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Constitutional Law--Smith Act--Requirement of Words of Incitement

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GOVERNMENTAL RESTRAINTS, 56 (1956). In light of this great diversity of opinion throughout the country, it appears that the Supreme Court has not created a satisfactory test whereby it could be the judge of what is or is not obscene throughout the whole United States.

The Court, on the same day the principal case was decided, went even further in its crusade against obscenity by affirming a New York court which permitted an injunction to be issued, without a hearing, to prevent the sale of literature alleged to be obscene. *Kingsley Books v. Brown,* 77 Sup. Ct. 1325 (1957). This leaves open the widest conceivable inquiry, the scope of which no one can adequately guard against. *Winters v. New York, supra; United States v. Cohen Grocery Co., supra.* Those who urge increased repression of allegedly obscene books are, of course, convinced that obscenity can be identified. In reality, however, the word does not refer to a thing so much as a mood. Its dimensions are fixed part by eye of the individual beholder and part by generalized opinion. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS (1956); HAUGHT, BANNED BOOKS (2d ed. 1956).

It is submitted, therefore, that the Court should either abandon any attempt to create a test for obscenity and give the broad sweep of the first and fourteenth amendments full support, or limit is censorship to only "hard core" pornography. (This term itself may be equally as difficult to define or create a test for, but its use would narrow the censor's scope of material.)

Although there may be nothing of any possible value to society in a particular book, it is as much entitled to the protection of free speech as the best of literature. *Winters v. New York, supra.* For so long as these statutes may be construed by any court to include writings which are other than pornographic, a constant threat to the free press exists. Note 40 ILL. L. REV. 417 (1946).

J. E. J.

CONSTITUTIONAL LAW—SMITH ACT—REQUIREMENT OF WORDS OF INCITEMENT.—Petitioners, fourteen leaders and organizers of the Communist Party in California, were convicted of conspiring (1) to advocate and teach the duty and necessity of the overthrow of the Government by force and violence and (2) to organize, as the Communist Party of the United States, a society to so advocate and teach in contravention of the Smith Act. The indictment was

brought under the following statutes: 54 STAT. 671, 18 U.S.C. §§10, 11, 13 (1940); 62 STAT. 808, 18 U.S.C. § 2385 (1948); 62 STAT. 701, 18 U.S.C. 371 (1948). The court of appeals affirmed and the Supreme Court granted certiorari. *Held,* that the trial court erred by omitting to charge that the advocacy must be of action, not of abstract doctrine, by the use of language reasonably and ordinarily calculated to incite persons to action. *Yates v. United States,* 77 Sup. Ct. 1064 (1957).

It is well settled that the Constitution does not confer an absolute right to unrestricted speech and that the state has the power to delimit and prescribe punishment for utterances which endanger the state's well-being. *Dennis v. United States,* 341 U.S. 494 (1951); *Gitlow v. New York,* 268 U.S. 652 (1925); *Schenck v. United States,* 249 U. S. 47 (1919). By classic dictum, the words must be used in such circumstances and be of such a nature as to create a clear and present danger of bringing about the substantive evils Congress has a right to prevent. *Schenck v. United States, supra* (dictum). Exception was made to this rule when the statute, N.Y. PENAL LAWS §§ 160, 161, prohibited utterances of a specified character; for the danger of the substantive evil having been legislatively predetermined, the only question is sufficiency of evidence to show a natural and probable effect. *Gitlow v. New York, supra.*

The exception made in *Gitlow v. New York,* has generally not been followed, but some form of the "clear and present" danger rule has been applied. See *Dennis v. United States, supra; Pennekamp v. Florida,* 328 U.S. 331 (1946); *Taylor v. Mississippi,* 319 U.S. 583 (1943); *Herndon v. Lowry,* 301 U.S. 242 (1937). But see *Dunne v. United States,* 138 F.2d 137 (8th Cir. 1943), *cert. denied,* 320 U.S. 790 (1943); *Whitney v. California,* 274 U.S. 357 (1927).

It appeared that the exception was made part of the rule in *Dennis v. United States, supra,* by the Court's acceptance of the court of appeals' interpretation of the rule, stated by Judge Learned Hand: "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." *United States v. Dennis,* 183 F.2d 201, 212 (2d Cir. 1950).

This interpretation of the rule left some doubt of the causal connection required between the words spoken and the evil apprehended; for this interpretation does not require that the [im] probability of the evil be a result of the speech, but could be construed

as justifying a prior restriction of free speech because of a probability of the evil resulting from *any* cause. See Antieau, *Dennis v. United States--Precedent, Principle or Perversion?*, 5 VAND. L. REV. 141 (1952).

It would seem that another question was raised by a second holding in the *Dennis* case, that the court determines the existence of the "clear and present" danger. Resolving the first doubt in favor of a causal connection being required between the speech used and the evil apprehended, the court would find that a "clear and present" danger did or did not exist. If such did exist, it could only exist because of the inciting character of the speech; for preaching of an abstract doctrine could not create a "clear and present" danger. Then the only question left for the jury would be the sufficiency of the evidence to show a conspiracy.

The district court, in the principal case, held illegal advocacy to be an utterance made with the specific intent to accomplish forcible overthrow and since absence of inciting language would not justify a finding of specific intent, reversal would be required if the court found insufficient evidence to support the verdict; *i.e.*, absence of inciting language. *United States v. Schneiderman,* 106 F. Supp. 906 (S.D. Cal. 1952), *sub nom. Yates v. United States,* 77 Sup. Ct. 1064 (1957). It appears that, in effect, the court was determining the character of the language before the question was given to the jury.

The court of appeals held that an illegal conspiracy was shown when an overt act in furtherance of the criminal design was shown. If the doctrine of destruction had not become a rule of action then no agreement or conspiracy had been shown. *Yates v. United States,* 225 F.2d 146 (9th Cir. 1955).

In rejecting both of these views the Court iterated the importance of distinguishing between speech that is a statement of an abstract idea which may prompt its hearers to take unlawful action and speech which advocates that action be taken. Neither of these views require that the jury find the advocacy to be of action. One may intend evil results from his speech, but in the absence of some "probable" resulting harm he has committed no crime. Doctrinal justification of forcible overthrow, though uttered with a specific intent, is too remote from concrete action to constitute a "probability." It is no crime to conspire to advocate abstractly the overthrow of the government even though it is the intent that such be

accomplished. To agree to discuss the desirability of the destruction of the government is not an illegal conspiracy. *Yates v. United States*, 77 Sup. Ct. 1064 (1957).

It is submitted that those doubts raised in *Dennis* are thus resolved: (1) the speech must bear a causal relationship to the danger; (2) the court, considering all the surrounding circumstances, determines that speech of a certain character creates a "clear and present" danger; (3) the jury determines the character of the speech.

"Every idea is an incitement", *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (dissenting opinion of Justice Holmes), "but there is an underlying validity in the distinction between advocacy and interchange of ideas, and we do not discard a useful tool because it may be misused." *Dennis v. United States*, 341 U.S. 494, 546 (1951) (concurring opinion of Justice Frankfurter). The exercise of the right of free speech lies at the foundation of free government by free men. *Schneider v. State*, 308 U.S. 147 (1939).

It is believed that the ruling in the principal case, though tending to allow the formation and continued existence of certain groups which harbor contempt for our form of government and our religious and social values, assures us that one of our most cherished freedoms, the right to express one's views without fear of censure, has not been encroached upon.

"When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilization apart." *Dennis v. United States*, 341 U.S. 494, 584 (1951) (dissenting opinion of Justice Douglas).

When the fears and excitement caused by the present day world conflict have died away, this decision will be viewed as one stating but well recognized legal principles.

J. McD.

CRIMINAL LAW—HABEAS CORPUS—LACK OF JURISDICTION RESULTING FROM FAILURE TO COMPLY WITH HABITUAL CRIMINAL STATUTE.—*P*, convicted of a felony for the third time, was sentenced to life