mistake to mandate the scanner? (This is meant to be a difficult question. The answer is not obvious. But mandating the scanner would not be a clear mistake.)

A. Accounting

The two cases just given are standard. Federal regulators often act without the slightest hesitation even though the benefits of their action will not be immediate; indeed, such benefits might occur many years in the future (as in the case of climate change).[4] Federal regulators also act without much hesitation when reasonable people think that the chance of producing any benefits at all is under 50%. Consider, for example, regulations designed to reduce the risk of a nuclear power accident (improbable but potentially catastrophic) or another financial crisis, for example by increasing capital and liquidity requirements. Of course, regulators will not impose costs for no benefits. Instead they will think about the expected value of regulatory requirements. If a mandate will have a 1/X chance of producing $500 million in benefits, it might be worth proceeding even if X is pretty big—and if the potential benefits are (say) $5 billion, a chance of 1/20 would justify a quite costly regulatory mandate.

The American regulatory state has become a *cost-benefit state*,[5] at least in many domains. In deciding whether to impose regulatory controls, officials ask whether the benefits would justify the costs, as mandated by Executive Order

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3 *Cf.* Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 760 F. Supp. 2d 4, 9–14 (D.D.C. 2011) (exploring procedural challenges to adoption of new screening equipment).

4 INTERAGENCY WORKING GRP. ON SOC. COST OF CARBON, U.S. GOV'T, TECHNICAL SUPPORT DOCUMENT: TECHNICAL UPDATE OF THE SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS UNDER EXECUTIVE ORDER 12866, at 2–3 (2013), https://www.whitehouse.gov/sites/default/files/omb/inforeg/social_cost_of_carbon_for_ria_2013_update.pdf [https://perma.cc/FG7E-MSBV].

5 *See* CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION 2 (2018); CASS R. SUNSTEIN, THE COST-BENEFIT STATE ix (2002). On the philosophical issues, see generally MATTHEW ADLER, WELL-BEING AND FAIR DISTRIBUTION xiii (2012).

13,563 and its predecessors.[6] (It is true that some statutes forbid executive branch officials from making cost-benefit analysis the rule of decision,[7] but even when this is so, such officials are required by executive order to provide an accounting.) Sometimes this inquiry presents difficult challenges because quantification of various costs and benefits is difficult. Importantly, administrators have various tools for handling those challenges.[8]

Whether or not those tools are sufficient, the most general point is that in deciding whether to proceed, officials need not be much moved by learning that the benefits would not be imminent, or even that they are not likely to occur at all. The question is *the expected value of proceeding*. A lack of imminence suggests that the discount rate will greatly matter,[9] and of course a low probability of obtaining benefits must be recognized, and it will drive the expected value way down. But these are points about the magnitude of the benefits, which may nonetheless be high, or at least high enough to justify proceeding.

B. Precautions and a Principle

In the regulatory context, some people reject cost-benefit balancing in favor of some kind of Precautionary Principle, calling for regulation even when it cannot be said, with anything like certainty, that precautions will actually eliminate harm.[10] On one view, the proponents of an activity face the burden of proof. They must show that they are not threatening to harm people, and until they meet that burden, they are forbidden from engaging in risk-creating activity. Suppose, for example, that new foods contain genetically modified organisms and that genetically modified organisms may create risks to human health and the environment. If so, many people would understand the Precautionary Principle to ban the marketing of such products.

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6 *See* Exec. Order No. 13,563, 3 C.F.R. 215 (2012). Distributive impacts, equity, and human dignity may all be taken into account. *Id.*

7 *See generally* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 464–71 (2001) (ruling that a provision of the Clean Air Act forbids Executive Branch officials from making a cost-benefit analysis the rule of decision, and noting that the statute requires "an adequate margin of safety" in order to protect health).

8 *See* CASS R. SUNSTEIN, VALUING LIFE 1–9 (2014).

9 For a vivid account, see FRANK ACKERMAN & LISA HEINZERLING, PRICELESS 179–81 (2004).

10 *See id.*; JALE TOSUN, RISK REGULATION IN EUROPE: ASSESSING THE APPLICATION OF THE PRECAUTIONARY PRINCIPLE 39 (2013).

The Precautionary Principle plays a role in many nations, and some version of it can be found in American law as well.[11] It is generally understood to be far more proregulatory than cost-benefit balancing, and those who endorse it do so in part for that reason. No nation has become a Precautionary State, but there are good arguments for taking regulatory steps to reduce uncertain or low-probability risks of harm, certainly if those steps are not especially costly.[12]

Particularly to those who favor cost-benefit balancing, the Precautionary Principle is highly controversial, in part because it seems to require steps that impose risks of their own—and thus violate the Precautionary Principle.[13] If, for example, nuclear power plants are banned on precautionary grounds, nations might have to rely on fossil fuels, which emit greenhouse gases, and thus create serious risks. If foods with genetically modified organisms are banned, more expensive foods or more dangerous foods might be marketed instead. To the extent that the Precautionary Principle forbids the very steps that it mandates, it is paralyzing, even incoherent, and cost-benefit analysis is a preferable approach.

Some people endorse a more limited idea, the Catastrophic Harm Precautionary Principle, which supports regulatory restrictions in cases in which catastrophic harm cannot be ruled out.[14] The basic claim here is that even if a harm is highly unlikely to occur, and even if it will not occur imminently, sensible regulators might be willing to proceed. In certain circumstances, and depending on the costs, it might well make sense to prevent low-probability risks of catastrophe. Airports might be made more secure against the risk of terrorism even if terrorist acts are unlikely. The same point might hold when it

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11 *See* Exec. Order No. 13,563, 3 C.F.R. 215 (2012).

12 *See* JON ELSTER, EXPLAINING TECHNICAL CHANGE 185–207 (1983); DANIEL STEEL, PHILOSOPHY AND THE PRECAUTIONARY PRINCIPLE 199–217 (2015); Cass R. Sunstein, *Irreversible and Catastrophic*, 91 CORNELL L. REV. 841, 897 (2006). Elster, in particular, emphasizes the problem of Knightian uncertainty, which means that it is not possible to assign probabilities to various outcomes. In decision theory, it is sometimes said that in the face of uncertainty, it is best to eliminate worst-case scenarios. *See generally* Stephen M. Gardiner, *A Core Precautionary Principle*, 14 J. POL. PHIL. 33, 33–34 (2006) (exploring when to rule out worst-case scenarios). This view obviously has implications for speech—for example, when we cannot know the probability that certain speech will produce serious harm.

13 *See* INDUR M. GOKLANY, THE PRECAUTIONARY PRINCIPLE: A CRITICAL APPRAISAL OF ENVIRONMENTAL RISK ASSESSMENT 3 (2001).

14 *See* Nassim Nicholas Taleb et al., *The Precautionary Principle (with Application to the Genetic Modification of Organisms)* 3 (Sept. 4, 2014) (Extreme Risk Initiative—NYU School of Engineering Working Paper Series), http://www.fooledbyrandomness.com/pp2.pdf [https://perma.cc/2K5N-E2UN].

is not possible to specify the likelihood of terrorist acts.[15] With respect to regulation in general, no one seriously questions the claim that in some settings, officials should eliminate catastrophic risks, even when it cannot quantify their likelihood.

II
THE COSTS AND BENEFITS OF SPEECH

Is speech different? How?

For purposes of analysis, I am going to use a broadly welfarist framework, suggesting that we should focus on the real-world consequences of various approaches.[16] If, for example, an approach to free speech would seriously harm people's capacity to learn about values or facts, it would be exceedingly hard to defend. (Think: dictatorships.[17]) If an approach to free speech would allow significant numbers of people to be killed, it would have a big strike against it. (Think: free speech absolutism.) It should be readily acknowledged that welfarism raises many questions and doubts. For one thing, it needs to be specified; are we speaking of some form of utilitarianism, or something more capacious?[18] Perhaps more fundamentally, we need to know *what kinds of welfare losses count*. Suppose that certain forms of speech make people sad or mad. May they be regulated for that reason? The standard forms of welfarism must count sadness and anger as hedonic losses, but a system of free speech could not stand as such if it did so as well. If speech could be regulated whenever it made people sad or mad, we would be regulating a lot of speech. (I am not going to count sadness and anger as losses here.)

For those who reject welfarism and think that, for example, a deontological approach to speech would be preferable,[19] my focus will seem quite misplaced. Notwithstanding this point, I believe that a broadly welfarist approach to free speech has considerable appeal, and that we can make considerable progress on the clear and present danger test without running into

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15 *Cf.* ELSTER, *supra* note 12, at 203–04 (discussing elimination of the worst worst-case in circumstances of uncertainty, with reference to nuclear power).

16 *See generally* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982) (discussing the underlying issues).

17 *See generally* AMARTYA SEN, POVERTY AND FAMINES (1981) (discussing dictatorships in the context of poverty and famines).

18 *See* Amartya Sen, *Utilitarianism and Welfarism*, 76 J. PHIL. 463, 463–64 (1979).

19 *See* Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 204 (1972).

murky philosophical waters.[20] The proof, of course, lies in the pudding.

A. Speech and Conduct

At least in principle, current thinking about costs and benefits would seem to apply to speech no less than to conduct. Suppose that we had a perfect technology for making predictions about the probability that certain causes, including speech, will produce certain effects. Suppose that the technology demonstrates that a specified kind of speech—promoting, say, terrorism—is more likely than not to produce serious harm in the form of successful attacks, resulting in two thousand deaths, not in a week or a month, but in two years, or five. In that event, the clear and present danger test is not met, because the danger is not imminent. Or suppose the technology can show that the likelihood that speech will cause harm, tomorrow, is just one in five—but that if the harm does occur, it will be very grave (consisting, again, of two thousand deaths). Again, the clear and present danger test is not met, because the danger is not clear. In both cases, it would seem odd to say that regulation is off-limits. At the very least, it would seem odd to reach that conclusion without further inquiries.

Of course, a full evaluation would require attention to the benefits of the speech, not only its costs. With respect to the assessment of benefits, there are special challenges, perhaps especially for speech that combats a tyrannical or unjust status quo, and that promotes, purposefully or otherwise, violence as a form of resistance. But we could easily imagine cases in which the benefits of speech that has a high expected cost would also be relatively low—so that the outcome of cost-benefit analysis is not at all favorable to protecting such speech. Suppose that in the two cases just given, the speech consists of a wild, paranoid tract against the United States or the West, calling for acts of violence. It seems safe to assume that the benefits of protecting that speech do not justify thousands of deaths.

In analyzing such problems, it is not necessary to use our imaginations. Terrorist organizations are engaged in incite-

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[20] Note as well that even if one embraces a deontological approach to freedom of speech, and believes that the right to speak freely has intrinsic value, one might not be committed to any kind of free speech absolutism. If the consequences of speech are bad enough, the right might be overridden. For those who accept that conclusion, the analysis here will be relevant, even if a full-blown welfarist approach to freedom of speech is unappealing.

ment and recruitment activities every day.[21] Their initial weapon is speech. On the internet and elsewhere, they call for acts of murder and destruction. Let us simply stipulate that however hateful, most or many of these statements cannot be said to be more likely than not to produce imminent lawless action. In such cases, there is no clear and present danger as that phrase is generally understood. Instead, they create a *nonquantifiable risk that such action will occur at some point in the unknown future*. On standard regulatory principles, government may nonetheless be permitted to take action, at least if the benefits of allowing the speech do not exceed the costs. (I will turn to the question of benefits in due course.)

The case of terrorism may be unique, but the analysis can be extended to an assortment of problems, some relatively new (at least in their prominence) and some on the horizon. Consider efforts, by foreign agents or by Americans, to disseminate "fake news" so as to skew elections or to foment social discord.[22] We could readily imagine that the dissemination of such "news" cannot be shown to present a clear and present danger. But is it so clear that efforts to skew electoral outcomes, by the spreading of knowing falsehoods, should be protected by the First Amendment? Is it so clear that some kind of balancing is not in order?[23]

Such balancing is hardly foreign to free speech law. Indeed, a kind of cost-benefit balancing played a crucial role in *Dennis v. United States*,[24] a decision that is generally treated as a dinosaur, or an object of ridicule, in constitutional law circles. The case involved an alleged conspiracy by members of the Communist Party hoping to overthrow the U.S. government. The Court said that it was "squarely presented with the application of the 'clear and present danger' test, and must decide what that phrase imports."[25] In that sense, the Court

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21 *See* MARC SAGEMAN, MISUNDERSTANDING TERRORISM 89–92 (2017).

22 A valuable discussion is found in Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 219–31 (2017).

23 I am bracketing two intriguing questions: (1) whether and when foreign agents, and those who might listen to them, have free speech interests and (2) whether and when false statements of fact are protected by the First Amendment. On the first question, see Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972) (holding that would-be listeners to foreigners, outside the United States, can claim a degree of First Amendment protection, subject to congressional override). On the second question, see Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1437–40 (2015).

24 341 U.S. 494, 503 (1951).

25 *Id.* at 508.

purported to apply rather than to reject that test. The Court explained:

> Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. . . . Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt.[26]

At that point, the Court referred to Judge Learned Hand's formulation for the court below, a form of cost-benefit balancing in accordance with which, "[i]n each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[27] The Court adopted this standard as its own, on the ground that it "takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words."[28]

Not coincidentally, Judge Hand's free speech formula is similar to the famous Hand formula for negligence, celebrated in (and actually helping to spur) the economic analysis of law. Judge Hand's negligence standard calls for cost-benefit analysis:

> Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B;

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26 *Id.* at 509.

27 *Id.* at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)) (alteration in original).

28 *Id.*

> liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL.[29]

For speech, Judge Hand was singing the song of contemporary American regulators, and in *Dennis*, the Court embraced the idea as a rendering of the clear and present danger test. But today, almost no one likes that idea.[30] Why not?

B. "More Speech, Not Enforced Silence"

1. *Counterspeech.* In their great free speech opinions, Justices Oliver Wendell Holmes, Jr. and Louis Brandeis emphatically rejected cost-benefit balancing. Brandeis offered the most elaborate explanation. In his view, "[o]nly an emergency can justify repression."[31] That conclusion undergirded his own understanding of the clear and present danger test, which (contrary to *Dennis* and Judge Hand) required a showing of imminence. In his account, "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."[32] As he put it, that is "the command of the Constitution," and it "must be the rule if authority is to be reconciled with freedom."[33]

Some of this is mere rhetoric on Justice Brandeis' part. The imminence requirement is not clearly "the command of the Constitution."[34] There are plenty of ways to reconcile authority with freedom, and the clear and present danger test is merely one. The *Dennis* approach may or may not be under-protective of speech, depending on how we understand the optimal level of protection, but it is surely an effort at reconciling authority and freedom. Perhaps it is not the best one. At one point, Judge Learned Hand himself offered a radically different route, one with great contemporary relevance in light of the rise of terrorism. In his view, the free speech principle does not pro-

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29 United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d. Cir. 1947).

30 On the need for the word "almost," see the qualified defense of *Dennis* in Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 8–36 (1986).

31 Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

32 *Id.*

33 *Id.*

34 *See generally* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 264–94 (2017) (demonstrating that the First Amendment was not originally understood to include the clear and present danger test).

tect explicit or direct incitement to violence, even if no harm is imminent.[35] If you are merely agitating for change, the government cannot proceed against you, but if you are expressly inciting people to commit murder, you are no longer protected by the Constitution. What matters is what you are saying, not whether it will have bad effects. Judge Hand greatly preferred his approach to the clear and present danger test, which he thought squishy and susceptible to biased assessments by federal judges. As he wrote:

> I am not wholly in love with Holmesy's test and the reason is this. Once you admit that the matter is one of degree, while you may put it where it genuinely belongs, you so obviously make it a matter of administration, i.e. you give to Tomdickandharry, D.J., so much latitude . . . that the jig is at once up. Besides even their Ineffabilities, the Nine Elder Statesmen, have not shown themselves wholly immune from the 'herd instinct' and what seems 'immediate and direct' to-day may seem very remote next year even though the circumstances surrounding the utterance be unchanged.[36]

Of course, cost-benefit analysis has been criticized on similar grounds,[37] though modern economic strategies can greatly reduce the problem.[38] By contrast, Judge Hand defended his exemption of incitement as a "qualitative formula, hard, conventional, difficult to evade."[39] Judge Hand's test would of course allow punishment of terrorist speech if and to the extent that it qualifies as incitement. (Note that Judge Hand's preferred test was hardly a cost-benefit test of the sort that he later embraced as a lower court judge in *Dennis*, because it embodied a categorical distinction; he preferred it in part for that reason, a point to which I will return.)

Whether or not it is right to exclude incitement, as Judge Hand understood it, from the protection afforded by the First Amendment, Justice Brandeis' approach cannot simply be read off the Constitution, and we cannot see the *Dennis* approach as necessarily or inherently incompatible with it. To be sure, the First Amendment protects "the freedom of speech,"

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35 *See* Masses Publ'g Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

36 Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 749 (1975) (quoting Letter from Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921)).

37 *See* Thomas O. McGarity, *Professor Sunstein's Fuzzy Math*, 90 GEO L.J. 2341, 2341–42 (2002).

38 For general discussion, see W. KIP VISCUSI, PRICING LIVES (2018).

39 Gunther, *supra* note 36, at 749 (quoting Letter from Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921)).

but you can embrace that form of freedom while agreeing or even insisting that on a certain showing of harm, regulation or subsequent punishment is acceptable.[40] Justice Brandeis' judgment on behalf of his understanding of the Constitution's command depends on arguments of his own, not a mere announcement of the inevitable meaning of the First Amendment.

2. *Imminence*. Of course, Justice Brandeis does offer an argument, and it is an exceedingly famous one to boot. The argument is essentially a defense of the imminence requirement: if there is time to avert the evil through discussion, then the remedy is not forced silence, but counterspeech. Instead of censoring speech or threatening to punish it, the government should attempt to rebut it. If people call for overthrow of the government, or claim that women should be subordinate to men, or attack racial minority groups, their arguments should be answered on the merits. For reasons elaborated by John Stuart Mill,[41] that process of rebuttal has numerous advantages: it corrects error, opens up new possibilities, sharpens thought even when it does not change it, undoes complacency, and helps societies to move in the direction of truth.

These are appealing ideas, but on reflection, they are a bit of a mess, certainly as a defense of the clear and present danger test in genuinely hard cases. Suppose that a speaker is saying something that is 49% likely to result in the death of 5,000 children, not imminently but in the next two years. Should the speaker be allowed to impose that risk? Or to sharpen the objection to Justice Brandeis, suppose that the probability of those 5,000 deaths is 99.99%, again not imminently but in the next two years. Why is imminence necessary? By emphasizing the potential value of discussion, Justice Brandeis is fighting the hypothetical. He is assuming or stipulating that because there is no emergency, speech can provide the remedy. Maybe so, but that is simply a way of denying the predicate of the question, which seems to deserve a real answer.

The regulatory analogy is helpful here. In the domain of regulation, the fact that a harm is not "present," in the sense of likely to occur imminently, is hardly a sufficient reason not to engage in regulation. No one contends that imminence should be a precondition for regulation. If a lack of imminence is not a sufficient reason to stop regulation in general, the question

40 See, e.g., Campbell, *supra* note 34, at 264–94, for evidence.

41 *See* JOHN STUART MILL, ON LIBERTY (Gertrude Himmelfarb ed., 1985).

remains: why is it a sufficient reason to stop regulation of speech?

It is true that with respect to Justice Brandeis' central concerns, speech may be unique; for (say) pollution, the harm that regulators seek to address is unlikely to be addressable (merely) through discussion, if only because we are not dealing with speech but action. If a company is planning to emit high levels of fine particulate matter in the next year, it would be puzzling to insist that the right response is more speech. To be sure, people could say to polluters, "Stop polluting!" But under plausible assumptions, that is not likely to be enough. Moral suasion can certainly help, but to stop environmental harm, we usually need action as well.

But to tighten the analogy with harmful speech, we might point out that environmental harm might well be addressable through some other means, short of immediately regulating the underlying conduct. Regulators might want to adopt a strategy of "wait, then act." If the harm is premature mortality or climate change, a less-than-imminent harm might well turn out to be preventable at some point before it actually occurs. For climate change in particular, adaptation, or some unforeseen technological fix, might prevent the harm in (say) 2040. That possibility raises a fair question, often offered by objects of regulation: *why should we impose expensive precautions today?* Whenever the issue involves health and safety, it is possible to think that interim steps will prevent the feared harms from coming to fruition. Would it not be better to delay costly measures until tomorrow, or the day after?

Possibly so,[42] but often not. The best answer, of course, is suggested in *Dennis* itself: if we do not act now, action might turn out to be too expensive or too late.[43] An ounce of prevention might well be worth a pound of cure. Regulators should certainly consider the question of timing and the possibility that the harm can be averted through other means, but there is no reason to foreclose regulatory action merely because the harm is not imminent. As always, the relevant numbers are critical to the analysis; if the probability of averting the harm is 50%, the benefits should be discounted accordingly, while also taking into consideration the costs of the steps that would avert the harm. A complete analysis would consider the full set of

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42 See the discussion of precautions and delay in Cass R. Sunstein, *Irreversible and Catastrophic*, 91 CORNELL L. REV. 841, 864–65 (2006).

43 *See* Dennis v. United States, 341 U.S. 494, 509 (1951); *see also* discussion *supra* subpart II.A.

costs and benefits, with reference to the appropriate discount rate and estimates of all relevant probabilities. But (and this is the central point) it would hardly lead to Justice Brandeis' insistence on imminence.

The upshot is that the imminence requirement is difficult indeed to defend, unless it is a rough-and-ready way to instantiate the idea that the harm must be likely. Justice Brandeis might be thinking that if the harm is not imminent, it is simply too speculative to say that it is likely, and that harms that are not imminent are unlikely to come to fruition so long as discussion is available. It would be lovely to think so. But it is not true; harms that are not imminent often come to fruition, and sometimes they are likely to do so.

3. *Likelihood.* So much for the imminence requirement. What about the idea that harms must be *likely*, taken by itself? We could imagine a free speech regime that requires a showing of likelihood but that says nothing at all about imminence: a high likelihood ten years hence is the same as a high likelihood tomorrow—but a high likelihood is what is required. As in the regulatory context, however, this is a puzzling view. A 10% risk of catastrophe may deserve more attention than a 55% risk of modest harm; at least as a first approximation, expected value is what matters.[44] What is so magical about a probability of more than 50%? Why should that be the threshold?

At its origin, the idea of a "clear" danger almost certainly meant something far more modest, now lost to history. When Justice Holmes first announced the clear and present danger test, he did not intend anything especially speech-protective.[45] And when he used the word "clear," he might well have meant not "more likely than not," but something more akin to "real rather than fanciful." On that view, the word "clear" was intended to clarify the word "danger" in a modest way, by signaling the simple fact that the government must actually be able to point to one. That would bring free speech law closely into line with regulatory standard, where fanciful risks also cannot be regulated (because regulation would fail cost-benefit balancing); and, of course, such a test would be a far cry from current law.

As a matter of current understandings, however, this point is moot. In *Brandenburg v. Ohio*, the Court read "clear" to

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44 If people are risk-seeking or risk-averse, of course, it might not be sufficient to consider expected value alone.

45 *See* THOMAS HEALY, THE GREAT DISSENT 92–104 (2013).

mean "likely."[46] That interpretation has been unchallenged for decades. What I am suggesting thus far is that the unchallenged interpretation seems very hard to defend, because cost-benefit balancing is better. Indeed, the difficulty of defending it becomes only clearer when we expand the viewscreen. In regulation, as noted, the expected value of the harm is only one part of the picture; the benefit of the underlying activity matters as well. We might be dealing with socially beneficial activity, and it might cost (say) $900 million to regulate it, or we might be dealing with activity from which society does not much benefit, and it might cost $1 million to regulate it. It much matters whether we are dealing with highly beneficial activity or not.

Should not the same be true for speech? And once we start thinking in terms of both benefits and costs, we will be refining the framework in *Dennis*, in a way that makes that framework compatible with regulatory approaches more broadly. In the cost-benefit state, why would that be a mistake?

III
DEFENDING LIKELIHOOD AND IMMINENCE

I now turn to three possible defenses of the clear and present danger test, taking them in ascending order of persuasiveness. The first is that in light of the insuperable difficulties of quantification, cost-benefit analysis is not feasible in this domain. The second points to the pervasive risk of institutional bias, arguing that the clear and present danger test is a second-best, designed to counteract that bias. On that view, the test is actually what cost-benefit analysis calls for, because it responds to the danger of inaccurate case-by-case assessments. This would be in the nature of a rule-consequentialist defense of the clear and present danger test.[47] The third, and the most convincing, justification is that in the real world, the cases for which the clear and present danger test fails did not exist in the last half of the twentieth century, or at least could not easily be identified if they did exist. If the second and the third justifications are put together, the clear and present danger test looks pretty good.

A reasonable conclusion is that the clear and present danger test is not easy to defend in principle or in the abstract. But the difference from the more general regulatory context is that it is hard to list real-world situations in which speech should be

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46 395 U.S. 444, 448 (1969).

47 *See* BRAD HOOKER, IDEAL CODE, REAL WORLD: A RULE-CONSEQUENTIALIST THEORY OF MORALITY (2003).

regulated because it produces nonimminent, low-probability harms. Because of the rise of terrorism, fake news, and related threats, however, the first half of the twenty-first century might be different from the second half of the twentieth on that count.

A. Challenges of Quantification

In the world of regulation, it is often possible to quantify both costs and benefits. For example, an energy efficiency regulation might be anticipated to cost $200 million per year. It might save consumers $400 million per year and also reduce air pollution by specified amounts, with monetizable effects. If so, the aggregate benefits are far higher than the aggregate costs. Analysis of this kind is standard for federal regulations.

The whole exercise is far more challenging for speech, and in some ways, it is neither feasible nor attractive. Suppose that a speaker is calling for violent acts to resist what he sees as oppression. Suppose that the acts will result in some number of deaths. We might enlist the usual number of the value of a statistical life, which is in the general vicinity of $9 million,[48] and multiply that by the number of lives at risk, discounted by the probability that the bad outcome will occur. But there are multiple uncertainties here. How many lives are at risk? Is $9 million the correct number in this particular context? What is the probability? Perhaps analysts can produce lower or upper bounds, which might make the analysis more tractable. But the guesswork here is substantial.

Valuation of the benefits of speech is even more difficult. Suppose that we are dealing with pro-Communist speech, racial hate speech, Nazi marches, terrorist recruitment, celebration of terrorist attacks, fake news of some kind, or calls for overthrow of a government. What is the benefit of that speech? Can we quantify it?

One way to answer that question would require us to probe some deep questions. We might protect speech because it protects autonomy; because it serves the goal of arriving at truth; because it is a safety valve; because it is indispensable to self-government; or because it promotes social welfare.[49] These are of course among the largest issues in free speech theory. Even

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48 *See* Memorandum from U.S. Dep't of Transp., Guidance on Treatment of the Economic Value of a Statistical Life (VSL) in U.S. Department of Transportation Analyses—2015 Adjustment (June 17, 2015), https://www.transportation.gov/sites/dot.gov/files/docs/VSL2015_0.pdf [https://perma.cc/7RZT-65RS] (setting value of statistical life for 2015 at $9.4 million).

49 For an instructive overview, see SCHAUER, *supra* note 16.

if we believe that one of these things is true, or that all of them are true, we will not have made much progress toward valuing benefits. If we are serious about costs and benefits, the valuation exercise requires quantification. For pollution reduction, it is usual to begin by asking about the real-world effects (reduced mortality, reduced morbidity), and then to quantify them (500 premature deaths averted, 2,000 nonfatal cancer cases averted), and then to turn them into monetary equivalents (usually with resort to the idea of people's willingness to pay).[50] For speech, steps of that kind are both difficult and (to put it mildly) not self-evidently attractive.

To value speech, we would hardly want to rest content with asking speakers how much they would be willing to pay to retain their right to say what they want (or how much they would demand to give up that right). That would be patently inadequate, a kind of category mistake. The value of the right to speak out or to take part in a political protest—say, by people objecting to police brutality or the practice of abortion—is not properly measured by asking speakers how much they would pay for it. One reason is that even if the answers to such questions are in some important sense relevant, the value of speech is not captured by its value to speakers; the audience matters as well, and it is probably what matters most. On one view, free speech is for listeners even more than speakers.[51]

To assess the value of speech to listeners, would it make sense to ask (a random sample of?) people how much they would be willing to pay to hear certain speeches? To ensure that certain speakers are allowed to speak? In a nation that values freedom, those are terrible questions. One reason is that speech is supposed to affect, and not simply to track, people's values and preferences. Economic analysis of willingness-to-pay does not adequately capture what matters. (Of course, some people think that the same is true for pollution,[52] but at least the theoretical justification is well-developed in that context.) Another reason is that people's judgments about the value of speech may well depend on whether it pleases them, which would produce a distorted assessment of the benefits of speech; whether speech is valuable does not depend on whether it pleases people.

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50 *See* SUNSTEIN, THE COST-BENEFIT REVOLUTION, *supra* note 5, at 39–66.

51 *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM (2000).

52 *See* Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1553–56 (2002).

For these reasons, the usual approach to valuing costs and benefits fails in this context. It presents insuperable empirical problems, and even if these could be surmounted, there are serious normative objections to using that approach. But what is the implication of these conclusions? *Dennis* did not purport to use economic analysis of any formal kind; it endorsed something far looser and more intuitive, designed to specify or soften the clear and present danger test in circumstances in which the danger was neither clear nor present. The basic idea is that *if speech has a positive probability of causing or contributing to egregious harm, government is not powerless to prevent it.* We can take this idea as a form of rough-and-ready cost-benefit analysis or as a version of the Catastrophic Harm Precautionary Principle. And indeed, it can be read as either. The basic point is that the difficulty of quantifying costs and benefits is neither a convincing objection to the *Dennis* approach nor an adequate defense of the clear and present danger test.

B. Institutional Bias

An alternative view is that the clear and present danger test is an excellent response to a pervasive institutional risk, which is that the government's own assessments will be systematically skewed, above all because its own self-interest, and the interests of powerful private groups, are so often at stake. The risk, in other words, is that while invoking the prospect of harm and speaking of expected value, public officials are actually trying to insulate themselves from criticism. Their real concerns are about protecting their own power and legitimacy, rather than protecting the society from danger. Our own history speaks volumes here.[53] Internationally, one can readily think of examples from Russia, China, Cuba, and Turkey.

Suppose, for example, that some protesters, objecting to what they see as racist violence by the police, demonstrate noisily in a large city, or that other protesters, skeptical of what they see as an overreaching national government, are vigorously objecting to recent legislation. Public officials might complain about a risk of violence, but their actual goal (whether conscious or not) might be to insulate themselves from criticism. Their interest in precautions, and their assessment of costs and benefits, will be systematically self-serving—an unreliable and even dangerous basis for authorizing action. Any

53 *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004).

Precautionary Principle, with respect to the harms stemming from speech, would put democracy itself at immediate and severe risk.

Cost-benefit analysis might seem much better, but it suffers from precisely the same vice, which is that it enables untrustworthy officials to invoke a seemingly neutral and abstractly appealing standard in defense of outcomes that actually violate that very standard. On welfarist grounds and in principle, the clear and present danger test might not be close to perfect. But in the real world, it is incalculably (so to speak) preferable to what would emerge from open-ended balancing by unreliable balancers. In short, it considers the risk of manipulation and biased judgment by those actually charged with assessing the costs and benefits. It has a rule-consequentialist justification, even if it misfires in some cases.

In the regulatory context, a similar argument is not unfamiliar. A standard claim, especially within the business community, is that government regulators typically overstate the benefits and understate the costs of what they do.[54] Whether or not that is true, the proper response, if it is indeed true, is to put in place institutional safeguards that correct mistaken judgments.[55] We might, for example, allow assessment by some kind of independent entity within the executive branch, or insist on judicial review of the agency's analysis. As in the context of regulation in general, so in the free speech context*: the most natural response to institutional bias is to create safeguards to combat it.*

Federal judges need not defer to whatever legislative and executive officials think; they could force them to meet a (high) burden of proof. On this approach, some version of the *Dennis* test would be firmly in place, but with strong judicial efforts to reduce the risk of bias. Other institutional safeguards might be put in place to reduce that risk, in the form of independent analysts within the legislative or executive branches, whose job would be to monitor the assessment of both costs and benefits. It is true that without a clear and present danger test, the very prospect of a prosecution or lawsuit, with its burdens and costs, might impose a large chilling effect on speech, even if

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54 *See* CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 173–89 (2013).

55 *See* Michael Greenstone, *Toward a Culture of Persistent Regulatory Experimentation and Evaluation*, *in* NEW PERSPECTIVES ON REGULATION 118–22 (David Moss & John Cisternino eds., 2009), http://www.tobinproject.org/sites/tobinproject.org/files/assets/New_Perspectives_Ch5_Greenstone.pdf [https://perma.cc/F58G-GGZL].

independent actors would ultimately be available to reduce the danger of bias. That is an important point. But it is hardly clear that it is sufficient to justify allowing speech that would impose a risk of creating serious or even catastrophic harm.

The upshot is that the risk of institutional bias is significant and entirely real, but the more direct corrective is not to jump from a cost-benefit test to a clear and present danger test, but to increase the likelihood that the proper test will be properly applied. The institutional defense of the clear and present danger test is forceful but incomplete. It identifies the right ailment, but it does not offer the most obvious cure. The question is whether that cure is available. The most that can be said is that if the right cure is unavailable, the clear and present danger test might be a second-best—but the institutional defense cannot, on its own, produce a full-scale justification of that test.

C. As It Happens

Here is a final argument on behalf of the clear and present danger test. In my view, it is basically convincing—or at least it has been convincing for most of the period in which the test has held sway. The problem is that it depends on empirical assumptions that will not always hold, and that probably do not hold today.

The central claim is that in the world in which we have lived and perhaps continue to live, the cases that confound the clear and present danger test arise rarely or not at all. I have pointed to situations in which harm is neither likely nor imminent, as when speech causes a 1/x risk of harm in a distant future. But the stubborn fact is that in such cases, the costs of allowing the speech have turned out to be low (in reality), and those costs can be avoided or minimized without restricting speech—as, for example, with counterspeech and by taking strong (and not unduly costly) steps to avert violence.

Suppose, for example, that a number of people call for violent acts in circumstances in which the clear and present danger test is not satisfied—to overthrow the government, to kill police officers, to have some kind of revolution. If such calls *in fact* produce violent acts that could not be prevented through other means, then the argument for speech regulation would be difficult to avoid. The clear and present danger test would be responsible for tragedy. But (the argument goes) there are essentially no such cases.

On this count, the regulatory context is altogether different. It is easy to find many cases in which regulation is important or even critical to prevent harms even if they would not occur imminently.[56] For situations of low-probability risks, it is more difficult to find many examples, but it is plausible to think that in the context of nuclear power and financial stability, numerous actions have been justified and desirable even if the harms were not "likely." A clear and present danger test would make no sense for regulation in general; it would impose intolerably high net costs. The same cannot be said in the context of speech. And that is, in a nutshell, the central defense of the clear and present danger test.

We would need a lot of detail to know for sure, but for the decades in which the clear and present danger test has held sway, this defense is plausibly convincing. Defenders of *Dennis* would be hard-pressed to point to situations in which their preferred approach would have prevented serious harm. To be sure, everything depends on assumptions about the state of the world. With certain assumptions in place, defenders of *Dennis* might be able to undertake that task. And even if they could not, we could easily imagine a nation, facing a high degree of volatility and serious risks of speech-induced violence, in which the argument for something like the *Dennis* approach would be quite strong. (From the standpoint of the British, would that have been the situation in the American colonies in the years immediately preceding the American Revolution? Is that the situation of many nations now?) And in an era of international terrorism and fake news, the argument for something like *Dennis* might well be stronger. At the very least, reasonable people might think so.

Is it? To some extent, that is an empirical question. To put the issue in sharp relief, suppose that within the next (say) ten years, there is a significant chance (say, 45%) of two or more serious terrorist attacks in the United States, each producing a loss of 2,000 or more lives, with proliferating harms of high magnitude. Suppose, too, that if relevant terrorist recruitment speech is banned,[57] both of those attacks would be prevented. If so, the cost-benefit calculus might well come out favorably to regulation—and the *Dennis* approach might well be better. At

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56 One example is depletion of the ozone layer. *See* Cass R. Sunstein, *Of Montreal and Kyoto: A Tale of Two Protocols*, 31 HARV. ENVTL. L. REV. 1, 1–9 (2007).

57 I am bracketing the question whether the speakers are inside the United States and simply assuming that they can avail themselves of the First Amendment.

least this is so if we believe (as I do) that the benefits of terrorist recruitment speech are essentially zero.

I do not mean to press any empirical claims here. But with this sketch of the best arguments for the clear and present danger test, we can see that under imaginable assumptions, it would have unacceptably high net costs. If the risk of institutional bias could be cabined, and if the test would allow horrifying acts to occur, then *Dennis* would be better. It is hard to say that the clear and present danger test has caused a great deal of mischief over the last fifty years. But it is not implausible to say that it will cause mischief over the next fifty years. In the context of terrorism and certain kinds of "fake news," whether that possibility justifies something more like *Dennis*, or perhaps akin to Judge Hand's incitement test, is at least a question worth asking.

CONCLUSION

The modern regulatory state uses cost-benefit analysis as its standard rule of decision, and it would not make much sense to say that the regulatory choices of the Environmental Protection Agency, the Department of Transportation, and the Department of Health and Human Services should be based instead on the clear and present danger test. Reasonable people have contended that cost-benefit analysis fails to take sufficient precautions against risks; almost no reasonable person argues that such balancing generally produces excessive regulation (even if it might do so in particular cases).

In principle, some form of cost-benefit balancing might well seem preferable to the clear and present danger test in the context of speech as well. A natural objection involves valuation: What, exactly, are the costs and the benefits of speech that (say) calls for some kind of political revolution? That is an excellent question, but at least in some cases, it is unnecessary to resolve difficult questions of valuation in order to say that the balance comes out unfavorably to speech, even though no danger is clear and present.

The best justifications for the clear and present danger test point to institutional biases and to the possibility that the cases that confound that test are not likely to arise in the real world. It need not be emphasized that public officials will often find a danger even when there is no such thing; their own desire for self-insulation will distort their judgments. It is true that institutional safeguards could reduce or perhaps eliminate this problem, which makes it important to contend that as

opposed to the clear and present danger test, *Dennis* responds to a generally nonexistent problem, or a problem that is best handled not through censorship, but with counterspeech and law enforcement.

In the United States from the period between 1960 and 2001, that conclusion seems right. But it is less obviously right today. The clear and present danger test is not a test for all seasons. In imaginable times and places, it rests on uncertain assumptions. Even in the face of international terrorism and the dissemination of "fake news" by foreign governments and others who seek to disrupt democratic processes,[58] it would be reckless to say that we would be better off without that test. But it is not reckless to say that that is a perfectly fair question to ask.

58 *See supra* text accompanying note 23.