Comments

BLACK POWER ADVOCACY: CRIMINAL ANARCHY OR FREE SPEECH

[Black Power] is the capacity of black people to be and to become themselves, not only for their own good, but for the enrichment of the lives of all. White people are afraid of the term because they see in it a mirror of white power. And that spells abuse.¹

The picture of black agitators traveling throughout the country, inciting ghettos to violence, is common in today's newspapers and television. This Comment will look closely at the picture, attempting to separate fact from distortion. The first question which presents itself is the nature of black power advocacy: Who are the speakers? What do they say? Why have they found so many willing ears? The first part of this Comment will examine black power advocacy and the use of criminal anarchy and syndicalism laws² [hereinafter referred to as criminal anarchy] to silence that advocacy.

Some criminal anarchy statutes have been held unconstitutionally vague and overbroad.³ However, New York has recently enacted a criminal anarchy statute which, on its face, seems to avoid the problems of vagueness and overbreadth.⁴ Yet, any statute which directly abridges speech must also meet the constitutional requirements of the clear and present danger test.⁵ There are two interpretations of the clear and present danger test; one is usually referred to as the Holmes-Brandeis formula,⁶

² Criminal anarchy and criminal syndicalist statutes are very similar in wording and have been analyzed and treated by the courts as if they were indistinguishable. See cases compiled in note 3 infra.
⁴ "A person is guilty of criminal anarchy when (a) he advocates the overthrow of the existing form of government of this state by violence, or (b) with knowledge of its contents, he publishes, sells or distributes any document which advocates such violent overthrow, or (c) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow." N.Y. Pen. Law § 240.15 (McKinney 1967).
⁵ This Comment will deal only with the advocacy provisions of (a) and (b).
⁷ "The question in every case is whether the words used are 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." Schenck v. United States, 249 U.S. 47, 52 (1919). To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable
the other as the *Dennis* formula. The second section will analyze these
two tests in light of recent black power advocacy and ghetto uprisings.

After discussing these prevailing constitutional tests, the final part of
the Comment will interpret the purposes of the first amendment's pro-
tection of freedom of speech and whether or not black power advocacy
is consistent with those purposes. This discussion lays the groundwork
for the suggestion of a different constitutional test of free speech. The
Comment concludes with an argument that black power advocacy is
within the scope of the first amendment and that it therefore should be
protected from abridgment by criminal anarchy laws.

I

FREE SPEECH NOW

A. Failure of the Traditional Civil Rights Groups

For the first time in the twentieth century freedom of speech has en-
tered the ghettos of black America in a meaningful way. It has pre-
viously lacked real meaning because the content of the speech has had
little relationship to the problems of the listeners. Until recently white
liberals and black leaders have not spoken to the issues which most con-
cern the people in the northern ghettos, the issues of poverty and pride.

In the early 1960's, Martin Luther King, Jr., and the Southern Chris-
tian Leadership Conference (SCLC), James Farmer and the Congress of
Racial Equality (CORE), and Bob Moses and the Student Nonviolent
Coordinating Committee (SNCC) all spoke of equality under the law.8
They struggled so that black men had the right to sit in the front of a
bus, to go to the school of one's choice, to eat at a lunch counter, to gain

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7 "In each case (courts) must ask whether the gravity of the 'evil,' discounted by its
improbability, justifies such invasion of free speech as is necessary to avoid the danger."*
Dennis v. United States, 341 U.S. 494, 510 (1951), quoting 183 F.2d 201, 212 (2d Cir. 1950)
(L. Hand, J.).

8 These men and organizations have brought about important changes in the life of the
black American. Their confrontation with southern segregation was one of the most coura-
geous acts in modern history. It may be that the attack upon the structure of segregation
was a necessary prerequisite to the attainment of equality and justice for all black people.
However, the years of civil rights activity have not significantly changed the life of the
majority of black people in the northern ghettos. SNCC and CORE have realized this failure
and have moved toward a philosophy of black power. SCLC is now working in the northern
ghettos, but their blanket condemnation of the use of violence in any situation has made
it difficult to gain adherents among the ghetto's young. For an excellent article on the
changes necessary in the traditional civil rights movement, see Kopkind, *Soul Power*, The
employment according to one’s skills, and to vote in elections. These are important rights, but translated into the world of reality they had little effect on the life of the black man in the northern ghettos. The right to sit in the front of the bus does not change the fact that the transportation system in Watts is hopelessly inadequate.\(^9\) The right to go to school with whites does not change the fact that in the north the proportion of black children going to schools which are in fact segregated has increased since 1954.\(^10\) The right to eat anywhere one chooses does not change the fact that food costs money and that “between 1949 and 1959, the income of Negro men relative to white men declined in every section of this country.”\(^11\) The right to vote does not change the fact that Californians voted nearly 2-1 to repeal fair housing laws.\(^12\) The right to be employed according to one’s abilities does not change the reality that in the major ghettos one out of three black men is either jobless or earning too little to live on.\(^13\) As a lady in Alabama said, “the food that Ralph Bunche eats doesn’t fill my stomach.”\(^14\) Poverty, not equality under the Civil Rights Act, is the issue for most black Americans.

Having a black skin not only means suffering economic and social discrimination, it means a lack of positive identity, a vague but decaying sense of shame, a hostility which vents itself on others in the community, and a frustration which explodes and destroys the self as well as others.\(^15\) Roy Wilkins and the National Association for the Advancement of Colored People (NAACP) and Whitney Young and the National Urban League did not speak to the problem of pride; they spoke of integration.\(^16\)

\(^{10}\) CALIFORNIA GOVERNOR’S COMMISSION ON THE LOS ANGELES RIOTS, VIOLENCE IN THE CITY—AN END OR A BEGINNING 65-68 (1965) [hereinafter cited as McCone Comm’n].

\(^{11}\) Marine & Hochschild, Color Black Gloomy, RAMPARTS, DEC. 1966, at 40, 41.

\(^{12}\) President Johnson quoted in id. at 41. The article also points out that in Watts “both comparative and actual Negro income levels steadily declined between 1960 and 1965.” Id.

\(^{13}\) Retiman v. Mulkey, 387 U.S. 369, 388 (1967) (dissenting opinion).

\(^{14}\) Thinking Black, NEWSWEEK, Nov. 20, 1967, at 39.


\(^{16}\) F. FANON, THE WRETCHED OR THE EARTH 27-83 (1966). This book, written by a black Algerian psychiatrist, has become one of the basic texts of the black power advocates.

\(^{16}\) The NAACP and the Urban League have been two of the most productive organizations in the long battle for civil rights. However as Whitney Young admits, “the Movement has never really attacked” the totality of problems facing the poor black man. RAMPARTS, supra note 10, at 40.

“The two Negroes appointed by him [President Johnson] to the commission [Riot Commission] were the NAACP’s executive director, Roy Wilkins, and Massachusetts’s Sen. Edward Brooke, both Establishment blacks. Wilkins is representative of a generation and a point of view more removed from the rioting blacks than some liberal whites. Three months before the uprisings, he had lashed the Rev. Martin Luther King for predicting racial outbreaks in a dozen U.S. cities. Brooke, sent to the Senate by voters of a state with a 97.5 percent white population, was a man who had gone out of his way to demonstrate that he was not representing the Negro’s cause in the Senate.” Dunbar, Memo from the Ghetto:
The philosophy of integration encouraged the black person to get rid of his ghetto accent, to speak like white people, to dress like them and to accept their values and their aspirations. Hopefully the white society would then accept the black person, and the end result would be a world of equality and brotherhood. But the means to that goal did not work; in fact, the means never were accepted by the majority of black people.\(^{17}\) Blackness, not integration, is the issue for the man in the ghetto.\(^{18}\)

**B. Malcolm X and the Beginning of Black Power**

While these civil rights organizations were involved in a dialogue with the white society, an organization called the Black Muslims had opened a dialogue with the people of the black ghetto. In the early 1960's their membership was over 100,000 and they were considered a genuine mass movement.\(^{19}\) Malcolm X was their major advocate; he spoke to the black man as no one had before. He told them that the white man had beaten their fathers and raped their mothers, that the white man's police harassed them, his merchants cheated them, and his politicians lied to them. These were things every black person had known, but had never heard anyone say in public or outside of quiet private conversations. Malcolm told them that there had been a great civilization in Africa, that Tarzan was the savage, not the black native. He told them that the wealth of the United States has been built on the backs of their ancestors. He told them that curly hair was beautiful, that black skin was beautiful, that a black man was as good or better than a white man. He told them that the majority of the world was colored, not white, and that the future was black—bright, beautiful black.\(^{20}\) Thus, black people were finally articulating ideas which had been lying dormant deep inside many ghetto dwellers. Now the feelings of pride in one's ancestors, one's appearance, and one's future began to come alive throughout the ghetto.\(^{21}\)

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\(^{17}\) "I've finally proved enough things to myself, pursuing the goals and norms of white middle-class America, to know how artificial that was for me. There's no end to the contest if you're just a black man trying to excel so thoroughly that people will forget you are black." Tom Williamson, Jr., a senior at Harvard, as quoted in *The Black Revolt Hits the White Campus*, Look, Oct. 31, 1967, at 29. See Wellman, *Putting on the Poverty Program*, Strom no. 2, 1967, at 51-66 (this magazine is published by the Free University of Berkeley, 1703 Grove Street, Berkeley, Cal.).


\(^{21}\) See Natural Hair, *New Symbol of Race Pride*, Ebony, Dec. 1967, at 139; *Wall of Respect*, id. at 48.
During the last year of his life Malcolm X split from the Muslims, rejecting the notion of black superiority and separation and began to develop a theory of black power.\textsuperscript{22} He discussed the necessity for political unity of black people, the development of an Afro-American culture, and the role of sympathetic whites in the struggle for freedom. Malcolm X was shot and killed in 1965, but the concept of black power did not die with him; it is now being developed and advocated in every ghetto of America.\textsuperscript{23} Black men such as Stokely Carmichael, Bill Epton, John Harris and Rap Brown are speaking to the problems of the ghetto,\textsuperscript{24} and they are speaking the thoughts of millions of black people.

\section*{XI}

\textbf{Nature of Black Power}

\section*{A. Black Power Advocacy}

The words “black power” often refer to a political philosophy which analyzes the position of black people in American society.\textsuperscript{25} Its major thrust is into the area of political power, advocating the need for an independent political party which would represent the needs of the black masses.\textsuperscript{26} Black power philosophy also explores the relationship of black people to the job market, the law enforcement agencies, the educational system and to other black people. It stresses the need for black people to control their own communities and to run their own lives without interference from white people.\textsuperscript{27}

The law has not concerned itself with black power advocacy in general; rather it has attempted to prosecute the advocacy only during times

\textsuperscript{22} See \textit{Malcolm X}, \textit{supra} note 20, at 288-382.

\textsuperscript{23} “Thinking black today remains more style than substance . . . but it commands white America’s attention simply because it is so pervasively there. Whether or not it is the majority view is neither measurable nor relevant: it is the operative mood of both the alienated ghetto young who make riots and the new Negro leaders who increasingly shape the public discourse about what is to be done.” Thinking Black, \textit{Newsweek}, Nov. 20, 1967, at 38.

\textsuperscript{24} Stokely Carmichael and Rap Brown are the leading spokesmen of the Student Non-violent Coordinating Committee (SNCC) and the most well-known of the black power advocates. Bill Epton was chairman of the Progressive Labor Movement (PL) in Harlem, New York. He was charged and convicted of advocating criminal anarchy for his activities during the Harlem uprising of July 1964. See text accompanying notes 95-109, 163-66 \textit{infra}. John Harris is an organizer for PL in Watts. He was charged with advocacy of criminal syndicalism for passing out of leaflets during the inquest into the police shooting of a black man in Los Angeles. See text accompanying notes 127-28 \textit{infra}.


\textsuperscript{26} See S. Carmichael & C. Hamilton, \textit{supra} note 25, at 46, 53-85.

\textsuperscript{27} Id. at 44-47.
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of ghetto unrest. Although most speeches during racially tense periods have not resulted in criminal anarchy indictments, there have been two cases in which recognized black power advocates have spoken or passed out leaflets and were subsequently charged with criminal anarchy. An analysis of these two cases and Rap Brown's infamous speech in Cambridge will enable one to examine the notion of black power advocacy and its relationship to criminally punishable speech.

The speeches and leaflets for which the black power spokesmen are being prosecuted have three major themes. First, and foremost, is a criticism of police and their policies. The most common cry of the ghetto is that black people must suffer daily harassment by the police. When an incident occurs in which a policeman shoots a black person as happened in Harlem and Watts, black power advocates articulate the cries of police brutality. These advocates argue that the police have continually brutalized black people; they call for the arrest of the officer involved in the

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28 People v. Epton, 19 N.Y.2d 496, 227 N.E.2d 829, 281 N.Y.S.2d 9 (1967), cert. denied, 88 S. Ct. 824 (1968); Harris v. Younger, Civil No. 67-1041 (C.D. Cal. March 11, 1968). These two cases were chosen because of their notoriety, and because they represent the kind of black power advocacy taking place throughout the country. The prosecuting attorney's office in Dayton, Ohio, was contemplating filing the charge of criminal syndicalism against Rap Brown for a speech which he gave in the summer of 1967. However, that office did not ask for a grand jury indictment because of the difficulty in proving "exactly what he had said at the rally." Letter from Lee C. Falke, Montgomery County Prosecuting Attorney, to Paul Harris, Feb. 26, 1968 (on file with the California Law Review).

29 Rap Brown gave a speech in Cambridge, Maryland similar to those of Epton and Harris. He was charged with incitement to riot for this speech, but just as easily could have been charged with criminal anarchy. Since the Cambridge speech was available and so typical of the black power advocacy under discussion, it is included in the analysis. The speech is quoted in the testimony of B. Kinnamon, the Chief of Police of Cambridge in Hearings on H.R. 421 Before the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. (1967) [hereinafter cited as Antiriot Bill Hearings].

30 "Last night police from all over the city declared war on Harlem. A large crowd of Negro people, protesting the racist murder of fifteen year old James Powell, demonstrated in front of the 28th precinct. Nearly fifty demonstrators were dragged, beaten and arrested as they attempted to enter the police station to demand the arrest of murderer Thomas Gilligan. Tempers flared as the Tactical Police Force threatened, abused and continued to push the people around. The people fought back in the only way they could. Bottles, cans, stones and Molotov cocktails were hurled at the cops from the corner and rooftops. The Gestapo-like cops shot at and brutalized innocent bystanders. What is to be done?" Brief for Appellant at 13-14, People v. Epton, quoted in "Stop the Cops" (leaflet), 19 N.Y.2d 496, 227 N.E.2d 829, 281 N.Y.S.2d 9 (1967).

31 "[T]he police are not merely the spark. . . . [T]oo many police have come to symbolize white power, white racism and white repression. And the fact is that many police do reflect and express these white attitudes. The atmosphere of hostility and cynicism is reinforced by a widespread perception among Negroes of the existence of police brutality and corruption, and of a 'double standard' of justice and protection—one for Negroes and one for whites." REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 206 (Bantam 1968) [hereinafter cited as Riot Commission Report].
specific shooting, and they warn the people of the ghetto to arm and defend themselves against attack by the police.32

The second common thread running through the prosecuted advocacy is the intolerable conditions in which black people live.33 The spokesmen point out the realities of the ghetto and then blame the white society for those conditions and for profiting from their continuance.

The third theme of black power advocates is the need for black people to control their community. They argue that three types of control are necessary: First, the ownership of the business in the ghetto;34 second, the control of welfare agencies, ghetto school boards, and law enforcement within their community;35 third, the election of black men who truly represent the ghetto poor.36

The speeches and leafletting of Brown, Carnichael, Epton, and Harris are clearly distinguishable from specific calls to violence made by black persons during times of ghetto uproar. For example, shortly before the Newark uprising began, a black man who was part of the demonstration protesting the police beating of a black cab-driver took the speaker's bullhorn and said, "Come down the street, we got some shit."37 This statement was an exhortation to pick up bottles and to begin throwing them at the police precinct station. The man's statement was comparable to a leader of a gang urging others to effect immediate harm. He stated no philosophy, analyzed no power relationships, and demanded

32 "Organize Apartment by Apartment, House by House. The Harlem Defense Council calls on all black people of Harlem to set up Block Committees with the purpose of defending each and every block in Harlem from the cops." Brief for Appellant, People v. Epton, supra note 30, at 15.

33 "Babies die. 500 people die a year for lack of food and nourishment. And yet we got enough money to go to the moon. . . . People in New York and Harlem die from rife and bites to death. Big old rats bite them to death and you tell the man about it and the honkey say: 'Hell, man, we can't do nothing about them rats.' Do you realize this is the same man who exterminated the buffalo? He killed the buffalo. Hell, if he wanted to kill the rats he could do it." Speech by Rap Brown to a crowd at Cambridge, Md., quoted in testimony of B. Kinnamon, Chief of Police of Cambridge in Antiriot Bill Hearings, supra note 29, at 32-33.

34 "Ain't no need in the world for me to come to Cambridge and I see all them stores sitting up there and all them honkies owns them. You got to own some of them stores. I don't care if you have to burn him down and run him out. You'd better take over them stores." Id. at 33.

35 "You got to control everything in your community from your Elk Hall to your school to your barroom. . . . cause if you can't control it, you see it's a weapon against you." Id. at 34.

36 "The Fourth of July. Independence Day, and we still in chains. See, ain't no such thing as second-class citizenship, brother; you either free or you slave. Don't run around here telling nobody you citizens. How many black mayors has Cambridge got? None. Not none. How many black councilmen has Cambridge got?" Id. at 35.

no political changes. It was solely a call to specific violence, and thus was not within the scope of the first amendment's protection.38

The Newark example is not atypical. Often during the uprisings or immediately preceding them, someone, upon drawing the attention of a volatile crowd, will say something to the effect of, "burn, baby burn,"39 or "let's get whitey." The men, or boys, making these spontaneous speeches have sometimes been referred to as agitators. Black power advocates also are often described as "agitators." However, the difference between them is essential and ought not to be confused in the eyes of the law. Black power advocacy is political speech; it describes life in the ghetto, analyzes the cause and effects of that life, demands social and economic changes, and often advocates revolution. Certainly there are violent statements and threats in the advocacy. But advocating violent revolution is not enough by itself to take speech outside of the protection of the first amendment.40

The key in examining the advocacy is to recognize that the violent statements are part of a totality. That totality is a speech or leaflet in the traditional form of revolutionary political advocacy. Sentences should not be read out of context, and the most violent words of the black power spokesmen are an integral part of their general, not violent, advocacy.41 In each of the four instances under examination, a general statement of political analysis or philosophy immediately precedes or follows the threat of violence. The leaflet distributed by John Harris, which is the basis of a criminal syndicalism indictment, states in part:

38 See Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 932 (1963). Justice Holmes in his famous example of a man shouting fire in a crowded theatre may have been attempting to distinguish calls to specific violence from legitimate speech. See Schenck v. United States, 249 U.S. 47, 52 (1919). The man who shouts fire, like the gang leader urging his followers to violence, is not attempting to communicate ideas to his audience. There is only the use of words to set off a physical reflex of panic or violence.

39 Cohen and Murphy, "Burn, Baby, Burn," LmE, July 15, 1965, at 36, 42.

40 In the early 1920's the Court used the "bad tendency" test of free speech. Under this test advocacy of violent revolution was punishable if it had a tendency to lead to an evil which the state could legitimately prevent. See Gitlow v. New York, 268 U.S. 652 (1925). However, this test is no longer considered good law as the Court now requires some showing of a clear and present danger that the advocacy might cause the violence. See Dennis v. United States, 341 U.S. 494 (1951). For a full discussion of these tests see text accompanying notes 70-98 infra.

41 "The nature and possible effect of a writing cannot be properly determined by culling here and there a sentence and presenting it separated from the context. In making such determination, it should be read as a whole; at least if it is short like these news items and editorials." Schaefer v. United States, 251 U.S. 466, 483 (1920) (Brandeis J., dissenting). The leaflets and speeches by the black power advocates are either shorter than, or about the same length as the writings in Schaefer. Cf. Roth v. United States, 354 U.S. 476, 488-89 (1957) (obscenity case).
Bring Parker, Yorty, and Bova to trial for murder—in a court of the people. Disarm the guards in the concentration camp. If 80% of us don't work in the factories, you don't produce!!**}

Taken alone these words can be viewed as a threat of violence to take place in the future. However, the sentences immediately preceding these words are in the tradition of classic political protest as they state the failure of the present system and point to the oppressed people's right of revolution:

Murder by cops and death by unemployment are methods of systematic extermination. This extermination isn't going to be stopped by going to the court of the exterminator as advised by some “Negro” politicians and preachers.

George Washington and the American revolutionaries never went to King George's court. The Jews never asked to go to Hitler's court.

The concentration camp must develop its own court and its own method of trial.

Bill Epton's speech in Harlem is another example of the nature of black power advocacy and its difference from the call to specific violence. The New York Court of Appeals quotes Epton as saying: “They [the police] declared war on us and we should declare war on them and every time they kill one of us damn it, we'll kill one of them and we should start thinking that way right now. . . .”*** Taken alone these words might be interpreted to be a call to immediate violence. But the words were part of a larger speech, and later in that speech Epton had more to say about the police:

To my left is a Puerto Rican policeman in plain clothes . . . I tell him now, and I tell my black brother on my right, that they had better choose their sides. Because when the deal goes down . . . he will have to go too unless he chooses the right side. There is only one right side. That’s our side. That’s the cause of the people and what we demand and what we get.**

It is clear from these words and the speech as a whole that Epton was not suggesting that those in the crowd pick up a bottle or brick and attack the plainclothes man. If he had, there is no doubt he would be guilty of inciting a crime; he would be in the position of a gang leader directing

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** Quoted in the Indictment of John Harris, Jr., People v. Harris, Super. Ct. No. 328981 (Los Angeles County Cal. Super. Ct.). This case was mooted by the decision in Harris v. Younger, Civil No. 67-1041 (C.D. Cal., March 11, 1968), declaring unconstitutional California's criminal syndicalism statute, CAL. PEN. CODE §§ 11400-01 (West 1955), upon which the indictment against Harris rested.

*** Id.


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criminal actions. But neither Epton, nor any of the other black power advocates were prosecuted for directing attacks on police or property. Their indictments were based on the speeches and leaflets which were expositions of their political philosophy and which included general advocacy of revolution and armed defense.

The attention of the press and the public has not been focused on anonymous street leaders and "agitators" such as the man in the Newark example. Rather the attention has been on the black power spokesmen, who are held responsible for the violence which has so shaken America in the past four years. In a Newsweek survey to find out what white adults thought were the basic causes of the uprisings, forty-five per cent of those questioned blamed "outside agitation;" the next most frequent reply, "prejudice-bad treatment," was mentioned by only sixteen per cent.\(^4\) In the examples of Brown, Harris, and Epton, local law enforcement agencies have responded like the general public to the ghetto uprisings and indicted outspoken black leaders under rarely used criminal anarchy statutes. The Congress has had a similar response as it passed an antiriot bill, which makes it a crime to travel or use any facility in interstate commerce with intent to incite a riot.\(^4\) In order to appraise correctly black power advocacy it is worthwhile to delve into the nature of ghetto "riots."

B. Race Riots in American History

Race riots are not new to America, and those people who are surprised by the present turmoil have forgotten their history. On July 3 and 4, 1916, East St. Louis was torn by rioting in which thirty-nine blacks and nine whites were killed.\(^4\) From July 27 to August 2, 1919, an ugly race riot in Chicago left twenty-three blacks and fifteen whites dead.\(^4\) In Detroit, on June 20, 1943, a fight started between a couple of black youths and a white man; soon white sailors joined in and within hours a major race riot was in progress. White mobs, estimated at over 1,000 people, attempted to march into the black ghetto, but were turned back. When it ended two days later, twenty-four blacks and nine whites had been killed.\(^5\) These were three of the worst of the many riots between

\(^4\) After the Riots: A Survey, Newsweek, Aug. 21, 1967, at 18, 19 (poll taken by Louis Harris).
\(^4\) Id.
blacks and whites in the first half of the twentieth century. They were marked by intensive fighting between black people and white people, rather than the recent pattern of black people against the police and national guard. They were usually touched off by an interracial clash, not by a law enforcement incident. This pattern of racial confrontation and violence was broken twice; once by the Harlem violence of 1935, and again by the Harlem uprising of 1943.

In Harlem the violence was touched off by police incidents, and the objects of the people's fury were mainly the police and the commercial establishments. In the Harlem uprising of 1935 only two blacks and two whites were killed. During the violence of 1943, five blacks were killed. It is not surprising that the Harlem experience was one with political as well as racial consciousness. Harlem is where the poor black man first began to organize on the issues of poverty and blackness. In the 1920's it was the center of Marcus Garvey's Universal Negro Improvement Association, the largest mass movement in the history of black Americans. His teachings were the precursor of today's concept of black power, and they gave Harlem residents an awareness that the enemy was not a white skin, but a white system.

While blacks and whites in East St. Louis and Chicago were tearing at each other's skins, the black people of Harlem were attacking the most visible signs of their oppression—the police and the merchants. Harlem was not a race riot; it was an unstructured uprising of the black ghetto dwellers against a political and social system controlled by whites for the benefit of whites. The difference between the two types of violence is important. It is impossible to deal rationally with a race riot, whose object is to destroy a people of a different color. But one can deal in a rational way with an uprising, for its demands are a change of political relationships and an alteration of social conditions.

C. Uprisings of the 1960's

The last four years of ghetto violence reveal a movement away from race rioting to a form of rebellion. The Harlem uprising of 1964 followed the pattern of earlier Harlem explosions. There were definite political demands, such as the suspension of the police officer who had shot a black teenager; to a significant degree, however, the uprising was colored by racial hatred.

One year after Harlem, the ghetto of Watts exploded to the cry of "burn, baby, burn." Watts, as Harlem, was a mixture of racial hatred and

51 President's Commission on Law Enforcement, supra note 48, at 118.
52 Id.
53 C. E. Lincoln, supra note 19, at 58-66.
political awareness. After Watts, a serious debate began in political and
civil rights circles as to the character of the Watts violence. Some believed
it was basically a race riot; others saw it as the beginnings of a revolu-
tion; the majority characterized the Watts violence as an uprising, an
unorganized rebellion.

In July 1967, the ghetto of Newark broke loose. The Governor of
New Jersey called it an “open rebellion” and later described it as a
“criminal insurrection.” With the remains of Newark’s fires still smolder-
ing the first national black power conference was held, attempting to
translate the fury of the rebellion into political alternatives.

One month after Newark, a ghetto holocaust hit Detroit. In many
sections of Detroit, poor whites and poor blacks looted side by side. Time
called it an “uprising.” The Berkeley Barb described it as “revolu-
tion.” Whatever the word one chooses, it is clear that the identity of
the enemy is no longer seen as a white face; rather it is viewed as a white
power structure which oppresses all blacks and many whites. Some of
the “estabishment” news magazines have recognized this change. News-
week observed: “In the view from the street corners of Harlem or Watts
or Detroit’s West Side, the riots are rebellions, the rioters not criminals
at all but the freedom fighters of an oppressed, beleaguered, powerless
colony of the white world downtown.”

There has been no sign that ghetto rebellions will cease in the next
few years. On the contrary, the growth of all black organizations, the
development of ghetto political awareness, and the continued militancy of
indigenous leaders point to many more summers of strife and turbulence.
There is similarly no evidence to suggest that states will stop arresting
those who during times of tension raise the cry of black power. Given

54 See Cohen & Murphy, supra note 39, at 36, 42.
56 See R. Conot, Rivers of Blood, Years of Darkness (1967).
57 Quoted in Hayden, The Occupation of Newark, The New York Review of Books,
60 The Detroit News described the uprising as “the first integrated looting in history.”
Quoted in the Los Angeles Free Press, Aug. 4-10, 1967, at 14, col. 2.
62 “The white man is irrelevant to blacks, except as an oppressive force. Blacks want to
be in his place, yes, but not in order to terrorize and Lynch and starve him. They want to
be in his place because that is where a decent life can be had.” Carmichael, supra note 14,
at 8.
63 "While the civil disorders of 1967 were racial in character, they were not "interracial.
The 1967 disorders, as well as earlier disorders of the recent period, involved action within
Negro neighborhoods against symbols of white American society—authority and property—
these two patterns, it is likely that criminal anarchy and criminal syndicalism statutes will continue to be used to attempt to quiet the violent voice of the ghetto. The remainder of this Comment will attempt to analyze the constitutionality of criminal anarchy and criminal syndicalism laws.

III

CRIMINAL ANARCHY

A. Differing Tests of Free Speech

Criminal anarchy statutes grew out of the labor turmoil and anarchist political activities of the late 1800's and early 1900's. A few months after an alleged anarchist assassinated President McKinley in 1901, the New York legislature enacted the first criminal anarchy law. Fifteen years later against the background of three thousand arrests of suspected communists and radicals by the Justice Department, California passed, as an emergency measure, the first criminal syndicalist statute. By 1922, nineteen states, as well as Hawaii and Alaska, had passed similar laws.

The New York criminal anarchy statute, the prototype for most other state anarchy statutes, was held constitutional by the United States Supreme Court in *Gitlow v. New York*. The Court's test of the first amendment's protection of free speech was whether or not the words in question had a tendency to lead to an evil which the state constitutionally could prohibit. This test, often referred to as the "bad tendency" test, was broadly stated in *Gitlow*:

That a State in the exercise of its police power may punish those who abuse this freedom [of speech] by utterances inimical to the public

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64 In Boston, Ivan Gonzalez, director of the South End Neighborhood Action Program, was arrested for "promotion of anarchy" due to an alleged speech he made. *N.Y. Times*, Aug. 6, 1967, § 1, at 54, col. 5. Fifteen black men and women in Queens, New York, who had been indicted on charges of conspiring to murder, were reindicted for criminal anarchy (the original indictment was dismissed as defective). *National Guardian*, Jan. 27, 1967, at 12, col. 3.


66 Ch. 371 §§ 160-66 (1902) (now *N.Y. PEN. LAW* § 240.15 (McKinney 1967)).

67 S. MANDELBUM, supra note 65, at 97. In 1918 the country was gripped by the first "red menace"; the government took quick action to meet what Attorney General Palmer called, "the advance of 'red radicalism'". *Id.* at 106. The General Intelligence Division of the Justice Department, under the direction of J. Edgar Hoover, gathered a file on 60,000 suspected radicals. Based on this file, the Government initiated the infamous Palmer raids of November 1919 and January 1920. Two hundred and forty-nine of those arrested were deported to Russia. *Id.* at 97.

68 Ch. 188 § 1, (1919) Cal. Stats. 281 (now *CAL. PEN. CODE* §§ 11400-02 (West 1956)).


70 268 U.S. 652 (1925). Although the statute in question was a state statute, the Court accepted the doctrine that the first amendment was applicable to the states through the due process clause of the fourteenth amendment. *Id.* at 666.
In 1927 the Court also used the "bad tendency" test in Whitney v. California to uphold the constitutionality of the California criminal syndicalism statute. In a concurring opinion, Justice Brandeis argued that the correct test was the clear and present danger formula which the Court had used in six cases from 1919 through 1920.

Justice Holmes first enunciated the clear and present danger formula in Schenck v. United States:

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.

Unlike the bad tendency test, the Holmes-Brandeis formula allows speech even though there is a threat to public interests. It offers more protection to speech than the bad tendency test by allowing speech unless there is an immediate threat of grave danger. In actual practice the Court used the clear and present danger test to uphold six convictions of advocacy which in retrospect do not seem to have presented an imminent danger to the state. In these cases the "nub of the evidence held sufficient to meet the 'clear and present danger' test was as follows: publication of twelve newspaper articles attacking World War I; one speech attacking United States' participation in the war; circulation of copies of two different socialist circulars attacking the war; publication of a German-language newspaper with allegedly false articles, critical of capitalism and the war; circulation of copies of a small pamphlet written by a clergyman, attacking the purposes of the war and United States' participation; mailing of circulars to draftees advocating that conscription was involuntary servitude.

During the 1920's the Court refused to apply the clear and present danger test, although Justice Holmes' dissent in Gitlow and Justice

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71 Id. at 667.
72 274 U.S. 357 (1927).
73 Id. at 373 (concurring opinion).
74 249 U.S. 47 (1919).
75 Id. at 52.
78 Frohwerk v. United States, 249 U.S. 204 (1919).
81 Schaefer v. United States, 251 U.S. 466 (1920).
82 Pierce v. United States, 252 U.S. 239 (1920).
84 268 U.S. 652, 672-73 (1925).
Brandeis' concurrence in Whitney were eloquent testimonials to free speech and were influential in the Court's return to the clear and present danger formula. Starting with Herndon v. Lowry in 1937, the Court for twelve years protected the first amendment right in question through the use of the clear and present danger rule.

In 1950, the Court in Feiner v. New York used the test to find that the speech did constitute an imminent threat of a breach of the peace, affirming a conviction for disorderly conduct. A year later in Dennis v. United States the Court reformulated the clear and present danger test, accepting the words of Judge Learned Hand who had written the majority decision for the court of appeals: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." Under this interpretation the Court balances the right of free speech against the gravity of the evil. As the gravity of evil increases, the necessity to show an immediate danger decreases. This reinterpretation in effect strikes out the requirement of immediate danger, and stresses the importance of the state's interest.

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85 274 U.S. 357, 374 (1927).
86 301 U.S. 242 (1937). Herndon, a black man, was an official Communist Party organizer in the black communities of Georgia. The literature he carried included phrases such as "National Rebellion" and "smash the National Guard." The Court reversed his conviction; the opinion suggests that where the specific intent of the defendant could not be proven there must be a clear and present danger that his advocacy would produce forcible resistance to the government. See id. at 262-63. The Georgia insurrection statutes involved in Herndon were later declared unconstitutional and void. Aelony v. Pace, 32 U.S.L.W. 2215 (M.D. Ga. Nov. 12, 1963) (per curiam). In Carmichael v. Allen, a three-judge district court granted an injunction prohibiting future prosecutions under these same statutes. 267 F. Supp. 985, 994 (N.D. Ga. 1967).
89 341 U.S. 494 (1951).
90 183 F.2d 201, 212 (2d Cir. 1950).
91 Dennis v. United States, 341 U.S. 494, 510 (1951). Learned Hand's formula is strikingly similar to that which he used to determine the standard of care in a negligence case. United States v. Caroll Towing Co., 159 F.2d 169 (2d Cir. 1947). In that case Hand was attempting to solve the problem of whether "absence of a bargee . . . will make the owner of the barge liable for injuries . . . if she breaks loose from her moorings." Id. at 173. The formula he created stated that there is liability if the burden of adequate precautions is less than the gravity of the injury multiplied by the probability of the accident occurring. The formula in Dennis could be similarly stated: Speech can be abridged when the interest of free expression is less than the gravity of the evil times the probability (the probability being a less important factor when the seriousness of the evil is high). Although Hand's formula may be an excellent tool by which the liability of barge owners is determined, one must have serious doubts about its application to the totally different area of first amendment law.
92 Emerson, supra note 38, at 912.
93 See McKay, supra note 87, at 1209.
The Court used the Dennis interpretation in Yates v. United States, in which fourteen members of the Communist Party had been convicted for advocacy of overthrow of the government by force and violence. The Court modified the Dennis test by requiring strict evidentiary proof of the criminal nature of the advocacy in question, proof which the government was unable to acquire. Since Yates in 1957, the Supreme Court has not used the Dennis test. It seems to have limited the Holmes-Brandeis test to cases where the state has held an individual in contempt of court because of his out-of-court publication.

In 1967, the New York Court of Appeals used the Dennis formula in affirming the conviction of William Epton under New York’s criminal anarchy statute. This was the first time the New York criminal anarchy law had been invoked since Gitlow in 1925. The court admitted that Gitlow and the bad tendency test were no longer good law. To preserve the constitutionality of the anarchy law, however, they read the following requirement into the statute: “There must be a ‘clear and present danger’ that the advocated overthrow may be attempted or accomplished.” The court cited Dennis as authority for the clear and present danger test and did not require a showing that Epton’s advocacy produced an imminent danger. The Supreme Court denied certiorari and dismissed the appeal “for want of a substantial federal question.”

The concurrence by Justice Stewart suggests the Court’s reasoning in denying certiorari. Stewart points out that Epton had been convicted of conspiring to riot, as well as advocating criminal anarchy and conspiring to advocate criminal anarchy. He argues that since the riot conviction raises no substantial

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95 See id. at 327-34.
99 Id. at 504-05, 227 N.E.2d at 834, 281 N.Y.S.2d at 17.
100 Id. at 506, 227 N.E.2d at 835, 281 N.Y.S.2d at 17.
101 Id.
102 See id. at 506, 227 N.E.2d at 835, 281 N.Y.S.2d at 17. The court gives no evidence that Epton’s words produced an imminent danger. Instead they stress the generally violent atmosphere of Harlem during the week of July 18th and the inflammatory nature of Epton’s advocacy. These factors are independent of each other, yet nowhere does the court attempt to show that the advocacy in a specific situation was likely to spark violence. See text accompanying note 128 for an analysis of how the requirement of imminent danger can be easily misused.
104 Id. at 825.
federal question, and since the three one-year sentences run concurrently, there is no necessity for the Court to consider the two criminal anarchy charges. He goes on to state that if the constitutionality of New York's criminal anarchy laws were properly before the Court, he would have voted to grant certiorari and note probable jurisdiction of the appeal "to reconsider the Court's decision in *Gitlow v. United States* . . . and to decide whether the New York anarchy statutes, either on their face or as applied in this case, violate the First and Fourteenth Amendments." The only other written opinion was by Justice Douglas, who dissented on both the conspiracy to riot conviction and the criminal anarchy convictions.

It is likely that the rest of the Court based its denial of certiorari on the validity of the conspiracy to riot count, which along with the concurrent sentences made it unnecessary to review the other counts of the indictment. Regardless of the reason for the Court's abstention, the result is that an important state court decision, which used the *Dennis* clear and present danger test to sustain a conviction for black power advocacy, has been allowed to stand. However, this result does not mean that the Court has expressly, or even impliedly, sanctioned the use of criminal anarchy statutes to silence black power advocacy such as Epton's. Three factors indicate that the Court was not deciding the constitutionality of criminal anarchy statutes, or the use of the *Dennis* clear and present danger formula as a test of the first amendment's protection of black power advocacy.

The first factor is Justice Stewart's reliance on the conspiracy to riot charge. His action is similar to that of the one judge in the New York Court of Appeals who dissented as to the criminal anarchy counts but accepted the conviction for conspiracy to riot. It may be that the facts in this case persuaded the justices that there was enough evidence of overt acts unrelated to advocacy so as to substantiate a conviction for conspiracy to riot. The second factor suggesting the Court's sidestepping of the criminal anarchy conviction is that Justice Black, traditional guardian of free speech, did not dissent from the per curiam opinion. The

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105 Id.

106 Id. at 825.

107 Justice Douglas also accepted this rule, although he felt that it was inapplicable because the conspiracy to riot conviction was open to doubt. Id. at 828.

108 19 N.Y.2d at 508, 227 N.E.2d at 836, 281 N.Y.S.2d at 19.

109 See 88 S. Ct. 824 (concurring opinion of Stewart, J.). Justice Douglas agreed with Stewart that some of the overt acts charged were not constitutionally protected. However, he argued that the charge to the jury drew no line between constitutionally protected and unprotected overt acts. Therefore, Douglas argued, the conviction "may have rested in whole or in part on overt acts which had First Amendment protection." Id. at 827 n.2 (dissenting opinion of Douglas, J.)
third factor, which strongly suggests that if the criminal anarchy law had been properly before the Court it would have been declared unconstitutional on its face, is the court's decision in *Keyishian v. Board of Regents of New York*.

**B. Attacking the Statute on its Face**

Early in 1967, the Supreme Court in *Keyishian* held as unconstitutionally vague New York statutes which disqualified persons from employment in the Civil Service and the educational system on the grounds of "the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts." The statutes equated the word "seditious" with "criminal anarchy" as defined in the New York criminal anarchy statute. The Supreme Court did not have to reach the clear and present danger issue, because it held that the definition, on its face, was unconstitutionally vague.

Recently there have been four important federal court decisions in the field of criminal anarchy. In February 1967 a three-judge district court in the Fifth Circuit, relying on *Keyishian*, held that the Mississippi Syndicalism Act, on its face, was unconstitutionally vague and overbroad. A month later, another three-judge district court held that the Georgia criminal insurrection statute was, on its face, unconstitutionally vague and overbroad. In September 1967, a three-judge district court in the Sixth Circuit held that the Kentucky criminal syndicalism and sedition statute was, on its face, unconstitutionally vague. In March 1968, a three-judge district court in the Ninth Circuit held that the California criminal syndicalism statute was, on its face, unconstitutionally vague and overbroad.

For a criminal anarchy statute to be constitutional it must clear two hurdles: First, the statute, on its face, must not suffer from vagueness or overbreadth. Second, the statute, as applied to the defendant, must require a showing of a clear and present danger of an evil which the state can legitimately prohibit. The recent development of the convening of three-judge federal courts to determine the constitutionality of criminal anarchy statutes on their face will force state legislatures to rewrite their

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112 Id. at 598.
113 Id. at 598-604.
statutes in narrow and specific terms. Already the New York legislature has redrafted the criminal anarchy law, reducing five paragraphs into three phrases.\textsuperscript{120} However, regardless of how narrowly a state draws its statute, a law which attempts to prosecute advocacy must still clear the second constitutional hurdle—the clear and present danger test.

C. Clear and Present Danger

The constitutional protection which the clear and present danger test affords is in a somewhat confused state. Although it seems that the Supreme Court will use the \textit{Dennis} formula, the Holmes-Brandeis test is not yet dead, as evidenced by \textit{Wood v. Georgia}\textsuperscript{121} and its persistent use in significant lower court decisions.\textsuperscript{122} A comparison of the Holmes-Brandeis version of the clear and present danger test with the \textit{Dennis} interpretation is a fruitful method of analyzing when, if ever, black power advocacy should be punishable. Therefore, if one assumes that a narrowly drawn criminal anarchy statute is not unconstitutionally vague or overbroad, then the question is whether black power advocacy in times of ghetto tension creates a clear and present danger under either the Holmes-Brandeis formulation or the \textit{Dennis} standard.

1. The Holmes-Brandeis Formula

The clear and present danger test as expounded by Holmes and Brandeis involves four requirements which must be satisfied before advocacy can be constitutionally punished: First, the circumstances must be potentially dangerous in fact.\textsuperscript{123} Second, the feared evil must be "extremely serious."\textsuperscript{124} Third, there must be "reasonable ground to fear that the serious evil will result if free speech is practiced."\textsuperscript{125} Fourth, the "degree of imminence" of the danger must be "extremely high."\textsuperscript{126}

\begin{footnotesize}
\textsuperscript{120} N.Y. PEN. LAW § 240.15 (McKinney 1967).
\textsuperscript{121} 370 U.S. 375 (1962).
\textsuperscript{124} Bridges v. California, 314 U.S. 252, 263 (1941); Whitney v. California, 274 U.S. 357, 376-78 (1927) (concurring opinion).
\textsuperscript{125} Whitney v. California, 274 U.S. 357, 376 (1927) (concurring opinion); Schaefer v. United States, 251 U.S. 466, 483 (1920) (dissenting opinion).
\textsuperscript{126} Bridges v. California, 314 U.S. 357, 376 (1941); Whitney v. California, 274 U.S. 357, 376 (1927) (concurring opinion). An intent to cause an evil the government can legitimately prevent may also be a requirement of the clear and present danger test: "[T]he United States constitutionally may punish speech that produces or is intended to produce
The first and second requirements seem to be easily satisfied in most tense ghetto situations. The large number of violent upheavals caused by small incidents point to the conclusion that the ghettos are black social dynamite and that in times of unrest circumstances are in fact potentially dangerous. The requirement that the evil must be "very serious" is also applicable to the uprisings whether one defines the evil as attempted overthrow of the government or as the destruction of lives, homes, and businesses.

The requirement that the danger is highly imminent is more difficult to apply. Given the explosive nature of the ghetto it seems on first glance that in almost all situations serious violence is imminent. Yet, the incidents which have ignited the uprisings occur almost daily in the ghetto, and in the vast majority of instances there is no violence. The case of John Harris is a good example of how the imminence of danger requirement is incorrectly confused with the potentially dangerous circumstances requirement. Harris was leafleting outside the inquest into the shooting of

a clear and imminent danger . . . ." Abrams v. United States, 250 U.S. 616, 627 (1919) (dissenting opinion of Holmes, J.) (emphasis added); "[T]he necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent. . . ." 274 U.S. 357, 373 (1927) (concurring opinion of Brandeis, J.) (emphasis added). Under the above statement of the test, if the state proves an intent to cause the evil, then the speech may be abridged without a showing of imminent danger. Although the above language of Abrams and Whitney strongly suggests that a bad intent alone satisfies the clear and present danger test, the following language of Schenck v. United States contradicts that interpretation: "If the act, 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." 249 U.S. 47, 52 (1918) (Holmes, J.) (emphasis added). One might agree that intent is necessary as an additional ingredient to a showing of a clear and present danger. Cf. Dennis v. United States, 341 U.S. 494 (1951), in which an intent to bring about the evil was held necessary to a conviction under the statute for knowingly and willfully advocating the necessity of overthrowing the government by force and violence. Accord, Yates v. United States, 354 U.S. 298 (1957). If, on the other hand, one argues that bad intent alone is sufficient for a conviction, then the heart of the clear and present danger test—the requirement of imminence—is rendered meaningless.

In the case of black power advocates, often, if not always, the spokesman's subjective intent is not to incite violence at the time of the speech. The intent is to raise the level of political awareness of the listeners, and in the weeks and months that follow to send organizers into the community to build mass participation in the black power movement. However, the Courts do not look to the subjective intent of the spokesmen. Rather, they use an objective test based on whether the content of the speech is "language reasonably and ordinarily calculated to incite persons." Dennis v. United States, 341 U.S. 494, 511 (1951). Based on this test the jury looks to the contents of the speech, a speech antithetical and probably hateful to their own beliefs, and decides if the intent was to incite people to violence. There is little doubt that the use of this objective test of intent would result in the finding that black power advocates do intend to incite violence. But see Justice Holmes' treatment of intent in Abrams in which he suggests that the intent should be equated with motive or purpose. 250 U.S. 616, 626-28 (1919) (dissenting opinion).
Leonard Deadwyler. The courtroom was filled with angry black people, and in general the atmosphere was one of tense excitement. The shadow of the Watts uprising of the previous summer cast itself darkly over the courtroom. Clearly the requirement of potential danger was satisfied. However, there were other factors which pointed to the lack of an imminent danger. The inquest was being held downtown, not in the ghetto. The courthouse and surrounding area were filled with a majority of white people. The number of policemen present was high. Finally, the response of the people receiving the leaflets from Harris did not evidence an immediate attempt to act violently. Thus, the evidence indicates that the district attorney was in error when he concluded that there was an “extremely high” likelihood of immediate violence. Moreover, the fact that he did reach that conclusion and then acted on it by prosecuting Harris, illustrates the danger in using such a test at all. It is at best a vague notion susceptible to abuse, at worst a meaningless phrase which allows the silencing of advocacy whenever the circumstances are potentially dangerous.

The final requirement that there must be reasonable ground to fear that the speech will produce a serious evil is a requirement of causation. The underlying assumption is that it is advocacy which causes people to revolt, an assumption which results from superficial and simplistic analysis. Vice-President Humphrey offered some insight into the problems of causation when he said:

I’d hate to be stuck in a fourth floor in a tenement with the rats nibbling on the kids’ toes—and they do—with the garbage uncollected—and it is—with the streets filthy, with no swimming pools, with little or no recreation.

I’d hate to be put in those conditions, and I want to tell you if I were in those conditions and that should happen to have been my situation, I think you’d have had a little more trouble than you’ve had already because I’ve got enough spark left in me to lead a mighty good revolt under those conditions.

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127 Leonard Deadwyler was a black resident of Los Angeles who was stopped for speeding while driving his pregnant wife to the hospital. The policeman testified that his revolver went off accidently when Deadwyler’s car made a sudden lunge forward. Mr. Deadwyler died of the gunshot wound.

128 See L. A. Times, May 25, 1966, § 1, at 1, col. 1; id. May 26, 1966, § 1, at 3, col. 2; id. at 24, col. 6.

129 The author wrote two letters on behalf of the California Law Review to the Los Angeles District Attorney’s Office requesting information and materials on the Harris case, but received no answer to either letter.

130 Address by Vice-President Hubert Humphrey to the National Association of County Officials, July 18, 1966. New York Congressman Joseph Resnick stated: “Outside agitators” have not been causing the riots in our cities. It has been the “inside agitators” that are to blame—the growl of a man’s stomach telling him he is hungry, the emptiness of a man’s
The Vice-President is pointing out that it is the basic conditions in which people live that are the root causes of rebellions. This is a basic rule of human behavior which white people can and do understand. A *Newsweek* survey asked whites the following question: "As an individual, what do you think it feels like to be discriminated against as a Negro?" The largest number of whites, twenty-six per cent, felt it might incite them to fight back, even to riot.131

It is difficult for a middle-class white person to understand the conditions of the ghetto and probably impossible to empathize with those who live day to day on the outside of our plentiful society. Without attempting a comprehensive documentation of ghetto conditions, a few specifics are necessary. De facto segregation of northern urban schools has increased in the past years.132 Education within the ghetto has in general failed to fulfill its purpose. A recent study has shown that scores on I.Q. tests of Harlem school children actually declined between the third and sixth grade.133 The campaign to keep black people in school is based on the theory that a high-school graduate will find a job easier than a drop-out. However, unemployment among black high-school graduates is 16.1 per cent while the rate for black drop-outs is 16.3 per cent.134

Between 1960 and 1965, unemployment among nonwhites was twice as high as whites.135 The black person makes up only 3.5 per cent of the nation's professional and technical pool, while he constitutes 26 per cent of the unskilled laborers.136 Of all those engaged in apprentice training programs he makes up only 3.1 per cent.137 In Cleveland's ghetto of Hough, where a four-day uprising took place in 1966, the unemployment rate is 15.6 per cent.138 In other major cities, black unemployment is from two to four times higher than white unemployment.139

"pocket telling him he has no money for clothes and a livable house." Quoted in *Black Poverty*, *Newsweek*, Nov. 20, 1967, at 41.

The *Riort Commission Report* has also noted that the root causes of the uprisings lie deep in the history of white Americans' treatment of black Americans. "[T]he most fundamental matter is the racial attitude and behavior of white Americans towards black Americans. Race prejudice has shaped our history decisively in the past; it now threatens to do so again. White racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II." *Supra* note 31, at 203.

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132 *Marine & Hochschild, supra* note 10, at 41.
133 *Newsweek, supra* note 131, at 22.
137 *Id.* at 446.
139 *Id.* In 1964, 23% of black teenage boys were unemployed as opposed to 15.3% of
One complaint of black power advocates is that merchants in the
ghetto charge more for goods than in wealthier areas. *Time* magazine sub-
stantiates this practice, stating that:

In Detroit's slums, a 5-lb. bag of flour costs 14 cents more than in
fashionable Grosse Pointe, Michigan, peas 12 cents more per can, eggs
up to 25 cents more per dozen. A television set selling for $124.95 in
downtown Detroit costs $189 in a ghetto shop.140

Housing is one of the ugliest realities of ghetto life. About twenty-nine
per cent of the Negro population live in housing which is substandard and
overcrowded.141 A committee of the Illinois General Assembly, after tour-
ing slum housing in 1965, stated, "It is hardly possible to believe that
human beings live in a modern city in the conditions which the Commit-
tee observed."142 Although there has been a good deal of legislation on
slum housing, in general the law has given little or no help to the tenant.143
Public housing, instead of solving the problem, has created cities within
the city where black children grow up isolated and unstimulated by their
environment.144

The law has also failed to protect the rights of the poor black man. In
the North the failure seems to result from neglect and the inherent in-
equities of our legal system.145 In the South the guarantees of the law have

white teenage boys. Also 31% of black teenage girls as compared with only 11 per cent
of white teenage girls were unemployed. In 16 northern cities black joblessness was be-
Dame Law 552, 554 (1964-65).

140 Time, supra note 138.
141 *Black Poverty*, *Newsweek*, supra note 130.
142 *REPORT OF THE COMMITTEE OF THE ILLINOIS HOUSE OF REPRESENTATIVES ON SLUM
HOUSING AND RENT GOUGING* 4 (June 1, 1965) quoted in Sax & Hiestand, *Slumlordism as a
143 Sax & Hiestand, id. at 873-74.
144 "The Public Housing Authority's 'projects' are undoubtedly a critical detour in
this country's aspirations towards 'The Great Society.' Social architects, designing for emer-
gency conditions, are establishing permanent superblocks of environmental monotony,...
Unless the dignity and excitement of living become inherent by-products of our future
proposals, we have little recourse but to fear more riot filled summers." Letter from scholar-
ship recipient Phillip Lehn to the National Foundation for the Arts and the Humanities,
145 "The harsh fact is that in the United States today just as many indigent persons
are deprived of legal assistance as receive it. Too often troubled people find that Legal Aid
does not really exist in their communities or that it is fenced off from them by too stringent
eligibility rules, anachronistic policy on the types of cases handled, lack of publicity, in-
sufficient staff personnel or unconscionable delays in service. Too often within the inner city
there is but an illusion of service—an attractive facade." Annual Report of the President
of the National Legal Aid and Defender Association, Sept. 1964, quoted in P. Wald, *Law and
Poverty: 1965*, at 48 (1965). For an excellent series of articles and source materials con-
cerning the law and the urban ghettos see *The National Lawyers Guild Practitioner*,
fall 1967.
been subverted by “the failure of local officials in several Southern states to adhere to their oath of office to support the Federal Constitution,” and by the absence of federal prosecutions.

No statistics, no matter how dramatic, can bring the ghetto to life. The life and cry of the ghetto can best be understood through the artist, the musician and the poet. However, the law has created the phrase “clear

146 U.S. COMMC’N ON CIVIL RIGHTS, LAW ENFORCEMENT, A REPORT ON EQUAL PROTECTION IN THE SOUTH 1 (1965). “During 1963 and 1964 severe outbreaks of racial violence occurred in several communities in Mississippi. . . . Specifically, law enforcement officers: (a) failed to protect Negroes from preventable acts of violence; (b) failed to conduct adequate investigations of incidents of violence; (c) arrested or abused victims of violence who reported incidents to them; (d) allied themselves or publicly expressed sympathy with extremist racist groups; (e) and failed to prosecute adequately cases in which arrests were made.” Id. at 174.


148 Sit at your window. Ask yourself why.
The red glow of fire lights up the night sky.
Far below where the sirens scream thru the black
The dark streets re-echo with the sharp rifle’s crack.
Down there where the screaming mobs surge like the sea
In broken glass, gasoline, flying debris,
The troopers press forward with bayonets fixed
Into the shower of bottles and bricks.
What are the confused thoughts that race through your brain,
At the sight of a city gone completely insane?
Oh, how can I tell you in terms black and white
Why there’s fire in the city tonight?
I can’t talk to you, you’ve never been there,
In the hate-haunted canyons of human despair.
You’ve never been back of the invisible wall
Through the sickening stench of the tenement hall.
You’ve never walked down the trash-littered street.
Seen fear and suspicion on the faces you meet,
Where your presence brings silence to the children at play.
Where angry eyes watch from a dark passageway,
Where the volcano slumbers and dark eyes indite
And there’s fire in the city tonight. . . .

And this is the price of the wrong that’s been done;
A fury that rages on past the sun.
Like the roar of a river that’s been too long held back
Striking out blindly in wanton attack,
Smashing and burning a whole city wide
Onward and onward in mad suicide,
Reaping the seeds that for years have been sown.
A mad whirling cyclone of hate against hate
In this hour of darkness, friend, let’s pray it’s not too late.
and present danger” which it uses as a tool to dissect the ghetto and to analyze whether black power advocacy should be treated as criminal anarchy or free speech.

It may be argued that the clear and present danger formula is not concerned with the basic conditions which cause frustration and hate. The issue as viewed by Holmes and Brandeis is whether there is a reasonable ground to fear that the advocacy is the triggering device, the specific agent which touches off the explosion. This test does not require that violence has actually occurred, only that reasonable men could agree that in the tense circumstances there was a high likelihood of imminent danger. This requirement of reasonable fear forces one to develop some criteria of reasonableness.

In order to determine whether it is reasonable to conclude that advocacy will produce violence in crisis circumstances, one must look to a survey of crisis situations and analyze the causes of the explosions. If one could show that in most tense situations an outbreak of violence immediately followed a black power speech, this would be strong evidence that it was reasonable to expect that the speech would cause the violence. However, the studies of ghetto uprisings reveal that the opposite is true; that is, in ninety-three per cent of the cases there was no such advocacy.

For as long as the wall stands between black and white
There'll be fire in the city all night.


149 Whitney v. California, 274 U.S. 357, 376 (1927) (concurring opinion). With regard to ghetto uprisings it may be that there is no triggering event upon which responsibility can be fixed. The National Advisory Commission on Civil Disorders reported that “disorder did not typically erupt without preexisting causes, as a result of a single ‘triggering’ or ‘precipitating’ incident. Instead, it developed out of an increasingly disturbed social atmosphere, in which typically a series of tension-heightening incidents over a period of weeks or months became linked in the minds of many in the Negro community with a shared network of underlying grievances.” Riot Commission Report, supra note 31, at 111.

In surveying over 100 uprisings from July 1964-September 1967 the author drew from three major sources. The first was a number of charts on major riots and disorders. Hearings on Riots, Civil and Criminal Disorders Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations, 90th Cong., 1st Sess., pt. 1, at 14 (1967) [hereinafter cited as 1967 Hearings]. These charts include the Mayors’ reports of the incidents which triggered the violence. The percentages in the text above are drawn from these charts and the additional research done by the author. The charts list 101 major incidents. Of these, four resulted from traditional Southern civil rights activity—Selma, Ala., 1965; Bogalusa, La., 1965; Grenada, Miss., 1966; Greensboro, N.C., 1967—and are not classifiable as riots. Two other incidents resulted from attacks on civil rights marchers by white bystanders in Chicago, Ill., and Cicero, Ill., both in 1966. Subtracting these six from the total the result is ninety-five major uprisings. Of the ninety-five only seven involve black power advocacy as a factor in the disturbances—Atlanta, Ga., Sept. 1966; Nashville, Tenn., Houston, Tex., Cincinnati, Ohio, Cambridge, Md., Dayton, Ohio, and Mt. Vernon, N.Y., all in 1967. Bill Epton’s advocacy during the Harlem uprising of 1964 was
The President's Commission on Law Enforcement and Administration of Justice found that the seven uprisings in the summer of 1964 were all touched off by police incidents.\textsuperscript{151} The following year the uprisings grew worse. On August 11, 1965, a black ghetto called Watts broke loose with a fury and intensity that caused the white residents of Los Angeles, many of whom had never heard of Watts, to lock their doors in fear. Although the McCone Commission found that "the Los Angeles riot started with the arrest of Marquette Frye"\textsuperscript{152} this statement tells little of the relations between the black community and the Los Angeles Police Department which helped to precipitate the uprising.

In Los Angeles the police often refer to their night sticks as "nigger-knockers,"\textsuperscript{153} and some police stations had posted on their bulletin boards a picture of Eleanor Roosevelt, with the caption "Nigger Lover."\textsuperscript{154} On the other side, some black men had little respect for the law; as one said, "Whitey talks about law and order—it's his law and order! Not mine!"\textsuperscript{155} Everyday, black citizens and white policemen passed each other on the streets of Los Angeles as enemies.\textsuperscript{156} When relations between police and
the ghetto become this warped it is not surprising that it was a police incident, rather than black power advocacy, which sparked the destruction of 175 million dollars worth of property and the death of thirty-six persons.\textsuperscript{167}

In July and August of 1967 there were more uprisings than there were summer days,\textsuperscript{158} with Detroit being the worst in this country's history. The Detroit rebellion started after a police raid on an after-hours club. As the squad cars and a paddy wagon carried away the seventy-four black people arrested, a crowd gathered and then, as in Watts, a bottle smashed against a squad car window; within minutes the rebellion was in progress. In Detroit, as in the overwhelming majority of the uprisings, there was no black power advocacy.\textsuperscript{159}

Even in situations where black community leaders have advocated peaceful protest, other members of the community have taken matters into their own hands. The events surrounding the beginning of the Newark rebellion shed light on the spontaneous outbreak of violence. In Newark on the evening of July 12, 1967, a black cab driver was arrested after he had "tailgated" a police car and had entered into a "short scuffle" with the police.\textsuperscript{160} At the bail hearing the cab driver testified that the police "caved in my ribs, busted a hernia, and put a hole in my head."\textsuperscript{161} Within a few hours, the story of the beating had circulated through Newark's shadowy slum. A large crowd began to converge on the Fourth Precinct where the driver was being held. Leaders of the local poverty program, the Legal Services Project, and the Congress of Racial Equality, with police permission and bullhorns, spoke to the crowd; they militantly criticized the police and pledged their resources to the defense of the cab driver.\textsuperscript{162} A peaceful protest march was attempted, but gained little support. Soon rocks and bottles were crashing through the precinct windows, and the Newark rebellion had begun.

If a black power spokesman had stood up in front of the precinct and had given a speech advocating violence, there is no doubt that the mass media would have reported that he had instigated the violence. Furthermore, it is quite likely that he could have been convicted under a criminal anarchy statute. However, the facts show that the people had decided to

\begin{thebibliography}{99}
\bibitem{158} See Time, supra note 134, at 14.
\bibitem{159} See Time, July 21, 1967, at 15.
\bibitem{160} Id.
\bibitem{161} Hayden, supra note 57, at 14.
\bibitem{162} Id.
\end{thebibliography}
act and did not need an "agitator" to spark their violence. Speech, any speech, in this situation would not have been the factor which produced the action.

Examining the seven per cent of the cases which did involve both advocacy and violence it can be shown that in almost half of them speaking or leafleting did not ignite the violence. The example of Bill Epton in Harlem is a good illustration of a situation where there was militant advocacy but no triggering of an uprising. In a highly tense situation Epton spoke to a crowd on a Harlem street corner advocating the necessity of smashing the state and declaring war on the police. After the speech the crowd peacefully broke up. That night the Harlem uprising began. Though it is possible that Epton's speech helped to create a mood of hostility, other factors also contributed to that mood. The poor relations

163 In the Nashville uprising of April 8-10, 1967, Stokely Carmichael had spoken at Fisk, a predominately black college, the day before the uprising. The day of the violence, he spoke across town at the predominately white Vanderbilt University a few hours before the disturbances began. N.Y. Times, April 9, 1967, § 1, at 1, col. 2. The violence was triggered by the manager of a restaurant which served Fisk University students when he called the police to arrest a black student. A picket line protesting the action was formed, and soon afterwards the police arrived and the violence ensued. Id., April 11, 1967, at 16, col. 2.

The former mayor of Mt. Vernon, New York reported that "haranguing by agitators and extremists" had triggered the uprising of July 25-30, 1967. Unable to find any reports in the N.Y. Times which substantiated this charge the author wrote the Mayor's office in Mt. Vernon. A prompt reply was received from the new Mayor, who enclosed clippings taken from their local paper, The Daily Argus. None of the clippings mention black power advocates. The reports imply that the "agitators and extremists" were local youths who were upset about poor jobs, bad housing and little recreational facilities. See Daily Argus, July 27, 1967, at 1. "The curfew in the troubled Third Street sector . . . lifted last night after a meeting between city officials and leaders of Negro youths." Id. July 29, 1967, at 1. There is no implication that these youths gave black power speeches; rather, it seems that they were gang leaders directing the disorders. See clippings from Daily Argus, July 27-29 (on file with the California Law Review). The reports of the Mt. Vernon uprising are an instructive example of how agitation becomes confused with black power advocacy. For a full discussion of this problem see text accompanying notes 36-39 supra.

In the Cambridge uprising of July 24-26, 1967 Rap Brown had given a street-corner speech three hours before the violence began. Antiriot Bill Hearings, supra note 29, pt. 2, at 734-35. An hour after Brown's speech he led a group of people on a march towards the center of town. As they walked towards downtown Brown was hit by a shotgun pellet. The Dorchester County State's Attorney said that Brown was "probably" hit by police buckshot. N.Y. Times, July 26, 1967, § 1, at 1, col. 5. An hour or two later the black community was invaded by "armed whites, who raced through the Negro section firing wildly at Negroes standing in the streets . . . ." Id., July 25, 1967, at 20, col. 6. From these reports of the events it is more likely that the firing by police at the marchers led by Brown, and the attack by the groups of armed whites, rather than Brown's speech, were the igniting factors of the subsequent uprising. Report of the National Advisory Commission on Civil Disorders (Bantam 1968) included a thirty-five page analysis of the Cambridge uprising. The report accuses the police of helping start the violence by overreacting to Rap Brown's speech. It also stated that the uprising, "can best be interpreted as a response to actions of the city officials." S.F. Chronicle, March 5, 1968, at 13, col. 5.

164 See text accompanying notes 44-45 supra.
between the police and the community, the recent police shooting of a black teenager, the news coverage, even the sweltering heat of the night might have been factors which combined to create the violent mood. The New York Court of Appeals recognized that there was no immediate causal chain between the speech and the violence when it stated that there was "no evidence here that the defendant . . . had any hand in causing the riots that began on the evening of July 18." It is likely that many of those involved in the fighting and looting had been in the crowd that listened to Epton's speech. However, at the time of the speech they were not ready to act, and even though Epton's advocacy was provoking and explosive there was no explosion, no violence.

In the remaining four per cent of the cases it is difficult, if not impossible, to prove that advocacy caused the uprisings. An illustration of this type of situation is the Atlanta rebellion of September 1966. A few hours after a police officer shot a black man, Stokely Carmichael released a protest statement to a local radio station. An hour later there was a demonstration started by local members of SNCC, at which Carmichael was not present. Two people in the crowd got up and talked about the shooting incident. The police considered the statements inflammatory and ordered George Ware of SNCC to remove the sound truck. When he refused, he was arrested. Another member of SNCC, Bobby Walton, tried to speak, but he too was arrested. The district court stated that "The arrest of these two men stirred up additional excitement and resentment, resulting in the first physical interference with the work of the police." The crowd began to shake the patrol wagon but the police were able to drive it away from the crowd. However, the patrol wagon hit a pregnant

168 The cause of the Houston uprising is asserted by some to be agitation by members of SNCC. 1967 Hearings, supra note 150, pt. 1, at 160. Other sources assert that the uprising was triggered by police provocation. Analavage, Houston to Put Militants on Trial for Murder, The Southern Patriot, Dec. 1967, at 1, col. 3 (this monthly newspaper is published by the Southern Conference Educational Fund, Louisville, Ky.). The reports on the Cincinnati uprising also conflict, but there is no doubt that police action was one of the factors, if not the primary factor in triggering the violence. See N.Y. Times, June 14, 1967, at 34, cols. 4-6; id., June 15, 1967, at 34, col. 4. There is also a good deal of controversy over the cause of the Dayton uprising. See N.Y. Times, June 17, 1967, at 14, col. 7. For an analysis in Atlanta, Georgia see text accompanying notes 168-74 supra.
169 "[T]hat we were tired of these shootings . . . and that we would mount a protest and tear up and turn inside out the city until the incidents have stopped." Carmichael v. Allen, 267 F. Supp. 985, 988 (N.D. Ga. 1967).
170 Id.
woman, and with that people began throwing rocks and bottles at the police.

From these facts one could not fairly conclude that Carmichael's statement which had been broadcast over the radio was the triggering agent. It is possible that these words helped to create a mood of anger, but other factors, such as the shooting itself, may have contributed equally and probably more to the mood than Carmichael's statement. When there is a time lag between the speech and the action, the causal connection becomes almost impossible to define. In the Epton case there was a two or three hour time lag, and the court had no difficulty stating there was no causal connection.\textsuperscript{171} In a case such as this where the time lag was one hour, it would seem that sixty minutes is sufficient for the volition of the individual to become primary. It seems that the Solicitor General of the Atlanta Judicial Circuit was in agreement with this analysis, as he stated to reporters that he did not have sufficient evidence to indict Carmichael for insurrection or incitement to insurrection.\textsuperscript{172} However, unknown to the Solicitor General, Carmichael was arrested for violation of the State Riot Statute and the city disorderly conduct ordinance.\textsuperscript{173}

The speeches of the two SNCC members during the demonstration are more difficult to analyze. In the situation presented above, there were three events occurring within the space of ten to fifteen minutes. First, there were the speeches by the black protestors; at this point there had been no action by the listeners. Second, there was the stopping of the speeches by the police and the arrest of the SNCC workers who tried to speak; at this point the crowd began to act. Third, there was the patrol wagon accident; at this point the uprising began. It would be difficult to conclude that the speeches were any more responsible for the violence than the other two events. In fact, it may be more reasonable to conclude that the stopping of the speech triggered the hostility of the crowd. Another possible conclusion is that if the patrol wagon had not hit the woman, the angry crowd would have dispersed. A fourth conclusion is that the three events were so close in time and so interrelated that they must be viewed as one event. Given these possible conclusions and the difficulty in choosing between them, singling out the advocacy for criminal penalty would not seem justified; this is especially true in light of the Holmes and Brandeis opinions which stress the importance of free speech and imply that advocacy can be punished only when it is a primary cause


\textsuperscript{173} Id.
of the evil. In this situation the Solicitor General did not give in to the public hysteria, as he refrained from indicting the SNCC spokesmen for inciting insurrection.

In each of the cases where speech and violence are closely related in time and space there are significant independent factors intervening between the advocacy and the action. The only proof of a causal relationship between black power advocacy and the forcible action is the time and space relationship itself. Since it has been shown that in ninety-three per cent of the cases speech was not necessary to the violence, there is little basis to infer that in the few other situations the speech was an essential causative factor of the violence.

The clear and present danger test sidesteps the question whether or not there was a real causal connection by requiring only that reasonable men agree that the advocacy could have caused the violence. But this sidestepping only restates the problem of what is the standard of reasonableness. If there is no proof that the advocacy was the cause of the violence, there is no concrete basis upon which one can state that it is reasonable to believe that the advocacy produced the uprising. Without a concrete basis, vague notions of fiery speeches causing mob action become the standard of reasonable fear.

A further difficulty caused by the use of the standard of reasonable fear, instead of requiring proof that the speaker caused the action, is that there have been many tense situations where there was black power advocacy but no violence. Unfortunately, these cases are rarely reported; yet, from this author's study it seems that there may be more of the advocacy-no violence type of situation than any other. However, for

174 Compare Justice Brandeis' dissent in Schaefer v. United States, 251 U.S. 466, 482 (1920), with the majority decision, id. at 477-79.


176 See notes 125 & 129 supra and accompanying text.

177 On February 17, 1968, Stokely Carmichael visited Oakland, California to speak at a rally on behalf of Huey Newton, Minister of Defense of the Black Panther Party for Self-Defense, who was in jail charged with fatally shooting a policeman. The newspaper headlines reflected the tension of the community: Carmichael Warns: Free Newton—Or Else, Berkeley Daily Gazette, Feb. 17, 1968, at 1, col. 1. That evening the author attended this rally, at which advocacy of black power was put forth in its most militant, and sometimes violent, form. The program began with African dancing and pulsating drums. Members of the Black Panthers patrolled the audience wearing buttons exclaiming "Free Huey." Stokely Carmichael, giving his first public speech since his recent return from Cuba, Algeria, and Africa, advocated that black Americans see themselves as part of the "revolutionary third world." Adding to the militancy was the unexpected appearance of Rap Brown who had seemingly violated a court order restricting him to New York to attend the rally. The rally ended with Carmichael demanding and the crowd responding, "Free Huey—or else!" Although this was an explosive rally in circumstances potentially dangerous, there was absolutely no violence. See Berkeley Daily Gazette, Feb. 19, 1968, at 1, col. 5. See the report of Rap Brown's militant speech in Watts during the celebration of the 1965
purposes of analysis this survey is limited to the situation where there is violence. The conclusion one draws is that in ninety-three per cent of the cases advocacy was not present; in three per cent advocacy was not a primary factor, and in the remaining four per cent it is difficult, if not impossible, to prove that the advocacy caused the violence. Based on this evidence, it does not seem reasonable to believe that in times of ghetto tension black power advocacy will produce an uprising.

There is one seemingly strong argument for using a reasonable belief test instead of a results test. This argument points out that in order to protect the state and its citizens from harm it is necessary to be able to stop a speech which is likely to create violence. If the police must wait to arrest a person until the violence has taken place, then the prevention of harm is impossible. Regardless of the merits of this argument in other situations, it is irrelevant to most criminal anarchy prosecutions. Criminal anarchy arrests usually take place days, even weeks, after the advocacy.\footnote{Criminal anarchy cases are not like the “insulting or fighting words” cases\footnote{in which a speaker infuriates a hostile crowd. In the situation of a black power advocate speaking to a black audience there is no danger of fights between the listeners,\footnote{nor is there danger that the crowd will attack the speaker. The only possible danger is that the crowd will attack police and property. This danger cannot be avoided by arresting the advocate during his speech because the other factors which contribute to the violence are still present. The ghetto crowd listening to the speech and already hostile to the police would be more likely to act violently if the police tried to arrest the black spokesman.\footnote{Criminal anarchy arrests, which produced no violence or disturbance. N.Y. Times, Aug. 14, 1967, at 22, col. 3. See Rap Brown’s black power speech to a crowd in Jacksonville, Florida only a week after the Detroit uprising, which produced no violence. Trae, Aug. 18, 1967, at 21-22.\footnote{Miss Anita Whitney, a woman near sixty, was arrested three weeks after a convention of the Communist Labor Party which did not result in any violence. Her presence at the meeting was held sufficient grounds for her conviction of criminal syndicalism. Whitney v. California, 274 U.S. 357 (1927); Z. Chafee, Free Speech in the United States 343-54 (1941). Bill Epton was arrested more than two weeks after his speech during the Harlem uprising. Brief for Appellant, at 4, People v. Epton, supra note 30. Carmichael was arrested two days after his radio broadcast and the Atlanta uprising. See Carmichael v. Allen, 267 F. Supp. 980, 990 (N.D. Ga. 1967). John Harris was arrested almost four months after he had passed out leaflets at the Deadwyler inquest. Indictment of Harris, supra note 42. Rap Brown was charged with criminal syndicalism six weeks after his speech given on the day of the Dayton uprising. Letter from Henry Phillips, City Prosecutor, Dayton, to California Law Review (on file with the California Law Review). “The matter was not referred to the Grand Jury for consideration, and, therefore, there is no formal indictment.” Id.\footnote{Id.}}}}}}\footnote{E. g., Terminiello v. Chicago, 337 U.S. 1 (1949).\footnote{Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).\footnote{Feiner v. New York, 340 U.S. 315 (1951).\footnote{See text accompanying notes 169 and 173 supra.}}}
both historically and practically, are not a means for preventing the imminent danger. Of course the argument can be made that although criminal anarchy prosecutions will not stop the violence caused by that particular instance of advocacy, they will act as a deterrent to future black power advocacy. While this argument may be persuasive in theory, the last four years of increasing black power advocacy have shown that arrests and even convictions for advocacy do not deter other black power speakers.

The Court has never made a full empirical analysis of the advocate's relationship to the expected danger. It may be that the judicial process is not adequate to make these kinds of factual determinations. But if the Court is committed to a formula which requires determinations as to when there is an actual danger and as to the likelihood of speech causing action, then its refusal to attempt empirical answers to these issues results in vague notions of danger and causality determining the scope of free speech. If one allows the constitutional test of free speech to be a vague requirement of a reasonable belief of clear and imminent danger, then everytime there is a ghetto crisis militant black power advocacy will be open to prosecution.

2. The Dennis Test of Clear and Present Danger

The Supreme Court, in Dennis v. United States, gave a new interpretation to the clear and present danger test in an effort to deal with the advocacy of members of the American Communist Party. This test not only emasculates the concept of present danger as meaning imminent or immediate, it also makes the probability necessary for limiting free speech dependent on the seriousness of the evil; that is when an evil is very grave, then a lesser degree of probability is necessary. Applying this formula, the Court viewed the evil as an attempt to overthrow the government, which it classified as an extremely grave evil. However, it did not try to find that there was a "present" danger of this evil occurring. The time when this attempt to overthrow the government would take place was seen as being sometime in the indefinite, possibly remote future. The

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183 Justice Brandeis suggested this lack of adequately defined standards, stating in Whitney v. California that, "This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection." 274 U.S. 357, 374 (1927) (concurring opinion). Fourteen years later, Justice Black writing for the Court reiterated this weakness of the clear and present danger test in Bridges v. California, 314 U.S. 252, 261 (1941).


185 See text accompanying note 89 supra.

Court accepted the trial judge's instructions to the jury which stated the time element in the following words: "[O]verthrow ... by force and violence as speedily as circumstances would permit."

It is important to note that when the danger is imminent, the *Dennis* test produces the same result as the Holmes-Brandeis test. Therefore in the case where someone advocates violent change during a ghetto crisis, both tests allow for punishment of that speech. However, there are frequent situations in which the two tests produce different results. In circumstances such as Harris spreading leaflets during the Deadwyler inquest or Carmichael making a statement over the radio after a police incident, a court might well decide that there had been no immediate danger. Therefore, according to the Holmes-Brandeis test, the advocacy would be constitutionally protected. However, using the *Dennis* test where there is no requirement of imminent danger, the advocacy is punishable.

In *Yates v. United States*, the Supreme Court read *Dennis* to mean that advocacy of action was punishable but that advocacy of abstract doctrine was within the traditional protection of the first amendment. The Court accepted the *Dennis* reformulation of the clear and present danger test, balancing the requirement of immediate danger against the gravity of the evil. However, it stressed that the punishable advocacy must be present advocacy of immediate or future forcible action. This question then arises: If the violent action is to occur at some time in the future, what is the rationale for viewing the present advocacy as constituting a danger? The Court in *Dennis* rested its answer on the then prevailing notion of the Communist Party of the United States. It stressed the high degree of organization, the intricate chain of command which linked every individual cell, and the rigidly disciplined members who were conditioned to respond immediately to their leaders' commands almost as Pavlov's dogs were conditioned to respond to the bell. The Court in *Yates* stated:

The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to "action for the accomplishment" of forcible overthrow, to violence as a "rule or principle of action," and employing "language of incitement," . . . is

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187 341 U.S. at 512.


189 Id. at 321.

190 "Dennis was thus not concerned with a conspiracy to engage at some future time in seditious advocacy, but rather with a conspiracy to advocate presently the taking of forcible action in the future." Id. at 324.

191 341 U.S. at 498.

192 Id. at 510-11; 547 (concurring opinion of Frankfurter, J.); Id. at 566 (concurring opinion of Jackson, J.).
not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented toward action, and other circumstances are such as reasonably to justify apprehension that action will occur.\textsuperscript{193}

If black power organizations do not fit the model of a dangerous group as described in \textit{Dennis} and \textit{Yates}, it is arguable that this more restrictive test should not apply to them.

Black power organizations fall into several classifications. There are four general categories of groups whose members are likely to give speeches or pass out literature during periods of ghetto tension. The first consists of national organizations which adhere to Marxist revolutionary theory, such as the Progressive Labor Movement and the W.E.B. DuBois Clubs.\textsuperscript{194} The second category consists of local ghetto groups not tied to any particular political-economic philosophy, such as the Black Panther Party for Self-Defense in Oakland, California.\textsuperscript{195} The third grouping includes the college based Afro-American organizations such as the Afro-American Student Union at the University of California Berkeley campus, the Black Student Union at San Francisco State College, and the Student's Afro-American Society at Columbia University.\textsuperscript{196} The fourth category is made up of those groups, such as SNCC and CORE, which carry on both traditional civil rights activities and nationwide black power organizing.\textsuperscript{197}

None of the above mentioned groups have a network of highly organized and intricately related local units. In two of the categories the groups have only local membership.\textsuperscript{198} None of the organizations maintain a high degree of discipline over their members. The most publicized and seemingly dangerous group, SNCC, is not even a membership or-

\textsuperscript{193} 354 U.S. at 321.
\textsuperscript{195} See \textit{Huey From Jail}, S.F. Express Times, March 14, 1968, at 6, col. 4 (this weekly newspaper is published by the Trystero Co., 15 Lafayette Street, San Francisco, Cal.).
\textsuperscript{196} See \textit{The Black Revolt Hits the White Campus}, \textit{Look}, Oct. 31, 1967, at 29.
\textsuperscript{197} Interview with Ed Wilson, former Field Secretary for SNCC, presently attending Boalt Hall March 1, 1968 (on file with the California Law Review).
\textsuperscript{198} College afro-american groups are made up of only local membership. Most of the local ghetto groups are also based on community membership. Although the Black Panther Party for Self-Defense may develop similar groups in other communities, they stress that decisions be made through local rank-and-file discussion, and there is no select body which has control over policy. Telephone interview with Gene Dennis, San Francisco reporter for the People's World, currently doing a series of articles on Huey Newton, Minister of Defense for the Black Panthers, who is presently accused of shooting two Oakland policemen, Feb. 24, 1968 (on file with the California Law Review).
ganization. It is a loose collection of people with no national directives; nor does it require those working on a SNCC project to agree with every policy of SNCC.\textsuperscript{199} The other groups are also distinguished by their local autonomy, and their lack of discipline. Even the two traditional revolutionary groups, Progressive Labor and the DuBois Clubs, have rejected the rigidity of the leader-member relationship of the Communist Party of the 1940's and 1950's.\textsuperscript{200} They stress local autonomy and do not require their members to forsake dissenting views.\textsuperscript{201} Thus, none of those groups fit the dangerous group model fashioned in \textit{Dennis} and \textit{Yates}.

A reading of the best in-depth study of a major uprising, The Los Angeles Riot Study (LARS)\textsuperscript{202} suggests that Watts violence was produced not by a preestablished plan, but by a spontaneous community catharsis. The study testifies to the facts that (1) up to fifteen per cent of the Negro adult population, or about 22,000 persons were active at some point during the rioting, and in more than a spectator role; (2) an additional thirty-five or forty per cent of the Negro adult population, or at least an additional 51,000 persons, were active spectators to the disturbance; (3) support for the riot was as great among the relatively well-educated and economically advantaged as among the poorly educated and economically disadvantaged in the curfew area.\textsuperscript{203}

Although there have been accusations of a conspiracy behind the uprisings,\textsuperscript{204} the evidence strongly points to the conclusion that there was no conspiracy, no preestablished plan, no group of subversives. The report of the FBI on the uprisings of the summer of 1964 testifies to the spontaneous nature of the violence.\textsuperscript{205} The McCone Commission concluded:

\textsuperscript{199} Interview with Ed Wilson \textit{supra} note 197. SNCC and the Black Panther Party for Self-Defense have begun to work out some form of merger. However, as pointed out by Wilson, the philosophy of SNCC, as well as the philosophy of the Black Panthers, is based on the concept of local groups making the decisions which control their action in their own community. The merger was officially announced at a rally held for the benefit of Huey Newton on Feb. 17, 1968. Having attended that rally the author heard nothing in the explanations of the merger to warrant a belief that the local autonomy would become subservient to some national grouping.

\textsuperscript{200} Telephone interview with Conn Hallinan, former President of San Francisco DuBois Club, in Oakland, Cal., Feb. 20, 1968 (on file with the \textit{California Law Review}).

\textsuperscript{201} Id.


\textsuperscript{203} Id. at 3.

\textsuperscript{204} Senator G. Murphy of California stated that "the looting was so expert that there are grounds for belief that there may have been ‘rehearsals’ for the incident. . . . It was done by a small vicious group of trained troublemakers . . . . " Quoted in R. Conor, \textit{supra} note 56, at 426.

\textsuperscript{205} "Each of the seven major city riots, with one exception, was an escalation from a minor incident. . . . In each instance there was first violent interference with the policemen
There is no reliable evidence of outside leadership or pre-established plans for the rioting. The Attorney General, the District Attorney, and the Los Angeles Police have all reached the conclusion that there is no evidence of a pre-plan or a pre-established central direction of the rioting activities.

The Detroit Police Commissioner stated that there was "no evidence of any conspiracy involved in the riots." The Governor's Select Commission on Civil Disorder issued a comprehensive report on the Newark uprising in which it found that, "[t]he evidence presented to the Commission does not support the thesis of a conspiracy or plan to initiate the Newark riot." The National Advisory Commission on Civil Disorders concluded that "the urban disorders of the summer of 1967 were not caused by, nor were they the consequence of, any organized plan or "conspiracy." The Commission also stated that it had "found no evidence that all or any of the disorders or the incidents that led to them were planned or directed by any organization or group, international, national or local."

Although this evidence strongly rejects the conspiracy theory, a court might focus on the fact that it was dealing with a black power group, and ignore the group's indirect relationship to the uprising. It might disregard the rationale of Dennis and Yates and look solely to the literal test used in those cases. The evil would be seen as an attempt to overthrow the government as quickly as circumstances would permit, and thus as dangerous as that presented in the Communist cases. The advocacy would be present advocacy of forcible action. The group might be falsely described as disciplined, organized and dangerous. The result of mechanically using the Dennis test would be that a court could easily find black power advocacy punishable under a criminal anarchy statute.

The Court in Yates held the Government to very strict evidentiary requirements. The Government had to show that the defendants had been engaging in present advocacy of forcible action, which meant a present on the scene, followed by the gathering of a crowd. Store windows were broken ... rocks were thrown, ash cans hurled from roof tops, bottles, bricks, Molotov cocktails and fire bombs were thrown; the latter usually on the second or third day of the riots. Looting followed. As news of the riots was spread by the newspapers, radio and television the riots spread to other sections.” FBI report on the uprisings of summer 1964, as quoted in R. CONOT, supra, at 201.

206. CONOTE, supra note 9, at 22.
207. TIME, supra note 134, at 16.
208. GOVERNOR'S SELECT COMMISSION ON CIVIL DISORDER, REPORT FOR ACTION, 305 (1968).
210. Id.
call to violence to take place at some future time.\textsuperscript{211} Five defendants were acquitted because of the weakness of the evidence, and new trials were ordered for the remaining nine. However, the others were never tried because the Government asked the district court to dismiss the case as they had been unable to satisfy the Supreme Court's evidentiary requirements.\textsuperscript{212}

There are two reasons why, in most instances, the \textit{Yates} restriction on the \textit{Dennis} test will not result in protecting black power advocacy. First, most advocacy takes place where there is a situation of imminent danger, and is thus punishable under any formulation of the clear and present danger test. Second, in the instances where there is no immediate danger, the advocacy is still phrased in terms of a present call to forcible action and not in terms of abstract doctrine.

After the \textit{Yates} decision it was observed that the Government would have to use informers and undercover agents in order to acquire the necessary evidence.\textsuperscript{213} This is exactly what was done in the \textit{Epton} case. An undercover agent was planted in the Harlem Progressive Labor group. The agent, wired with a "minifon," taped a conversation in which Epton said the demonstration to protest police brutality would lead to violence.\textsuperscript{214} Two "police cadets"\textsuperscript{215} were infiltrated into the Cleveland DuBois Club and their reports on the activities of members of the DuBois Club, the Jomo Kenyatta Freedom House, and the John F. Kennedy House were used extensively in the hearings on the antiriot bill.\textsuperscript{216} If federal and state police agencies continue to use undercover agents, they will have little trouble acquiring the evidence necessary to convict under the \textit{Dennis-Yates} formula.

This formula, which stresses the grave evil of an international conspiracy to overthrow the government, was developed during the height of McCarthyism and was based on the then prevailing notion that the American Communist Party was merely a cog in a tightly intertwined, monolithic, international communist conspiracy directed by Moscow. It


\textsuperscript{212} Mollan, \textit{supra} note 96, at 732.

\textsuperscript{213} "I have always thought, as I still do think, that this Government was built upon a foundation strong enough to assure its endurance without resort to practices which most of us think of as being associated only with totalitarian governments. I cannot join an opinion which implies that the existence of liberty is dependent upon the efficiency of the Government's informers." Noto v. United States, 367 U.S. 290, 302 (1961) (concurring opinion of Black, J.).


\textsuperscript{215} \textit{Antiriot Bill Hearings}, \textit{supra} note 29, at 432.

\textsuperscript{216} Id. at 432-39, 453-54, 459-65.
is questionable whether this vast, robot-like conspiratorial model is applicable to black power groups. Now that the cold war has in some ways subsided, the Court should feel free to reevaluate its reasoning in *Dennis*, or stated in another manner, the Court should determine whether they will treat blacks as they have treated reds.

3. *The Abridgment of Advocacy Only in Times of Tension*

This comment has argued that both the Holmes-Brandeis test and the *Dennis* formulation are vague and uncertain. Therefore the courts are defining statutes which punish speech by uncertain formulas. In actual practice, the vague formula is filled with the subtle prejudices and hidden fears of the white society.

Those who favor the clear and present danger test state that in some situations advocacy is so closely linked with action that to protect society advocacy must be punished. They could point out that Carmichael is free to publish his ideas; after all, his book on black power is sold in bookstores around the country. They might argue that Harris and Epton are free to advocate these ideas except when a community is on the verge of a riot. This argument in its theoretical form states that all views will be expressed, with the exception that during relatively short periods of tension, speech may be silenced.

In practice, the above theory has been used to silence speech not only during brief periods of crisis, but to silence certain speech altogether. Even when speech is limited for brief periods, the effect is to create an atmosphere of caution if not fear. The general public reacts to the branding of certain speech as illegal by identifying the content of that speech with criminal activity. Those people who agree with the speech are wary of voicing their ideas, feeling unwilling to suffer public disapproval, or possibly the loss of a job, or other recriminations. Many will not speak for they know that police and lower courts often have a more restricted notion of the first amendment that the Supreme Court, and that challenging them would involve long and costly court battles. It is in these ways

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218 Between 1919 and 1920, the Supreme Court upheld convictions of antiwar advocates in six separate cases. See note 69 *supra*. It is important to a consideration of free speech issues of today to realize that the indictment against antiwar advocates Dr. Benjamin Spock, Rev. William Coffin, and three other dissenters is based on the same law used to convict the antiwar advocates of World War I. The Christian Science Monitor, Jan. 16, 1968, at 1, col. 2.

219 Ann Fagan Ginger, unpublished manuscript (on file with the Alexander Meiklejohn Civil Liberties Library in Berkeley, Cal.). Mrs. Ginger argues persuasively that a decision by the Supreme Court vindicating an individual's right to speak years after the actual event does not adequately protect the freedom of the individual. She points out that by the time of the decision the political situation is different, the parties to the action are often signifi-
that limiting speech in one situation produces a chilling effect on freedom of speech in general.

The second difficulty with the theory which allows the limiting of speech only during times of immediate crisis is that it seriously limits the effectiveness of speech. People are most responsive to ideas when their interests are clearly at stake. When a policeman shoots a black man in the ghetto, it creates a potentially violent situation. At the same time, if black spokesmen are free to speak it forces white people to open their eyes and ears to police activity in the ghetto. The shooting also motivates black people to express their views and to join together to pressure for change. It is in this type of situation that people want to exercise the right to speak and want to hear others express their ideas for change. It is in this situation that society can benefit from hearing all voices, not just those of the black politicians and respectable spokesmen. To allow speech only after a crisis has calmed down means allowing speech after the community is no longer actively concerned.

It is precisely in the crisis situation where the black community watches to see if “whitey” will allow the deepest feelings of the ghetto to be heard. If national and state governments are concerned about creating a new atmosphere in which the black community will trust the white society, then it must allow the angry voice of the ghetto to speak.

Those who favor the temporary limiting of advocacy say that speech is not limited during all crisis situations but only in those during which there is a likelihood of imminent danger. However, this argument is irrelevant to the ghetto because the authorities have treated “crisis” and “imminent danger” as synonymous in the ghetto context. If one agrees that the ghetto is black social dynamite, then it is true that any crisis creates a general clear and present danger of violence as long as that crisis exists. Therefore, the result of accepting the clear and present danger test is that speech is suppressed in the very instances when it plays its most meaningful role. This inhibiting of speaking and organizing in the community makes peaceful change more difficult to achieve. It may, in a specific ghetto, temporarily maintain the present order; but this restriction of community action allows conditions to continue which will cause, in a week, a month or a year, that very ghetto to explode with even greater violence.

cantly changed and the individual is exhausted financially and emotionally. In order for freedom of speech to be meaningful to citizens, it must be protected at the time and place it occurs. This protection can best be achieved by educating the public, the news media, the schools, the law enforcement agencies and the lower courts to the benefits enjoyed by a society which strictly adheres to the first amendment.

220 See text accompanying notes 126 & 127 supra.
221 Cambridge, Maryland is an example of a city which has suffered many disorders
A different test of the first amendment is needed to protect freedom of speech against the political and social turmoil of the times. Two obstacles stand in the path of accepting a more protective test. First, it is difficult for lawyers, professors and judges to comprehend the ghetto and thereby see the value of black power advocacy. Second, there is a lack of understanding of the role which the first amendment was designed to play in America's political system. An understanding of the purposes of the first amendment makes it possible to decide whether or not black power advocacy is consistent with those purposes and thus whether it should be protected as an expression of freedom of speech.

IV
PURPOSES OF FREE SPEECH

There are four basic purposes of free speech which consistently run through the writings of the founding fathers, the court decisions and the writings of the classic free speech theorists. These purposes, generally stated, are: self-government; search for truth; ensuring societal change; dignity of the individual.

A. Self-Government

The participation of citizens in the political decisions which affect their lives is at the heart of a democratic system of government. The American revolution was a protest against the limitation of that right of unrelated to black power advocacy. Months before Rap Brown ever came to Cambridge there had been attacks on white owned businesses. N.Y. Times, July 25, 1967, § 1, at 1, col. 8. Cincinnati is an example of a city which had one uprising and a few weeks later had another siege of violence without any black power advocacy involved. N.Y. Times, July 27, 1967, § 1, at 18, col. 8. Other examples of cities which suffered repeated disorders not caused by black power advocacy are Chicago, Aug. 1965 and July 1966; Omaha, July 1966 and April 1967; New York, July 1966 and July 1967; Detroit, Aug. 1966 and July 1967; San Francisco, Sept. 1966 and May 1967; Los Angeles (Watts), Aug. 1965 and July 1967. See 1967 Hearings, supra note 150, at 14 (charts).

Black power speech is terribly threatening to white people. The more liberal one considers himself the more threatened he becomes, for black power is a slap in the face to the white person who benevolently holds out his hand to the black man. Dr. Coles, a Harvard psychiatrist who has worked extensively with black children, as well as with the civil rights movement, gave an enlightening analysis of the relationship of the white and black person in our society. He analogized to the situation of parent and child, when the child is breaking away and striving for his own independence. A key to understanding one's reaction to black power advocacy lies in one's understanding of the anger one felt at the child. The anger felt toward the child for talking back, for striking out and for leaving home is much the same as the anger the sincere white person feels toward the outspoken black man. Dr. Coles summed up his observations in the following manner: "The black person is saying, 'I'm a man and you're going to have to look at me as a man and treat me as a man. It will be painful for you and it will be painful for me.'" National Educational Television, Public Broadcasting Laboratory, Nov. 5, 1967. Seen on KQED, San Francisco.
self-government. The concept of self-government means that elected officials should be responsive to the will of the people, and not vice-versa. Free speech is one of the primary constitutional mechanisms which ensures the continuation of this relationship between the people and their government, for it is through public debate that the government is made aware of the criticisms and suggestions of the people. As Justice Douglas has said: "[O]ne main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues." In order to make those decisions, all relevant views must be heard and analyzed. Free speech is then the tool by which the building of a democratic society continues; it is the essence of self-government.

Black power advocates argue that in order for self-government to become a reality to the ghetto dweller there must be a break with the two party system. They argue that most black elected officials do not represent the interests of the poor black man. They point out that even in cities where blacks are in a majority or a near majority black people do not run the city government. Believing that the political system of America is unresponsive to the voice of the ghetto, they advocate the organizing of power blocs. These black power blocs could then exert economic, social, and political pressure so that black people could affect the decisions which control their lives, and thereby make self-government a reality.

B. Search for Truth

The quest for truth has been one of the strongest justifications for protecting speech. What is truth to one man is blasphemy to another.

223 It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by the consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

224 "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people . . . ." DeJonge v. Oregon, 299 U.S. 353, 365 (1937).


227 The recent victories of mayoralty candidates Carl Stokes in Cleveland and Richard Hatcher in Gary, Indiana may be the beginning of a change in this pattern.

228 See S. Carmichael & C. Hamilton, supra note 25, at 44-47, 78-81.
A doctrine which at one moment in time is regarded as obviously true, in another time is shown to be false. Galileo was prosecuted for believing what today any schoolboy takes for granted. Justice Frankfurter expressed the relationship between speech and truth in the following manner:

The history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths. Therefore the liberty of man to search for truth ought not to be fettered, no matter what orthodoxies he may challenge. Liberty of thought soon shrivels without freedom of expression.229

Truth is difficult to perceive when there is little or no communication. The truth about life in the ghetto, the inner feelings of ghetto dwellers, and the relationship between the ghetto and the rest of society, is hidden beneath years of fear and prejudice. Fear is one of the most disabling of emotions. The fear with which the black man has grown up makes it difficult for him to see the white man as he really is.230 The fear results in half-truths and distortions, often leading black people to see oppression where there is a genuine interest by white society in bettering conditions. For example, many ghetto families feel that special school classes for slightly retarded children are dumping grounds for black children who act up in class, and that children are put in these classes on the basis of unfair, biased tests and arbitrary decisions over which the parents have no control. School authorities are often unaware of these feelings or how to deal with them, and they mistake the parents negative attitude toward the special help as a sign of their ignorance or lack of concern for the child.

Black power advocates have directed much of their criticism at the

229 Dennis v. United States, 341 U.S. 494, 550 (1951) (concurring opinion). This eloquent testimony to the value of free speech was written in a case in which it was held constitutional to abridge the speech in question. Id. There is a tendency of Justices to praise the need for unfettered speech while at the same time upholding the speaker's conviction. See e.g., Schenck v. United States, 249 U.S. 47 (1919) (per Holmes, J.); Whitney v. California, 274 U.S. 357, 372 (1927) (concurring opinion of Brandeis, J.). One possible interpretation of this apparent contradiction between word and decision is that the Justices are concerned about free speech, but that the defendant in the particular case does not legitimately fit within the scope of the first amendment's protection. Another interpretation is that the Justices, like most people, are, in part, servants and slaves of their social and political environment. Compare e.g., Whitney v. California, 274 U.S. 357 (1927), with DeJonge v. Oregon, 299 U.S. 353 (1937); compare Schenck v. United States, 249 U.S. 47 (1919) (per Holmes, J.), with Schaefer v. United States, 251 U.S. 466 (1920) (dissenting opinion of Holmes, J.); compare Dennis v. United States, 341 U.S. 494 (1951), with Yates v. United States, 354 U.S. 298 (1957).

230 A white SNCC worker, Bob Feinglass, saw that fear and poignantly expressed it in a letter to his parents: "When we walk up to a house there are always children out front. They look up and see white men in the car, and fear and caution cover their expressions. Those terrified eyes are never quite out of my mind; they drive me as. little else could." Letters from Mississippi 68 (E. Sutherland ed. 1965).
The fact that these speeches attack the schools in generalized and often unfair terms does not detract from the fact that they are exposing the relationship between a white school system and a black community. This exposure allows the distortions and half-truths to be aired publicly. In this way, hidden feelings can be dealt with, and half-truths will eventually give way to whole truths.\textsuperscript{232}

\section*{C. Ensuring Positive Change}

The third purpose of freedom of speech is to ensure positive change in society.\textsuperscript{233} Free speech is necessary to maintain a balance between order and chaos. The voicing of new ideas and demands puts those in power on notice of the weaknesses within the established system. Sometimes these weaknesses can be cured by better communication between the representatives of the status quo and the dissenters. At other times the weaknesses are so ingrained in the status quo that structural changes are necessary. In both instances, freedom of speech combats the tendency of established authority to become isolated from the needs of the people and to resist change.

One of the characteristics of a governing body is to resist change and disruption of the status quo, to look with disfavor upon new ideas and new methods of treating old problems.\textsuperscript{234} If the voices of the protestors are effectively silenced, one of two results may occur. The first is that others holding the same dissenting views will be afraid to speak. Controversial subjects will not be taught in schools, suspect books will be taken off library shelves, and the demands for change will die unheard in a thousand private souls. Soon the people, having heard only one view, begin to accept it. The society becomes stultified and the ideas of those in

\textsuperscript{231}"Public education is a weapon. Cause they're teaching people how to hate black. They're teaching little children how to hate black. They're putting in their old stinky history books that Columbus discovered America. How in the world is some dumb honkey going to discover a country with people living there? The Indian was here, but he was saying ** he was saying that the Indian ain't human cause he ain't white." Speech by Rap Brown quoted in \textit{Antiriot Bill Hearings}, supra note 29, at 34-35.

\textsuperscript{232} An objection to the statement that black power advocates open a dialogue between the ghetto residents and the school authorities is the charge that "responsible" black leaders could better bring about the needed communication. This objection assumes that those who run the local school districts take heed of what nationally recognized civil rights leaders propose. This assumption is incorrect because local school officials do not act based on what the news media report as Martin Luther King's opinion of the problem in the schools. An interview with Whitney Young in \textit{Time} does not create a dialogue between the local school authorities and the community. When local ghetto representatives voice their criticisms of the schools, the authorities undoubtedly will listen twice as fast as when national spokesmen voice similar criticisms at civil rights rallies far from that local school board.

\textsuperscript{233} \textsc{T. Emerson}, \textit{Toward a General Theory of the First Amendment}, 11-15 (1963).

\textsuperscript{234} \textsc{The Federalist No. 46, 49} (Madison).
positions of power become all-pervasive. In our age of material comfort and the incredible potential of mass media to influence and control thoughts and opinions, the society which George Orwell envisioned may no longer be merely a science fiction nightmare.\textsuperscript{235}

The alternative result of silencing open dissent in a society is to eliminate speaking above ground and force dissenters underground to speak and organize. When the conditions demanding change are so extreme that they effect millions, then the silencing of the dissent does not produce the death of that dissent. This Comment has implied that the need for comprehensive changes in the lives of black Americans is an absolute necessity. It has put forth evidence that a sizeable portion of the black population was active in the uprisings and about half the population of the ghetto was sympathetic to the uprisings.\textsuperscript{236} It has argued that the demands of black power advocates, although phrased in exaggerated, "shock-effect" statements, are the demands of a large segment of the black community. These arguments suggest that it will be impossible to stop black power advocacy by limiting their ability to speak in the open.

When courts silence black power advocacy they endow black power ideas with a fascination that an oppressed doctrine has for an oppressed people. An alternative to making martyrs of black power advocates is to allow full freedom of speech so that their doctrine can be met above ground, and stripped of its claim that "whitey" is afraid to let these ideas be heard.

Black power advocacy has not yet been completely suppressed and consequently its ideas are being fiercely debated in black communities throughout the country. Martin Luther King argued on the issue of violence versus nonviolence:

> It is unfortunately true that however the Negro acts, his struggle will not be free of violence initiated by his enemies, and he will need ample courage and willingness to sacrifice to defeat this manifestation of violence. But if he seeks it and organizes it, he cannot win.\textsuperscript{237}

The debate is joined by Huey Newton of the Black Panther Party for Self-Defense who argues, "The racist dog policemen must withdraw immediately from our communities, cease their wanton murder and brutality and torture of black people, or face the wrath of the armed people."\textsuperscript{238}

The black man hears both sides; he then can enter into the debate, and eventually make his own choice. He is experiencing a real dialogue,

\textsuperscript{235} See G. Orwell, 1984 (1949).
\textsuperscript{236} See text accompanying note 203 supra.
\textsuperscript{237} Quoted in R. Williams, Negroes With Guns 13 (1962).
\textsuperscript{238} Quoted in Stern, America's Black Guerillas, RAMPARTS, Sept. 1967, at 24.
and faces a real choice. If speech is silenced, then the choice is made in dark tenement basements which have been transformed from prisons to fortresses. At that point the choice will almost certainly be violence; the result is almost guaranteed to be chaos, not order.

Another loud and often vicious debate in the ghetto concerns the responsibility of the black middle class to help the black lower class. In militant speeches black power advocates have charged that many successful black men have turned their backs on their brothers in the ghetto after moving into positions of influence and status within the white world. They have warned the “black bourgeoisie” that some day soon they would suffer the wrath of the mass of poor blacks. One of the many positive results of this verbal attack has been the gradual realization and acceptance by the black middle and upper classes that:

... the [black] middle class owes a debt to Negro progress in this country. That debt can be paid partially by educated men taking their acquired skills to the ghetto and offering them at a fair and honest rate. . . .
Black Americans of all walks of life must pull together or face the possibility of slipping back.

Freedom of speech in this situation has created an awareness in the black middle class which may produce constructive change and avoid a violent “clash between classes.”

D. Dignity of the Individual

The dignity of a human being is something very precious. To an American it means that he has certain rights which must be respected by all, by friends and strangers, by police and government. If those rights are violated, he can seek vindication before an impartial body of his peers. The average white American has the protection of the law, and, knowing that he has that protection, goes through his daily life acting and speaking as he feels. These feelings of security and respect create pride, and encourage expression of one’s ideas. But the black man’s most familiar feelings have been those of fear and caution. Evidently Governor Kirk of Florida believes that given an above-board choice the black man will reject black power advocates. Kirk suggested that Brown be given more TV coverage, not less. The Governor said, “Give him three hours on national TV, and then forget about it.”

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239 Evidently Governor Kirk of Florida believes that given an above-board choice the black man will reject black power advocates. Kirk suggested that Brown be given more TV coverage, not less. The Governor said, “Give him three hours on national TV, and then forget about it.” Tmrz, Aug. 18, 1967, at 22.
240 See The Black Panther, Nov. 23, 1967, at 7 (this weekly newspaper is the official publication of the Oakland Black Panther Party, P.O. Box 8641, Oakland, Cal.).
242 Id.
243 “I never doubted that Malcolm X, even when he was wrong, was always that rarest thing in the world among us Negroes: a true man. And if, to protect my relations with the many good white folks who make it possible for me to earn a fairly good living in the
create shame and silence. The black actor and playwright Ossie Davis, in his eulogy to Malcolm X, described those feelings:

White folks do not need anybody to remind them that they are men. We do! . . . Protocol and common sense require that Negroes stand back and let the white man speak up for us, defend us, and lead us from behind the scene in our fight. . . . But Malcolm said to hell with that! Get up off your knees and fight your own battles. That's the way to win back your self-respect. That's the way to make the white man respect you. And if he won't let you live like a man, he certainly can't keep you from dying like one!

Malcolm . . . scared hell out of the rest of us, bred as we are to caution, to hypocrisy in the presence of white folks, to the smile that never fades.244

Free speech means that people can say aloud what they are thinking. For many years the threats and pressure put on the black man by the white society has kept him from speaking his thoughts. The example of black power advocates speaking in public the hidden feelings of the black person has begun to break through the emotional block resulting from years of subservience and silence. It is only when the black man can freely speak his mind that he will feel the dignity enjoyed by white Americans.245

Black power advocacy, especially in times of crisis, creates the pre-requisites for peaceful change by waking whites out of their ignorance and shaking blacks out of their fear. Black power advocacy enhances the black man's drive for dignity and self-government.246 It can partially overcome the barriers to communication between black and white. Silencing that advocacy, even if only in times of an alleged clear and present danger, will not stop violence; rather it will increase the intensity and
professionals of that violence. Strictly drawn criminal anarchy statutes under present constitutional standards of clear and present danger can be used to punish black power advocacy, thereby producing harmful results for both black and white Americans. A constitutional test of the first amendment which protects black power advocacy is necessary to help create a society where black and white can live together in real equality.

V

THE SCOPE OF THE FIRST AMENDMENT

The test this Comment proposes is not new; it is based on the words of the first amendment and concentrates on interpreting the phrase, "freedom of speech." If the speech in question comes within the scope of this phrase, then the words of the first amendment take their literal effect: "Congress shall make no law . . . abridging the freedom of speech." The fourteenth amendment makes this prohibition equally applicable to the states.

A. Freedom of Speech Includes Political Speech

For the purposes of this Comment, "freedom of speech" is interpreted to include "political" speech. This does not imply that the term ex-

247 Prosecuting advocacy does not prevent the evil which the State is attempting to avoid. The speeches in public may be stopped, but this only forces the groups underground, where they continue their dangerous activities in secret. For example in 1951 the Supreme Court upheld the conviction of leaders of the Communist Party for what essentially amounted to advocacy or teaching. Dennis v. United States, 341 U.S. 494 (1951). In 1953 Attorney General Brownell stated that the Communist Party was a "greater menace now than at any time" because "the Communists have gone underground since the Smith Act trials started." Quoted in Chase, The Libertarian Case for Making it a Crime to be a Communist, 29 Temp. L.Q. 121, 132-33 (1956). As long as black power advocates are allowed to speak, the Government is put on notice of any threat of violent attack upon the state. However, if prosecutions continue, so that they cannot continue to advocate publicly, the black power movement will be forced to move underground, to the vast concrete jungles of the urban ghettos.


250 Ibid. Whatever may be the wisdom, however, of an approach that would reject exceptions to the plain language of the First Amendment based upon such things as "libel," "obscenity" or "fighting words," such is not the issue in this case. For the majority does not, and surely would not, contend that the kind of speech involved in this case—wholly related as it is to conflicting ideas about governmental affairs and policies—falls outside the protection of the First Amendment, however narrowly that Amendment may be interpreted." Konigsberg v. State Bar, 366 U.S. 36, 66 (1961) (dissenting opinion). An excellent historical analysis on the relationship between political speech and the first amendment is found in B. Anastaplo, Notes on the First Amendment to the Constitution of the United States, 127-203 (1964).
cludes other kinds of speech; it only means that within the minimum scope of the first amendment's protection of speech is the protection of political speech. Two questions present themselves: What evidence supports the statement that freedom of speech includes political speech? Is black power advocacy within the traditional understanding of political speech?

The evidence that political speech cannot be abridged lies in the theory of the state on which our Constitution is based. The *Federalist Papers* are the finest expression of this theory.\(^1\) The state is seen as the force which dominates the life of society. The greatest amount of power within the society is concentrated in the governing body. Power feeds on itself; powerful forces in a country, if allowed to go unchecked, will consume all opposing forces, resulting in an "absolute tyranny."\(^2\) The builders of our nation created three mechanisms by which the tyranny of unlimited power could be avoided: The federal system, the separation of powers, and the Bill of Rights.

Within a federal system the national government did not have all the power. The states were given some power in the belief that they would be a strong check upon the national government. However, with the geographic expansion and economic development of the United States, the states' power has diminished in many areas.\(^3\) Thus, an effective check upon the growth of an "absolute tyranny" must be found elsewhere.

Within the scheme of the separation of powers James Madison aptly expressed the role of the judiciary:

> If they [the first ten amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.\(^4\)

\(^{251}\) See *e.g.*, *The Federalist* No. 10 (Madison).

\(^{252}\) "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishments of an absolute Tyranny over these States." U.S. *Declaration of Independence*.


The legislature was viewed as the primary check on the executive, and a necessary weapon of the legislature was the right of its members to speak freely on all matters pertaining to the governing of the society. This right of free speech for legislators was recently affirmed in *Bond v. Floyd*, where the Court stated: "The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." 

A representative government by definition is responsive to the will of the people. Therefore, if the first amendment protects the legislator's right to discuss local or national policy, it must also protect the right of the people to discuss those policies.

The right of the people to discuss freely government policy is inherent in a democracy. Yet the men who wrote the Constitution specifically expressed that right in the language of the first amendment. The first amendment and the other amendments which make up the Bill of Rights were to be the third formal check on the possible abuse of power. Since these rights resided in the people, they were the only one of the three checks of power outside the formal governmental structure. The right of the people to discuss and criticize government officials and policy was seen as the best means of protecting the democratic system.

In order to determine whether or not black power advocacy is political speech it is necessary to decide upon a meaning of political speech. The dictionary definition of "political" is "pertaining to ... the conduct of government, referring in the widest application to the judicial, executive, and legislative branches. ... " Public" is defined as "pertaining to

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256 Id. at 135-36.
257 "The parliamentary regime lives by discussion; how shall it forbid discussion? Every interest, every social institution is here transformed into general ideas, debated as ideas; how shall any interest, any institution sustain itself above thought and impose itself as an article of faith? The struggle of the orators on the platform evokes the struggle of the scribblers of the press; the debating club in Parliament is necessarily supplemented by debating clubs in the salons and the pothouses; the representatives, who constantly appeal to public opinion, give public opinion the right to speak its real mind in petitions." *The Eighteenth Brumaire of Louis Bonaparte*, BASIC WRITINGS ON POLITICS AND PHILOSOPHY: K. MARX & F. ENGELS, 332-33 (Anchor 1959).

258 The General Assembly of Virginia in a report prepared by James Madison, protested that "Congress (The Sedition Act) exercises ... a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." *Quoted in New York Times v. Sullivan*, 376 U.S. 254, 274 (1964).

259 WEBSTER'S NEW INTERNATIONAL DICTIONARY 1909 (2d ed. 1956).
In common usage, "political" refers to activities of the government and actions of citizens, such as voting and running for office, or taking part in organizations which try to influence local, state, or national government.

A third definition can be drawn from political theory. Political speech is that speech which concerns itself with the relationship between man and state. The state is viewed as a hierarchy of power units, each unit capable of control over the activities of man, and each unit is related in some way to other units. For example, a single police precinct is part of the hierarchy of power. The police precinct is intimately tied up with the city police department, which is related to numerous local, state, and federal agencies. An obvious illustration would be an emergency situation where the police must work along with state highway patrol, the national guard, and sometimes federal troops. The police are also interrelated with nonlaw enforcement agencies such as welfare departments, colleges and universities, and even the bar examiners.

The local school is also part of the hierarchy. It receives money from the federal government. Its curriculum is to some degree determined by the state legislature. Some of its practices, such as opening class with a prayer, or restricting its students to one color, are profoundly affected by decisions of the Supreme Court. There are many more examples of the relationship between elected governmental bodies and other units of power within society. In our present day of mass media, it is possible to argue that political speech is speech relating to the policies of major newspapers or even to the advertising practices of municipal buses. However, the narrowest definition of political speech is still broad enough to encompass black power advocacy.

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200 Id. at 2005.
204 See Note, 41 IND. L.J. 302 (1966).
205 CAL. EDUC. CODE §§ 7901-8151 (West 1960).
210 The Court has defined freedom of speech to mean more than just political speech: "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." Thornhill v. Alabama, 310 U.S. 88, 102 (1940).
B. Black Power Advocacy Is Political Speech

Most black power advocacy consists of three major themes, all of which are definitely political. First, criticism of the police, which in most cases is the prime object of the advocacy, is an expression of the people's right to protest actions of the executive arm of the state. Second, analyzing the relationship between the ghetto and the rest of society is an indictment of the structure and functioning of the state. And third, urging of community power is in the classic American tradition of minority groups such as the Jews, Italians, and Irish, who organized their ghettos in order to establish political and economic power blocs.

The two other themes which often run through the advocacy are the theory of violent revolution, and the psychology of the black American. Advocating the necessity of overthrowing the state is advocacy of the right of revolution, an age-old political demand, and one which is written into our own Declaration of Independence. The rhetoric which revolves around racial pride is also intimately tied to political demands, as shown by the following excerpt from a speech by Stokely Carmichael:

Don't be afraid, 'cause you're black and nappy-headed and got a broad nose, that you can't handle power. Don't you let 'em shame you! . . . We look at another Negro and say, "Now he is somebody!" I want a black sheriff in this county so our kids can look at him and say, "Some day I'm gonna be sheriff."

An examination of black power speeches and leaflets makes it clear that the advocacy falls within any generally accepted definition of political speech. The test of free speech suggested above confines itself to an interpretation of the phrase "freedom of speech" and therefore offers more protection to black power advocacy than either of the clear and present danger formulas. The scope of inquiry is not into a myriad of social and psychological factors inherent in determining the degree of

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271 See text accompanying notes 29-36 supra.
272 RIOT COMMISSION REPORT, supra note 31, at 278-82.
273 "Whenever any government becomes destructive of these ends (life, liberty and the pursuit of happiness) it is the right of the people to alter or abolish it, and to institute a new government, laying its foundations on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness." U.S. DECLARATION OF INDEPENDENCE. "This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it." Abraham Lincoln, Inaugural Address, March 4, 1861, quoted in American Communications Ass'n v. Douds, 339 U.S. 382, 440 n.12 (1950) (Jackson J., concurring and dissenting, each in part).
imminent danger and the causal relation between speech and action. Using the proposed test the only inquiry of the law is whether or not black power advocacy is political advocacy. Although this test is not completely independent of public hysteria and political pressure, it is far less susceptible to misuse than the present test in that it closely circumscribes the area of judicial inquiry and avoids the vagueness of the clear and present danger notions.

The major criticism of the preceding test of the first amendment is that it allows for speech in situations where that speech may create a danger to society. No argument can prove conclusively that advocacy never has, or never will produce ghetto violence. However, the risk, based on empirical evidence, that advocacy will produce an uprising is quite small. Those who believe that risk must be avoided regardless of its degree do not solve the problem, for even if violence is stopped one day by punishing advocacy, the ghetto is just as likely to erupt the next week or the next month. Rap Brown recognized this independence and spontaneity of the ghetto when he said, "No one person, no black person in America could have stopped Detroit from burning."

Black power advocacy has been used as a scapegoat. As the National Advisory Commission on Civil Disorders said: "What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it." As long as the scapegoating continues, the basic causes of the uprisings will not be adequately met.

278 See notes 150, 163, 177 supra and accompanying text.
279 "Three conclusions emerge from the data: . . . The fact that a city had experienced disorder earlier in 1967 did not immunize it from further violence." RIOT COMMISSION REPORT, supra note 31, at 113.
280 "If we seek to find those to blame (for the riots) let every man look in the mirror." Quoted in EBONY, How to Stop Riots, Oct. 1967.
CONCLUSION

The method used in this comment allows one to see in concrete terms the need to protect black power advocacy. All too often people accept the statement that free speech should be protected, without understanding why it is important to protect. If questioned, they reply that advocacy should be protected because the first amendment says so. They are unable to take their justification any further than a general approval of the freedom of the individual to speak his mind. The result of this superficial understanding is that in politically tense situations they fail to persuade others of the value of allowing dissent to be heard, and often lose their own faith in free speech. Hopefully, the analysis undertaken in this Comment will give some substance to the vague notions of what freedom of speech is all about, for free speech is a theory which is strengthened when its assumptions and arguments are vigorously tested.

Paul Harris

As preparation for this Comment the author engaged in informal discussions and interviews concerning the concept of free speech. The author talked with professors, lawyers, law students, and working people. The results were disheartening, for the vast majority of those talked to were unable to argue intellectually for the protection of certain speech, even when emotionally they wanted to protect the speech in question. The author must admit that he too failed to comprehend the role the first amendment was designed to play in our society, and how black power advocacy related to that role. The tendency to support free speech without giving it serious thought is widespread. This is an unfortunate tendency, as free speech, unlike many doctrines, gains strength and adherents when it is closely examined.