



12-1-1955

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Recommended Citation

Joseph O'Meara, *Freedom of Inquiry Versus Authority: Some Legal Aspects*, 31 Notre Dame L. Rev. 3 (1955).

Available at: <http://scholarship.law.nd.edu/ndlr/vol31/iss1/2>

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NOTRE DAME LAWYER

A Quarterly Law Review

VOL. XXXI

DECEMBER, 1955

No. 1

FREEDOM OF INQUIRY VERSUS AUTHORITY: SOME LEGAL ASPECTS*

I am to discuss some legal aspects of freedom of inquiry versus authority. This raises the issues which revolve around the freedoms protected by the First Amendment. More particularly, it raises the issue of free speech; for inquiry is not free — it is confined and frustrated — if one must keep the fruits of inquiry to one's self.¹

The first great case in America raising the issue of free speech was the prosecution in 1735 of John Peter Zenger for seditious libel.² Zenger, publisher of a weekly newspaper in New York, had criticized the colonial governor. He was prosecuted under an information issued by a servile attorney general at the behest of the outraged governor.

* This paper was one of a series presented during the academic year 1954-55 under the auspices of the Department of History of The University of Notre Dame. All of the papers dealt with the same general theme — Freedom of Inquiry vs. Authority.

¹ In the memorable words of Karl Adam, "A scholar cannot but profess that truth which he has discovered in the depths of his own soul by using all the scientific means at his disposal and by practising an absolute honesty." *THE SPIRIT OF CATHOLICISM* 14 (1943).

² 16 *AMERICAN STATE TRIALS* 1-39 (1928), from which all statements in the text regarding the trial are taken.

After Zenger's New York lawyers had been disbarred for daring to represent an enemy of law and order, his defense was undertaken by Andrew Hamilton, one of the leading advocates of his day. Though 80 years old, Hamilton journeyed from Philadelphia to New York to conduct Zenger's defense; and he served without compensation.³

The position of the Attorney General, as stated by Hamilton in his address to the jury, was as follows:

It is said and insisted on . . . that government is a sacred thing; that it is to be supported and revered; it is government that protects our persons and estates; that prevents treasons, murders, robberies, riots, and all the train of evils that overturns kingdoms and states, and ruins particular persons; and if those in the administration, especially the supreme magistrate, must have all their conduct censured by private men, government cannot subsist. This is called a licentiousness not to be tolerated. It is said that it brings the rulers of the people into contempt, and their authority not to be regarded, and so in the end the laws cannot be put in execution.⁴

This has a familiar sound. Essentially the same contention, for example, is attributed to Lenin in a speech in Moscow in 1920:

Why should freedom of speech and freedom of the press be allowed? Why should a government which is doing what it believes to be right allow itself to be criticized? It would not allow opposition by lethal weapons. Ideas are much more fatal things than guns. Why should any man be allowed to buy a printing press and disseminate pernicious opinions calculated to embarrass the government?⁵

In the *Zenger* case the court upheld the position taken by the prosecution; but the jury, disregarding the court's instructions, returned a verdict of not guilty.⁶

³ *Id.* at 4, 7.

⁴ *Id.* at 26.

⁵ MENCKEN, *A NEW DICTIONARY OF QUOTATIONS* 966 (1942).

⁶ 16 *AMERICAN STATE TRIALS* 1,39 (1928).

We have come a long way in this country since the *Zenger* case. The right to criticize the Government is no longer questioned. In our day the issue is *how far* men may go in what they say or write against public authority. In 1951 this issue was confronted in the *Dennis* case,⁷ in which the Supreme Court affirmed the conviction under the Smith Act of 11 top Communist leaders. Four of the justices joined in the opinion of the Court, written by Chief Justice Vinson. Justices Frankfurter and Jackson each wrote a separate concurring opinion. Justices Black and Douglas dissented, each in a separate opinion. The five opinions occupy 97 pages in the official report.

Plainly, the justices had trouble with the conflicting claims of national safety and free speech. Nor is this strange. Freedom and authority: both make valid claims and both overshoot the mark. The claims of authority, if fully realized, lead to totalitarian dictatorship, as everyone must know who has followed events in Russia, Italy, Germany, Spain, Argentina. On the other hand, if freedom totally overcomes authority, there is anarchy; and in anarchy there is no freedom.⁸

"[T]hough no man," said Edmund Burke, "can draw a stroke between the confines of day and night, yet light and darkness are upon the whole tolerably distinguishable."⁹ There are night cases and there are day cases in the conflict between authority and freedom. "Nobody doubts," for example, "that, when the leader of a mob already ripe for riot gives the word to start, his utterance is not protected by

⁷ *Dennis v. United States*, 341 U.S. 494 (1951).

⁸ "The root nature of our constitutional democracy makes us appreciate that in the legal field there is no liberty for one without restraint upon another. Liberty is the room which exists through the building of walls. Liberty inheres in a social process. Emphasis in that process is upon those 'wise restraints which make men free.'" Wyzanski, *Process and Pattern: The Search for Standards in the Law*, 30 IND. L. J. 133, 144 (1955).

⁹ BURKE, *Thoughts on the Cause of the Present Discontents* (1770), in 1 THE WORKS OF EDMUND BURKE 477 (5th ed. 1877).

the [First] Amendment.”¹⁰ It is equally clear, on the other hand, that the First Amendment “protects all utterances, individual or concerted, seeking constitutional changes, however revolutionary, by the processes which the Constitution provides.”¹¹

And there are twilight cases. The question in the twilight cases is whether and to what extent the First Amendment protects advocacy of *illegal* conduct — advocacy, which is addressed to the understanding and seeks to persuade, as distinguished from incitement, that is, a bare appeal to action.¹² The problem arises, as Judge Learned Hand has pointed out, “when [an] utterance is at once an effort to affect the hearers’ beliefs and a call upon them to act when they have been convinced;” and “the question is what limits, if any, the advocacy of illegal means imposes upon the privilege which . . . the utterer would otherwise enjoy.”¹³ The answer evolved by the Supreme Court, in a series of cases beginning with *Schenck v. United States*¹⁴ in 1919, is that speech may be punished—speech alone, unaccompanied by acts — if it creates a “clear and present danger” to the Nation.¹⁵

Until the *Dennis* case the Supreme Court had not attempted to determine “when a danger shall be deemed clear; how remote the danger may be and yet be deemed

¹⁰ *United States v. Dennis*, 183 F.2d 201, 207 (2d Cir. 1950).

¹¹ *Id.* at 206.

¹² *Id.* at 212.

¹³ *Id.* at 207. The statement in the text has reference to an utterance of a political nature. In Judge Hand’s words, “. . . it is at least doubtful whether other kinds of utterance, however lawful in so far as they were persuasive only, would retain their privilege if coupled with appeals to unlawful means. One can hardly believe that one would be protected in seeking funds for a school, if he suggested that they should be obtained by fraud.” *Ibid.*

¹⁴ 249 U.S. 47 (1919).

¹⁵ The cases are reviewed in the opinion of the Court of Appeals in *United States v. Dennis*, 183 F.2d 201, 207-209. See also Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1 (1951).

present."¹⁶ In the *Dennis* case the Supreme Court adopted this interpretation of the clear-and-present-danger test:

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.¹⁷

But this, obviously, is an *admonition* — stop, look and listen — not at all a rule or yardstick of decision.

What should be the rule? How can freedom and authority be reconciled? They can't be reconciled. All that we can

¹⁶ Brandeis, J., concurring in *Whitney v. California*, 274 U.S. 357, 374 (1927), quoted in the opinion of the Court of Appeals in the *Dennis* case, 183 F.2d 201, 208.

¹⁷ 341 U.S. 494, 510. This formulation of the test was adopted verbatim from Judge Hand's opinion in the court below, 183 F.2d at 212.

Though it has served the nation well, the clear-and-present-danger test does not seem to me to be equal to the situation created by the Communist conspiracy, numbering thousands of devoted adherents, all rigidly and ruthlessly disciplined, whose sole reason for existence is to deliver the United States to a foreign enemy, by stealth or violence or both, at the first opportunity.

I think it at least arguable that the conviction in the *Dennis* case was affirmed in spite of the clear-and-present-danger test rather than because of it. The defendants did, indeed, constitute a threat to the safety of the Nation, as the Court found, but not because of their speeches and writings. Not one of the five opinions in the case traces any danger at all to the speeches and writings of the defendants. According to Mr. Justice Douglas, there was no evidence in the record on this issue — the critical issue in the case (*id.* at 587); and this assertion went unchallenged by his colleagues.

Yet the Court found a clear and present danger (*id.* at 510-511):

"... we are in accord with the court below, which affirmed the trial court's finding that the requisite danger existed. The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score."

But this traces the danger, not to the speeches and writings of the defendants, but to their *conspiratorial activities*, to the fact that they were organizers and promoters of a plot against the Government and institutions of the United States, which, implacably, they advanced toward fruition with all speed deemed consistent with eventual success.

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ever hope for is a viable accommodation. Some limit there must be even to those freedoms protected by the First Amendment.¹⁸ But no formula will ever locate in advance the point at which the claims of freedom are overborne by the claims of authority.

This is so because, as Mr. Justice Holmes observed," general propositions do not decide concrete cases."¹⁹ Why do not general propositions decide concrete cases? For the simple reason that a conclusion follows from *two* premises, not from one only. Though all agree on the general principle applicable in a given situation in the practical order, yet this is inconclusive. The event depends upon the *minor* premise, and agreement on the minor by no means follows from agreement on the major.

Whence come the minor premises on which depend, in such large part, the resolution of concrete controversies? In the main they are practical judgments based upon a complex of factors too subtle for articulation. The old jingle illustrates the point:

I do not love thee, Doctor Fell.
The reason why I cannot tell;
But this I know, and know full well:
I do not love thee, Doctor Fell.²⁰

Footnote ¹⁷ continued from Page 7

In turn, this raises the question whether, when Communist conspirators are prosecuted, they should not be charged with seditious conspiracy to overthrow the Government by force and violence, a crime involving no issue of free speech. 18 U.S.C. §2384 seems plainly applicable. It provides:

"If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than \$5,000 or imprisoned not more than six years, or both."

See Douglas, J., dissenting in the Dennis case, *id.* at 581-582.

¹⁸ *Id.* at 571.

¹⁹ *Lochner v. New York*, 198 U.S. 45, 76 (1905).

²⁰ BURTON STEVENSON, *THE HOME BOOK OF PROVERBS, MAXIMS AND FAMILIAR PHRASES* 1425 (1948).

And the deeper the insight the more impossible it is to confine it within a verbal formula. In the poet's words, "Speech is but broken light upon the depth of the unspoken."²¹

The only conclusion, I submit, is that no form of words can be devised which will tell us in advance where to strike the balance between the contesting claims of authority and freedom. It is futile to look for a ready-made answer. There is no salvation from the necessity of facing up to the issue again and again.

But, though no ready-made answer, no yardstick is available, there are at least markers and signposts which indicate direction; and some of these I shall attempt to outline briefly.

Of freedom of thought and speech one can say with Mr. Justice Cardozo "that it is the matrix, the indispensable condition, of nearly every other form of freedom."²² Mr. Justice Jackson has aptly stated that freedom of speech "was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society . . . [T]his liberty was protected because they knew of no other way by which free men could conduct representative democracy."²³ That is why, in the words of Mr. Justice Rutledge, "it is . . . in our tradition to allow the widest room for discussion, the narrowest range for its restriction. . . ."²⁴ And so it should be, not only when the days are safe and placid, but also in times of insecurity and danger. Thus it was put by a great Chief Justice, Charles Evans Hughes:

The greater the importance of safeguarding the commu-

²¹ ELIOT, *The Spanish Gypsy*, in 18 THE WRITINGS OF GEORGE ELIOT 88 (New York: Houghton Mifflin Co. 1909).

²² *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

²³ *Thomas v. Collins*, 323 U.S. 516, 545-546 (1945).

²⁴ *Id.* at 530.

nity from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.²⁵

Too often free speech is discussed only in terms of the rights of the individual. That is not by any means the whole story. At stake is our collective political birthright. For it is one of the pre-suppositions of democracy that men will speak their minds; it is one of the conditions of democracy that all sides of public questions will be heard. Hence it is one of the obligations of citizenship to speak out for what one believes. Thus, over the years, is error best combated: such is the democratic thesis.

Nonetheless the contest between freedom and authority, even in a democracy, is an unequal contest, with the advantage on the side of authority; for authority has power and power has the drop on freedom. This is why eternal vigilance is the price of liberty. "Power," said Andrew Hamilton in the *Zenger* case,

may justly be compared to a great river, which, while kept within its due bounds, is both beautiful and useful; but when it overflows its banks it is then too impetuous to be stemmed, it bears down all before it, and brings destruction and desolation wherever it comes. If then this is the nature of power, let us at least do our duty, and like wise men (who value freedom) use our utmost care to support liberty, the only bulwark against lawless power, which in all ages has sacrificed to its wild lust and boundless ambition, the blood of the best men that ever lived.²⁶

When all is said it comes to this, I think, that we can get

²⁵ *DeJonge v. Oregon*, 299 U.S. 353, 365 (1937).

²⁶ 16 *AMERICAN STATE TRIALS* 1, 37 (1928).

no closer to a formula, to a yardstick of decision between authority and freedom when they collide, than to say that the presumption favors freedom; that the burden of proof — a heavy burden — rests on him who seeks to hobble freedom of inquiry and expression; that freedom should have the benefit of every doubt. You may think this too indefinite and vague; but I see no help for it.

A few remarks, now, of a more general character. Unfortunately many sincere people do not comprehend the genius of our democracy; or, if they do, they are unable to accept it. They believe it unpatriotic to stand up for the Constitution when it is invoked by someone who speaks out for a cause that is hateful to them or attacks what they prize. People of this sort frequently are bitter about the American Civil Liberties Union.²⁷ But look closely at what they say; examine carefully the drift of their remarks. You will find, I think, that their real complaint is against our American constitutional system. They cannot abide the principle of the equal protection of the laws. They cannot stomach the fact that:

Our law is no respecter of persons. The rights of just and upright citizens are not more sacred in the eyes of the law than the rights of the poorest and meanest citizens of the state. The safeguards erected by the Constitution are intended to protect the rights of all citizens alike. They protect the rights of the guilty as well as those of the innocent.²⁸

Such people would deny free speech to those with whom

²⁷ Are American democratic institutions worth defending? Freedom cannot be left to take care of itself. Make no mistake about that. Yet in all the length and breadth of this land the only organization exclusively and continuously dedicated to the protection and preservation of our basic freedoms is the American Civil Liberties Union. In the 20 years I have been a member I don't suppose I have ever been in total agreement with the Union's policies and actions. But it seems to me irrelevant that I don't see eye to eye with it in every particular. What counts is that night and day, year in and year out, it is on the firing line for the American heritage of freedom. Thus it has performed and is performing an enormously useful, if not an absolutely necessary function; and all of us are its debtors.

²⁸ *Batchelor v. Indiana*, 189 Ind. 69, 84, 125 N.E. 773, 778 (1920).

they are in fundamental disagreement. Though I have defended and will defend their right to hold and express this position, I think it important that its true nature should be understood. They would establish a party line in America — *their* party line, of course. This is an alien concept, a totalitarian concept; it is not consonant with the American tradition; it is anti-democratic; it is, in short, subversive and it should be recognized for what it is.²⁹

The simple truth is that you have to be for the Bill of Rights or not; you can't be for the Bill of Rights for yourself and your friends; it's all or nothing. A breach in the dyke imperils the whole countryside, not just the area adjacent to the break. There is only one protection against the flood and that is to contain it entirely. "He that would make his own liberty secure must guard even his enemy from oppression. . . ."³⁰ For no man's rights are safe unless all men's rights are respected. Every American should ponder and remember well the words of Judge Cuthbert W. Pound: ". . . the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected."³¹

This is the authentic American doctrine, and Catholics, in particular, should support and defend it. Have we not suffered persecution? Do we not know the meaning of oppression? Can we not measure well, therefore, the worth of freedom? "No group," said Bishop Wright, "is more in-

²⁹ The Chief Justice of the United States has reminded us: ". . . that we do have a battle today to keep our freedoms from eroding, just as Americans in every past age were obliged to struggle for theirs. Many thoughtful people are of the opinion that the danger of erosion is greater than that of direct attack. I do not mean to suggest—nor do they, I am sure—that, outside of the totalitarian menace, any substantial group of our citizens would wilfully destroy our freedoms. But the emotional influence of the times coupled with the latent suspicion and prejudice inherent in human nature are capable of threatening the basic rights of everyone, unless those emotions are controlled by self-discipline, community spirit and governmental action." Warren, *Blessings of Liberty*, 1955 WASH. U.L.Q. 106.

³⁰ *Cramer v. United States*, 325 U.S. 1, 48 (1945).

³¹ Dissenting in *People v. Gitlow*, 234 N.Y. 132, 158, 136 N.E. 317, 327 (1922).

debted to American Democracy than the Catholic people."³²

Freedom has its dangers. There is no doubt about that. The forefathers took a calculated risk. The risk was worth taking; it is still worth taking. That has been the faith of America, so eloquently expressed by Mr. Justice Brandeis:

Those who won our independence believed that . . . the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as means. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.³³

Just as the greatest menace to freedom is an inert people, so the best hope is the *will* of the people to be free.

Joseph O'Meara*

³² Most Rev. John J. Wright, Bishop of Worcester, in his Baccalaureate Sermon at the 110th Annual Commencement of The University of Notre Dame, June 5, 1955.

³³ *Whitney v. California*, 274 U.S. 357, 375-376 (1927).

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