CONCURRING OPINIONS

FAN 35 (First Amendment News) Clear & Present Danger in the states — Holmes's Legacy

By Ronald K.L. Collins
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46 States & 209 statutes

Incredibly, commentators have long overlooked one of Holmes's greatest contributions to American law, namely his contribution to state statutory law. Today, 46 states have codified, in one form or another, Holmes's clear-and-present-danger formula for either civil or criminal liability. This codification, found in 209 state statutes, is not limited to criminal advocacy cases. State lawmakers have tapped Holmes's famous formula for any variety of purposes, including but not limited to the following categories of regulation:

- Parental rights
- Food and drug safety
- Witness protection
- Bullying in schools
- Gun safety
- Therapist and counselor privilege
- Building safety
- Environmental reports
- Banking law
- Involuntary commitment
- State-municipal loans
- Treatment of the elderly

Because this body of statutory does not concern free speech cases involving criminal advocacy, *Schenck* and its progeny leading to and beyond *Brandenburg v. Ohio* need not govern the interpretative meaning of the clear-and-present-danger formula. In other words, state courts are largely free, consistent with other legal constraints, to give such statutes whatever interpretative gloss they wish.

Re Freedom of Expression

Of the 209 state laws that currently employ the clear-and-present-danger language, 40 have done so in matters relating to freedom of expression and/or assembly. Examples of such laws include the following:

- Regulation of the content of student newspapers
- Regulation of speech advocating the overthrow of the government
- Regulation of speech related to the incitement of riots
- Criminal contempt with respect to publication of court proceedings
- Regulation of criminal syndicalism
- Regulation of reading materials of the mentally ill
- Regulation of free assembly
- Regulation of expression in public places where alcohol is served
- Regulation of prison inmate correspondence

422 State Court Opinions

Such statutes, by contrast to the previous ones, raise First Amendment concerns, though the meaning assigned to the clear-and-present-danger formula will not always track that of *Schenck* and its progeny. In other instances – say, in cases involving either student or prisoner expression – state courts may use a standard of review less demanding than that of either Holmes's *Abrams* dissent or the *Brandenburg* holding. In still other cases, state courts relying on their own law may assign a different meaning to the phrase or even a meaning more constitutionally stringent than the one employed in *Brandenburg*. However such concerns may be, it is notable that, in the past decade alone, appellate courts in forty-one states have rendered some 422 opinions in variety of cases in which a clear-and-present standard, of one form or another, was employed.

The interpretation of all such Holmesian statutes might likewise bow to the Holmesian maxim that such laws are but a "mere text-book recommended by the government" to aid in assigning meaning to these statutory provisions. For Holmes, that meaning is to be discerned less by grandiose phrases like "clear and present danger" than by the relevant policy considerations that come into play in particular cases.

→ Source: Ronald Collins, *The Fundamental Holmes* 371-373 (2010) (with documenting note materials).

Twitter claims First Amendment violation

This from a *Wired* news story: "Twitter just sued the federal government over restrictions the government places on how much the company can disclose about surveillance requests it receives.For months, Twitter has tried to negotiate with the government to expand the kind of information that it and other companies are allowed to disclose. But it failed. Today, Twitter asserts in its suit that preventing the company from telling users how often the government submits national security requests for user data is a violation of the First Amendment."

". . . The American Civil Liberties Union applauded the legal challenge to the gag orders.'If these laws prohibit Twitter from disclosing basic information about government surveillance, then these laws violate the First Amendment,' said Jameel Jaffer, deputy legal director for the ACLU, in a statement. 'The Constitution doesn't permit the government to impose so broad a prohibition on the publication of truthful speech about government conduct. We hope that other technology companies will now follow Twitter's lead. Technology companies have an obligation

to protect their customers' sensitive information against overbroad government surveillance, and to be candid with their customers about how their information is being used and shared.'"

→ Read full story: Kim Zetter, "Twitter Sues the Government for Violating Its First Amendment Rights"

First Amendment rights in Ferguson

"In response to a lawsuit filed by the ACLU of Missouri, a federal judge ruled Monday that police in Ferguson cannot enforce a so-called 'five-second rule' requiring protesters to keep moving or face arrest. Shortly after Missouri Highway Patrol Captain Ron Johnson took charge of security in Ferguson to handle the protests that rose up in the aftermath of Michael Brown's death, he instituted a 'keep moving' rule. After a tense weekend of demonstrations in mid-August, Johnson informed protesters that they were now required to be in constant movement and weren't allowed to congregate in large groups."

". . . In her ruling Monday, District Judge Catherine Perry said that [certain] police tactic [were] a clear violation of the protesters' First Amendment rights and that local police needed to immediately cease enforcing [certain] rules." [See full story here]

Quick Hits

Scholarly Articles

- Sonja R. West, "The Stealth Press Clause," *Georgia Law Review* (2014)

The four articles listed immediately below are from the 2013-2014 issue of the *Cato Supreme Court Review*

- David Sentelle, "Freedom of the Press: A Liberty for All or a Privilege for a Few?" (Sept. 2014)
- Ilya Shapiro, "Ohio's Truth Ministry vs. Cato's Truthiness Brief" (2014)
- Allen Dickerson, "*McCutcheon v. FEC* and the Supreme Court's Return to Buckley" (2014)
- Trevor Burrus, "Injordinances: Labor Protests, Abortion-Clinic Picketing, and *McCullen v. Coakley*" (2014)

News Stories, Editorials, Op-eds & Blog Posts

- Eugene Volokh, "First Amendment right to videotape and audiotape city council hearings?," *Volokh Conspiracy*, Oct. 7, 2014
- "In Europe, Google tries to clarify line between privacy, free speech." *The Economist*, Oct. 6, 2014
- Suzanne Moore, "Does free speech give us the right to anonymously troll strangers?," *The Guardian*, Oct. 6, 2014
- Ryan Mancini, "ISIS and the issue of free speech," *Sundial*, Oct. 6, 2014

- Gene Policinski, "Passionate, patriotic protest in defense of civil disorder," *Fdlreporter.com*, Oct. 6, 2014
- Kristine Guerra, "Indiana judge: Door-to-door canvassing law violates free speech," *Indy Star*, Oct. 3, 2014
- Robert Drechsel, "Do gag orders in John Doe violate First Amendment rights?," *Jounal Sentinel*, Oct. 3, 2014
- Eric Owens, "First Amendment Now Allows Boobies Bracelets But Not American Flag Shirts In Public Schools," *The Daily Caller*, Oct. 1, 2014