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A RECENT DEVELOPMENT WHICH CLARIFIES THE LAW IN REGARD TO FREEDOM OF SPEECH

By

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Even after the entry of the United States into World War II this nation had no definite legal theory with which to draw the line between those utterances that are permissible exercise of the right of freedom of speech and those utterances that could be curbed by the government on the theory that they jeopardized our national security. (See *The Case of Civil Liberties v. National Security*. Dickinson Law Review, January, 1943, Vol. XLVII, No. 2.)

The two conflicting views on this subject were, first, the view of Justice Holmes that, "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 substantial evils that Congress has a right to prevent".¹ The second test is of long standing and was applied in an outstanding 1920 case.² This second test is known as the "indirect causation" or "reasonable tendency" test. By this is meant that if any utterance indirectly causes, or has a reasonable tendency to cause, a threat to national security, it can therefore be curtailed. Obviously the latter restricts freedom of speech to a greater extent than the former.

The case of *Terminiello v. Chicago*, U. S. Supreme Court Advance Opinions, Vol. 93, No. 15, decided May 16, 1949, is interesting both because it apparently clears up the question of which one of the above two tests is to be the accepted one, and also, intrinsically, because of the reasoning of the court in the majority opinion and the contrasting reasoning in the three dissenting opinions, the court having split five to four. The majority opinion, including a statement of facts, covered slightly more than two pages in the Advance Opinions but Justice Jackson's separate dissent covered twelve pages.

The facts, briefly stated, are that Father Terminiello, a Catholic priest under suspension by his Bishop, delivered an address under the auspices of the Christian Veterans of America to an overflow crowd in Chicago. A crowd of one thousand people gathered in the streets outside of the hall and a cordon of police was assigned to keep order but, despite this fact, several disturbances broke out. Terminiello, after a jury trial, was found guilty of violating an ordinance of the City of Chicago, providing that "All persons who shall make . . . any improper noise,

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¹ Schenk v. U. S., 249 U. S. 47, 39 Sup. Ct. 247 (1919).

² Pierce v. U. S., 252 U. S. 239, 40 Sup. Ct. 205 (1920).

riot, disturbance, breach of the peace, or diversion tending to a breach of the peace . . . shall be guilty of disorderly conduct. . . ." His conviction was affirmed by the Supreme Court of Illinois.³

In reversing this conviction Justice Douglas, speaking for the majority, said that "the statutory words 'breach of the peace' were defined in instructions to the jury to include speech which 'stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance . . .' ". Continuing, he pointed out the error in these instructions by stating that "the vitality of civil and political institutions in our society depends on free discussion" and that "it is only through free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from the totalitarian regimes . . . A function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. . . ."

"That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a *clear and present danger* (italics supplied by the author) of a serious substantive evil that rises far above public convenience, annoyance, or unrest."

Justice Jackson's dissent merits reading in its entirety. In it he combined philosophy, psychology, Greek proverbs, "old proverbs", "Mein Kampf", quotations from Joseph Goebbels, quotations from Woodrow Wilson and quotations from Terminiello's speech, with his own reasoning.

In the latter classification is his statement that "this court seems to regard these (order and liberty) as enemies of each other and to be of the view that we must forego order to achieve liberty. So it fixes its eyes on a conception of freedom of speech so rigid as to tolerate no concession to society's need for public order."

Justice Jackson's view of the charge in question was that it stated, for all practical intents and purposes, "that if this particular speech added fuel to the situation already so inflamed as to threaten to get beyond police control, it could be punished as inducing a breach of the peace." Later in this dissent we find the following quotation: "Where an offense is induced by speech, the Court has laid down and often reiterated a test of the power of the authorities to deal with the speaking as also an offense. '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* (Italics supplied by Justice Jackson) that they will bring about the substantive evils that Congress . . . has a right to prevent'."

³ Terminiello v. Chicago, 400 Ill. 23, 79 NE 2d 39.

Thus, seeing both the majority and minority opinions applying the same test, it seems to be an irrefutable conclusion from this case that this, the "clear and present danger test", is the proper test to be applied in order to determine the validity of any abridgment of our freedom of speech. This choice seems to be in accord with our conception of civil liberty since it is not hard to imagine the "reasonable tendency" or "indirect causation" test placing a too tight rein on one of our cherished basic freedoms, curbing our liberty even before any danger from its free exercise becomes actually apparent. As Americans we have come to feel that what we do and say shall be dictated only when it is proven to be necessary exercise of the police power of the state and not because their free exercise may have a "tendency" to work some undesirable result. Such a cure might be worse than the disease.