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MR. JUSTICE JACKSON, FREE SPEECH, AND THE JUDICIAL FUNCTION*

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All free speech cases decided by the United States Supreme Court are hard cases; and, if they do not, according to the old saw, make bad law, they do make law which is both fragile and fascinating. Wrapped up inside the kernel of each of these cases are many of the most troublesome problems which confront a democratic government: the relation of majority rule to minority rights, the necessity of peace and order but the equally imperative necessity of open discussion, and, not least, the paradoxical role of an appointive judiciary in curbing, in the name of democracy and freedom, popularly elected legislative and executive officials.

In the determination of this area of public policy, legal precedent is more shadow than substance; and the political philosophy of the individual justice becomes a matter not only of interest, but of paramount importance. Some members of the Court, like Justices Black and Douglas or the late Justices Murphy and Rutledge, set forth their ideas on free speech issues with remarkable consistency and usually with a great degree of clarity. On the other hand, Robert H. Jackson has been an enigma. Brilliant, eloquent, but erratic—this has been the typical judgment on Jackson the Judge. He could strike off grand phrases about the values of freedom one Monday noon and the following week write just as glowingly about the necessity of preserving law and order by jailing a trouble-making speaker. As Herman Pritchett has commented: "The unpredictability of Jackson's performance leads one to question whether he has developed any systematic theories about civil liberties or the judicial function."[1]

There is no doubt that Jackson's ideas about free speech as indicated by his votes and as expressed in his opinions cannot be fitted into the common classifications of libertarian or anti-libertarian; nor do these ideas place him firmly within either the cult of judicial activism or of judicial self-restraint. Ironically, part of the difficulty in understanding Jackson lies in his marvelous ability to weave words.

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1. PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 228-29 (1954); *cf.* Barnett, *Mr. Justice Jackson and the Supreme Court*, 1 WESTERN POLITICAL Q. 223, 240 (1948).

He had not only a talent for translating law into literature, but also a penchant for fashioning sentences into weapons with which to flay his opponents. As one of his harshest critics has conceded, Jackson possessed "an extraordinary command of language which enabled him to clothe even the scrawniest of his ideas in verbal raiment that gave them a verisimilitude of solidity."[2] Jackson's wry and pungent style, his bitingly sarcastic and often *ad hominem* remarks, brought out his dissents with a force which was sometimes overwhelming. But, on the whole, this great literary gift did not bring out his central ideas in stark relief.[3]

Still the difficulties in understanding Jackson are not insuperable.[4] One can take a big step toward a better understanding of Jackson—and toward a better comprehension of the work of the Court—by shifting the emphasis of the usual libertarian or anti-libertarian classification. Some controversies do involve questions merely of individual rights versus authority. Such a conflict was evident in the *Flag Salute* cases[5] where the right of the state to compel a sign of allegiance clashed with the right of the citizen to freedom of belief. But such simplicity has been rare in cases which have reached the Supreme Court. "Freedom," Walter Gellhorn has said, "is . . . a mosaic of many tiles,"[6] and like all mosaics it is three dimensional in scope. Most often free speech controversies involve an opposition between rights of individuals or groups, one to speech, the other perhaps to privacy or to reputation. The intervention of government to protect the interests of one side is the third and complicating dimension. Any court decision in such a case will be libertarian from one point of view, anti-libertarian from the other. Less obviously, but hardly less significantly, a similar triangular relationship exists for trials involving charges of inciting to riot or sedition. The speaker may claim the

2. Rodell, *Justification of a Justice,* Saturday Review, July 16, 1955, p. 18.

3. When subjected to close analysis, Jackson's opinions in free speech cases can usually be divided into three sections, which may or may not follow in the indicated order: 1) a warning, sometimes coupled with an *ad hominem* attack on the majority, of the direction in which the Court was taking the law; 2) a more elaborate, or at any rate, a different, statement of facts than that contained in the majority opinion; 3) a discussion of Jackson's views as to the correct decision.

4. The problem of understanding Jackson's views on free speech is somewhat simplified by the fact that his formal opinions in such cases were usually separate concurrences or dissents. He composed the institutional opinion of the Court on only four occasions: Collins v. Hardyman, 341 U.S. 651 (1951); Cole v. Arkansas, 338 U.S. 345 (1949); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Bakery Drivers Local 802, Int'l. Bhd. of Teamsters v. Wohl, 315 U.S. 769 (1942).

5. West Virginia State Bd. of Educ. v. Barnette, *supra* note 4; Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940). For a discussion of the difficulties of this classificatory problem in free speech litigation consult Freund, *The Supreme Court and Civil Liberties,* 4 VAND. L. REV. 533 (1951).

6. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 153 (1956).

protection of the first amendment, but other individuals, or the public as a whole, may invoke their right to freedom with law and insist that government fulfill its constitutional obligation to "insure domestic tranquillity." These are not easy matters to be solved by reference to an abstract concept of liberty. The question is rather liberty for what and for whom. The greatness of the judicial process lies in the fact that it is concerned with this clash of rights.

If the free speech cases which came before the Court in the 1941 to 1953 terms can be placed in this three dimensional context, both the problems facing the High Bench and the judicial philosophy of Robert H. Jackson can be seen with a finer measure of clarity. The cases might be logically subdivided into one or more of three categories: 1) Individual versus individual (or group versus group), with government intervening on one side or the other; 2) individual or group versus society as a whole, with government on the side of society; and 3) those cases which fit into the conventional mold of individual against authority.

I

Free Speech versus the Right to Privacy

The first free speech decision which elicited a separate opinion from Justice Jackson was the result of a cluster of Jehovah's Witness cases in 1943.[7] Most relevant for this discussion was *Martin v. City of Struthers*.[8] Here the Court struck down an ordinance of an Ohio industrial suburb which, to protect swing-shift workers, had forbidden persons distributing advertisements to ring doorbells or otherwise summon residents to the door to receive printed matter.

The issue, as summed up for the majority by Justice Black, was one of individual against government; and the function of the Court was to balance these competing interests.

> We are faced in the instant case with the necessity of weighing the conflicting interests of the appellant in the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message, against the interest of the community which by this ordinance offers to protect the interests of all of its citizens, whether particular citizens want that protection or not.[9]

With the issues stated in this manner, a decision for the Witness would be a victory for liberty, a decision for the city of Struthers a blow against freedom. But Jackson saw the situation as far more

7. Jones v. Opelika, 319 U.S. 103 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Martin v. City of Struthers, 319 U.S. 141 (1943); Douglas v. City of Jeannette, 319 U.S. 157 (1943).
8. *Supra* note 7.
9. Martin v. City of Struthers, 319 U.S. 141 § 143 (1943).

complex. He viewed the controversy not as householder and Witness battling government for their freedom, but as householder insisting on his right to quiet privacy and the Witness ringing the doorbell and demanding to be heard. The local government was trying to balance these two rights by permitting the Witness to distribute her literature in mailboxes or under doors but forbidding her to call residents to the door.

Placing the householder on the same side of the scales with the Witness, Jackson claimed, was contrary to the facts of the case. After all, the Witness had been arrested on the complaint of the householder. "The real question," Jackson asserted, was where the rights of the Witness "end and the rights of others begin."[10] This question had been ignored by the majority opinion. "Doubtless there exist fellow spirits who welcome these callers, but the issue here is what are the rights of those who do not and what is the right of the community to protect them in the exercise of their own faith in peace. That issue—the real issue—seems not to be dealt with."[11]

The Witnesses, Jackson thought, were invading the sacred privacy of the home. It was a questionable exercise of first amendment freedoms for a stranger to "corner a man in his home, summon him to the door and put him in the position of either arguing his religion or of ordering one of unknown disposition to leave . . . ."[12] Jackson could not believe that the first amendment had been meant to turn private homes into public disputing places, and in support he quoted Zechariah Chafee: " 'Freedom of the home is as important as freedom of speech. I cannot help wondering whether the Justices of the Supreme Court are quite aware of the effect of organized front-door intrusions upon people who are not sheltered from zealots and impostors by a staff of servants or the locked entrance of an apartment house.' "[13]

In 1948 another Jehovah's Witness case, *Saia v. New York*,[14] brought out the clash between Jackson and the Court majority. Lockport, New York, forbade use of sound amplifying devices without permis-

10. Douglas v. City of Jeannette, *supra* note 7 at 178 (separate opinion). Jackson expressed his views on the four cases cited in note 7 by this one opinion.
11. *Id.* at 177.
12. *Id.* at 181.
13. CHAFEE, FREE SPEECH IN THE UNITED STATES 407 (1941). Jackson did express the same idea as Chafee, though in language which was less polite: "As individuals many of us would not find this activity seriously objectionable. The subject of the disputes involved may be a matter of indifference to our personal creeds. Moreover, we work in offices affording ample shelter from such importunities and live in homes where we do not personally answer such calls and bear the burden of turning away the unwelcome. But these observations do not hold true for all." Douglas v. City of Jeannette, *supra* note 7 at 174 (separate opinion).
14. 334 U.S. 558 (1948).

sion of the chief of police. Samuel Saia, a Jehovah's Witness minister, had obtained permission to use loud speaking equipment in a small city park; but when the permit expired the chief of police had refused to issue a renewal, claiming that other users of the park had complained. In a terse, four page opinion, Mr. Justice Douglas, speaking for a five judge majority, held the Lockport ordinance unconstitutional on its face. Courts, Douglas said, had to balance the community interests involved, but in so doing they had to keep the first amendment in a preferred position.

Justices Frankfurter, Reed, and Burton dissented together on the grounds that the use in a small park of a device which carried the human voice over a large part of that park could well deny others the peaceful enjoyment of recreational facilities. "Surely," Frankfurter wrote, "there is not a constitutional right to force unwilling people to listen."[15]

Mr. Justice Jackson filed a separate dissent, castigating the Douglas opinion as "neither judicious nor sound":[16] it had ignored the fundamental fact that it was the use of sound amplifiers which Lockport prohibited, not the right to speak. "To my mind this is not a free speech issue. Lockport has in no way denied or restricted the free use, even in its park, of all the facilities for speech with which nature has endowed the appellant."[17] What the Witnesses really wanted, Jackson contended, was not to hold a religious meeting for their own people —there were other and more ample facilities available for this—but "to thrust their message upon people who were in the park for recreation, a type of conduct which invades other persons' privacy and, if it has no other control, may lead to riots and disorder."[18]

Jackson also disputed Douglas' statement that it was the Court's function to balance competing interests. That, he thought, was the stuff of politics and the very area from which the Court should exclude itself. Espousing a doctrine of judicial review which, taken alone, appears as naive as that of Mr. Justice Roberts in *United States* v. *Butler*,[19] Jackson fumed: "Our only function is to apply constitutional limitations."[20]

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15. *Id.* at 563 (dissenting opinion).
16. *Id.* at 566.
17. *Id.* at 568.
18. *Id.* at 570.
19. "When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty, —to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." 297 U.S. 1, 62 (1936). Although this statement does not come close to conforming with judicial reality, it does come close to conforming to what Jackson wished the judicial function were limited to. See *infra*, § IV.
20. Saia v. New York, 334 U.S. 558, 571 (1948) (dissenting opinion).

The next year, Chief Justice Vinson, who had been the fifth vote in the *Saia* majority, changed his mind when a similar case from Trenton, New Jersey, *Kovacs* v. *Cooper*,[21] came up. With the defection of the Chief Justice the four *Saia* dissenters became a majority, but they could not agree as to why the Trenton ordinance was valid. Justice Reed announced the judgment of the Court, but his opinion, which weakly tried to distinguish *Saia*, was joined only by Burton and Vinson. On the other hand, both Jackson and Frankfurter claimed that *Saia* was being properly buried, though deprived of a funeral oration.

In a brief concurrence Jackson reiterated his dissenting views of the previous year.

> I join the judgment sustaining the Trenton ordinance because I believe that operation of mechanical sound-amplifying devices conflicts with quiet enjoyment of home and park and with safe and legitimate use of street and market place, and that it is constitutionally subject to regulation or prohibition by the state . . . . Freedom of speech for Kovacs does not, in my view, include freedom to use sound amplifiers to drown out the natural speech of others.[22]

In these cases Jackson had shown a good deal of consistency. He had pictured each situation as involving a conflict of rights of individuals and had voted in favor of the right to privacy over claims to free speech. If the analysis stops here, Jackson's vote in *Public Utilities Commission* v. *Pollak*[23] seems at least mildly illogical. Capital Transit Company, which operated buses and streetcars in the District of Columbia, had equipped its vehicles with radios which played music interspersed with commercials. The Public Utilities Commission had held hearings on this practice and had concluded that the radio broadcasting was not only consistent with the public convenience but actually tended to improve service. Two passengers took the case to the federal courts, arguing that Capital Transit was interfering with their rights under the first and fifth amendments. Jackson joined in Burton's opinion for the Court which dismissed as mistaken the notion that a rider on a bus was entitled to "a right of privacy substantially equal to the privacy to which he is entitled in his own home."[24]

It was Justice Douglas, not Jackson, who this time trumpeted the cause of privacy. Believing streetcar riders to be a "captive audience,"[25] Douglas protested: "Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint;

21. 337 U.S. 77 (1949).
22. *Id.* at 97 (concurring opinion).
23. 343 U.S. 451 (1952).
24. *Id.* at 464.
25. *Id.* at 468 (dissenting opinion).

it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom."[26]

Without a doubt, Jackson had forsaken the cause of privacy. But in the Jehovah's Witness and sound truck cases privacy had not been the sole value for which Jackson had been voting. In all these cases he had also been sustaining a balance between competing rights—but a balance set by local authorities, not by the Court. In the *Pollak* case, Jackson once again refused to overturn the judgment of local authorities, an impressive demonstration of self-restraint when his own strong views on privacy are considered.[27]

Reputation v. Free Speech

No responsible person has ever claimed that the first amendment, either alone or in combination with the fourteenth, allows one individual to slander another. There was such little difficulty with this point that when Walter Chaplinsky, a Jehovah's Witness, appealed a breach of the peace conviction for calling a police officer a "god damned racketeer" and "a damned fascist," the Supreme Court was not only unanimous in upholding the conviction, but the opinion was written by Justice Murphy, the libertarian's libertarian.[28]

The *Chaplinsky* case was the first Jehovah's Witness controversy decided by the Court during Jackson's tenure, and its overtones could scarcely have impressed the new Justice with the righteousness of the Witnesses' cause. The excesses of Chaplinsky may have made it easier for Jackson to remark in a later case that "the singular persistence of the turmoil about Jehovah's Witnesses, one which seems to result from the work of no other sect, would suggest to this Court a thorough examination of their methods to see if they impinge unduly

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26. *Id.* at 467.

27. Compare Jackson's position in searches and seizures cases. See particularly: Irvine v. California, 347 U.S. 128 (1954); United States v. Jeffers, 342 U.S. 48 (1951); United States v. Rabinowitz, 339 U.S. 56 (1950); Brinegar v. United States, 338 U.S. 160 (1949); McDonald v. United States, 335 U.S. 451 (1948); Shapiro v. United States, 335 U.S. 1 (1948); Trupiano v. United States, 334 U.S. 699 (1948); Johnson v. United States, 333 U.S. 10 (1948); United States v. Di Re, 332 U.S. 581 (1948); Harris v. United States, 331 U.S. 145 (1947).

Jackson was still brooding about the doorbell case shortly before his death. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 76-77 (1955). Certainly he had won at least a limited reversal in Breard v. Alexandria, 341 U.S. 622 (1951), where Mr. Justice Reed's majority opinion held that *Struthers, supra* note 7, had been meant to apply only to free distribution of religious pamphlets. In his *Struthers* dissent, Reed had not taken such a limited view of the decision; and Mr. Justice Black, the author of the *Struthers* opinion, in a dissent joined by Mr. Justice Douglas, claimed that the *Breard* case was nothing less than an overruling of the earlier doorbell decision.

28. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

on the rights of others."[29] Jackson could not understand how the Court could allow Chaplinsky to be punished for using his choice epithets and could yet hold that other members of the sect could, with constitutional immunity, force their way into the homes of strangers and call their faith a "racket" and their church a "whore."

Running through Jackson's opinions is a fear that such fighting words would provoke violence, but he demonstrated as well a genuine appreciation of the fact that local officials were also attempting to achieve a delicate balance between the right of one man to speak and the rights of other men to decent reputations. This recognition was implicit in the Jehovah's Witness cases and was spelled out more clearly in his dissent in *Kunz v. New York*.[30]

Carl Jacob Kunz, an ordained Baptist minister, had been convicted for holding a religious meeting on New York City streets without a permit. At one time the Reverend Kunz had had a permit, but it had been revoked, after a hearing, because of complaints of scurrilous attacks against Catholics and Jews. Speaking through Chief Justice Vinson, the Supreme Court struck down New York's permit system as a prior restraint on free speech.

Jackson dissented alone. He opened his opinion with the statement that essential freedoms were currently being threatened on an unprecedented scale, and that it might become difficult to preserve the right of free speech even in the United States. "In such a setting, to blanket hateful and hate-stirring attacks on races and faiths under the protections for freedom of speech may be a noble innovation. On the other hand, it may be a quixotic tilt at windmills which belittles great principles of liberty. Only time can tell. But I incline to the latter view and cannot assent to the decision."[31]

Kunz had called the Pope the "anti-Christ" and Catholicism "a religion of the devil." He had branded Jews as "Christ-killers," and had endorsed the Nazi methods of dealing with Jewish people. "All the garbage that didn't believe in Christ should have been burnt in the incinerators. It's a shame they all weren't."[32] This type of speech caused Jackson to react in the same way as had the name calling of the Witnesses. The state, he warned, was not the only source of danger to freedom. As long as Kunz spoke in public there were rights of other people involved, including the basic right of a human being to live in peace and dignity. "Does the Jew, for example, have the benefit of these freedoms when, lawfully going about, he and his

29. Douglas v. City of Jeannette, *supra* note 7 at 181. The only nonunanimous decision involving Jehovah's Witnesses in which Jackson voted for the Witnesses was West Virginia State Bd. of Educ. v. Barnette, *supra* note 4.
30. 340 U.S. 290 (1951).
31. *Id.* at 295.
32. *Id.* at 296.

children are pointed out as 'Christ-killers' to gatherings on public property by a religious sectarian sponsored by a police bodyguard?"[33] As Jackson saw the case, the Court had taken away the rights of others in order to allow Kunz to preach a gospel of hate. "Is it not reasonable that the City protect the dignity of these persons against fanatics who take possession of its streets to hurl into its crowds defamatory epithets that hurt like rocks?"[34]

Free Speech v. Fair Trial

In 1918, the Supreme Court, over dissents from Holmes and Brandeis, had held that a newspaper publishing criticism of federal judicial proceedings could be punished for contempt of court under a statute allowing summary punishment for acts tending to impair the administration of justice.[35] In 1941, before Jackson's appointment, the Court overruled this decision.[36] But the 1941 case had involved only a question of statutory interpretation, and it was not until *Bridges v. California*,[37] decided at the next term, that the right to publish critical comments about pending judicial business was given full first amendment protection. Jackson joined in Black's opinion for the majority which held that "history affords no support for the contention that the criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case."[38] Applying the clear and present danger rule, Black could not find that Harry Bridges' threat to call a coast-wide strike if a state court decision were carried out, should have constituted a real peril to orderly administration of justice.

Jackson did not participate in the next free speech-contempt decision,[39] but in 1947 he showed that speech enjoyed no more of a value monopoly in this area than it did in other sectors of his judicial theory. *Craig v. Harney*[40] was the appeal by newspapermen of a contempt conviction in a Texas county court. The trial judge, an elected official who was not a lawyer by profession, had felt that a series of highly critical articles and editorials had been designed to intimidate him into granting a new trial in a case before him. While admitting that the newspaper criticisms were "strong,"

33. *Id.* at 302. Kunz admitted to the trial court that unless he had a policeman with him when he spoke, there was violence. Record, pp. 25-26.
34. *Id.* at 313. For similar support of efforts to protect reputations against speech, see *infra*, for the discussion of Beauharnais v. Illinois, 343 U.S. 250 (1952).
35. Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).
36. Nye v. United States, 313 U.S. 33 (1941).
37. 314 U.S. 252 (1941).
38. *Id.* at 268.
39. Pennekamp v. Florida, 328 U.S. 331 (1946).
40. 331 U.S. 367 (1947).

"unfair," and "intemperate," a majority of the Supreme Court reversed the conviction, saying "it takes more imagination than we possess to find in this . . . case any imminent or serious threat to a judge of reasonable fortitude."[41]

Where the majority opinion of Justice Douglas was couched in terms of first amendment liberties, Jackson's dissent emphasized the case as a clash between the newspaper's right to publish and the litigants' right to a fair trial. The judge had not been denying freedom, rather he had been attempting to reconcile conflicting freedoms. The right of the press was vital, Jackson wrote, "but so is the right to have a calm and fair trial free from outside pressures and influences. Every other right, including the right of a free press itself, may depend on the ability to get a judicial hearing as dispassionate and impartial as the weakness inherent in men will permit."[42]

II

Religious Zeal v. Public Peace

The first amendment is absolute in its prohibitions against infringements on freedom of speech or religion, but literal application of its terms no more defines what this "freedom" includes than it solves the problem of what might happen if a religious extremist runs into opposition. Not only might name-calling in the name of religion damage reputations, it might also incite to riot. Jackson saw this as a real danger in a multi-faith society. Although he was not on the Court when, in *Cox v. New Hampshire*,[43] it upheld a state statute requiring a permit for a religious parade through city streets, his philosophy was in accord with Chief Justice Hughes' statement that: "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."[44]

It will be recalled that Jackson voted to sustain Chaplinsky's con-

41. *Id.* at 375.

42. *Id.* at 394-95. Jackson was willing to sustain a judge's authority to keep order in the courtroom even in questionable circumstances, Sacher v. United States, 343 U.S. 1 (1952); Fisher v. Pace, 336 U.S. 155 (1949). But he would not approve disbarment of a lawyer because of a contempt conviction for overzealous advocacy of a client's case. "Perhaps consciousness of our own short patience makes us unduly considerate of the failing tempers of others of our contentious craft." *In re* Isserman, 345 U.S. 286, 294 (1953) (dissenting opinion). As Solicitor General, Jackson had stirred criticism by taking a very similar stand. For details see, GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 152-54 (1958).

43. 312 U.S. 569 (1941).

44. *Id.* at 574. Jackson quoted this with approval in Terminiello v. Chicago, 337 U.S. 1, 31 (1949) (dissenting opinion); and in Saia v. New York, *supra* note 14 at 572.

viction, and later dissented in other Jehovah's Witness cases, largely because of their aggressive tactics and offensive name-calling. On one occasion he had asked: "Does what is obscene, or commercial, or abusive, or inciting become less so if employed to promote a religious ideology?"[45] Jackson suggested that a common sense test of the Court's decision was to imagine what would happen if every religious group were to exercise the rights granted the Witnesses. "Religious freedom in the long run," he urged, "does not come from this kind of license to each sect to fix its own limits, but comes of hard-headed fixing of those limits by neutral authority with an eye to the widest freedom to proselyte compatible with the freedom of those subject to proselyting pressures."[46]

Jackson saw the first amendment as an outgrowth of a long experience which had taught that free society could not trust a majority to keep its religious zeal within tolerable limits. But he could not believe that that amendment had established the conscience of each minority sect as the final determinant of the limits of freedom. "Civil government can not let any group ride rough-shod over others simply because their 'consciences' tell them to do so."[47]

What was preached in a pulpit before a voluntary audience was one thing; what was said in the homes of strangers, in a public park, or on a public street, by loud speakers or by natural voice, was quite a different matter. This distinction was basic to Jackson's position in the Jehovah's Witness cases.[48]

Nor was he more sympathetic to the claims of other religious extremists. It was Jackson who cast the sole dissenting vote in the *Kunz* case. The Court, he protested, had not applied the clear and present danger test to the dispute. If it had, the New York permit system would have been validated because Kunz had been using fighting words likely to create an effect similar to shouting fire in a crowded theatre. The minister had employed "recognized words of art in the profession of defamation. They are not the kind of insult that men bandy and laugh off when the spirits are high and the flagons are low . . . . Jews, many of whose families perished in extermination furnaces of Dachau and Auschwitz, are more than tolerant if they pass off lightly the suggestion that unbelievers in Christ should all have been burned."[49]

Taunting the opposing justices to show why Kunz's words were of

45. Douglas v. City of Jeannette, *supra* note 7 at 179 (separate opinion).
46. *Id.* at 180.
47. *Id.* at 179.
48. Prince v. Massachusetts, 321 U.S. 158, 177 (1944) (separate opinion); Kunz v. New York, *supra* note 30 at 298. *Cf.*, however, his position in Terminiello v. Chicago, *supra* note 44 at 13-37.
49. 340 U.S. 290, 299 (1951).

more social value than Chaplinsky's, Jackson accused the majority of being hypercritical in striking down the New York ordinance for want of adequate standards when the Supreme Court itself had no standards for such cases. A city, he thought, could constitutionally promote the public peace and control its streets by means of a permit system, as long as it did not deny equal protection or try to censor speech that was not so defamatory as to be likely to cause violence. The first amendment, rooted in faith in reason, had been designed to promote peaceful exchange of ideas, not to open the floodgates to mob warfare.

An authority on the judicial process once wrote that a common technique of the dissenter "is to exaggerate the holding of the Court beyond the meaning of the majority and then to blast away at the excess."[50] Jackson availed himself of this tactic.

> Of course, if Kunz may speak without a permit, so may anyone else. If he may speak whenever and wherever he may elect, I know of no way in which the City can silence the heckler, the interrupter, the dissenter, the rivals with missionary fervor, who have an equal right at the same time and place to lift their voices. And, of course, if the City may not stop Kunz from uttering insulting and "fighting" words, neither can it stop his adversaries and the discussion degenerates to a name-calling contest without social value and, human nature being what it is, to a fight or perhaps a riot. The end of the Court's method is chaos.[51]

The Secular Agitator

Feiner v. New York, decided the same day as *Kunz,* forced the Court to consider another facet of free speech and public peace: that of the agitator whose speech is stopped on what the police claim is the brink of violence. Irving Feiner, a college student, had been convicted of disorderly conduct in Syracuse, New York, for making a street corner speech, the purpose of which was to publicize a meeting of the Young Progressives of America. This address, which was delivered in a colored neighborhood, also contained a plea for Negroes to insist on their rights. Feiner's language, while ambiguous, apparently conveyed the impression to some of his white listeners that he was urging violence. The crowd became restless, and police arrived on the scene and asked Feiner to stop talking. After several refusals, he was arrested.

Speaking for a six judge majority, Chief Justice Vinson accepted the finding of the New York courts that Feiner—and not those in the crowd who had disagreed with him and had threatened him—had constituted an imminent danger to the public peace. "It is one thing

50. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 18-19 (1955).

51. 340 U.S. 290, 311-12 (1951).

to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace."[52]

Jackson was with the majority in this case and did not file a separate opinion. He did, however, discuss his views on the *Feiner* decision in his *Kunz* dissent. He thought that emergencies might arise where there was danger of a riot which would permit the police to require a speaker whose speech was lawful to yield his right temporarily "to the greater interest of peace." To be valid, such police action had to be taken in good faith and in a threatening situation. "But silencing a speaker by authorities as a measure of mob control is like dynamiting a house to stop the spread of a conflagration. It may be justified by the overwhelming community interest . . . ."[53] It was doubtful, Jackson thought, whether the police had used the best methods of dealing with Feiner, but they had not overstepped the limits of allowable discretion.

Comparing the *Feiner* and *Kunz* decisions Jackson concluded that the Court had not been logical in freeing Kunz and permitting Feiner to be jailed. Under the New York permit system Kunz had had a hearing before a detached and responsible administrative official; witnesses had testified, cross-examination had been allowed, and judicial review had been available. Feiner had had none of these protections. "It seems to me that this procedure [in the *Kunz* case] better protects freedom of speech than to let everyone speak without leave, but subject to surveillance and to being ordered to stop in the discretion of the police."[54]

A year and a half earlier, *Terminiello v. Chicago*[55] had confronted the Court with a very similar problem, and Jackson had offered the

52. Feiner v. New York, 340 U.S. 315, 321 (1951).
53. Kunz v. New York, 340 U.S. 290, 301-02 (1951).
54. *Id.* at 312. In other permit cases Jackson took a similar position. He voted to sustain permits in Jones v. Opelika, 316 U.S. 584 (1942), *rev'd per curiam*, 319 U.S. 103 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Follett v. Town of McCormick, 321 U.S. 573 (1944); Saia v. New York, 334 U.S. 558 (1948); Kovacs v. Cooper, *supra* note 19. In Busey v. District of Columbia, 319 U.S. 579 (1943), which involved an ordinance similar to that of the *Opelika* cases, Jackson did not repeat his dissent. But in spite of this general support, Jackson would not tolerate a licensing system which was being used to discriminate against groups: Niemotko v. Maryland, 340 U.S. 268 (1951); Fowler v. Rhode Island, 345 U.S. 67 (1953). Jackson was part of the unanimous Court which struck down a pair of Texas municipal ordinances against the distribution of handbills in city streets as applied to Jehovah's Witnesses: Jamison v. Texas, 318 U.S. 413 (1943); Largent v. Texas, 318 U.S. 418 (1943). He also agreed with the Court in sustaining a similar ban against the distribution of commercial advertising leaflets in city streets. Valentine v. Chrestensen, 316 U.S. 52 (1942).
55. Terminiello v. Chicago, *supra* note 44.

same solution as in *Kunz* and *Feiner*. Arthur Terminiello, a Catholic priest under suspension from his bishop, had been convicted for disorderly conduct in inciting a riot. Terminiello, known as the Father Coughlin of the South, had come to Chicago under the auspices of Gerald L. K. Smith to address the Christian Veterans of America. Terminiello's reputation had preceded him; and before he arrived at the auditorium a large crowd, estimated at upwards of 1500 people, was angrily waiting for him. With the help of police, Father Terminiello managed to get into the packed hall and to deliver a speech which was more anti-semitic than anti-Communist. During the address there were disturbances both inside and outside the building; and the Illinois courts upheld the contention that Terminiello's speech, made in a context of violence, had constituted an invitation to immediate breach of the peace.

The U. S. Supreme Court reversed the conviction on the grounds that the ordinance under which Terminiello had been accused was an unconstitutional impairment of first amendment freedoms since it had been interpreted by the trial court to prohibit speech which only "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance . . . ."[56]

Speaking for himself, Frankfurter, and Burton, Jackson wrote another blistering dissent. He saw the case not as an isolated clash of a few neo-Nazis with radicals from the left, but as a "local manifestation of a world-wide and standing conflict between two organized groups of revolutionary fanatics, each of which has imported to this country the strong-arm technique developed in the struggle by which their kind has devastated Europe."[57] This was only a part of the Communist-Fascist war for control of the streets; any ruling against the power of legitimate political authority to police those streets would be a victory for both of these totalitarian groups.

Utilizing extensive quotations from the record, Jackson argued that Terminiello had been hurling insults at an already inflamed mob outside and at the same time had employed the tactics of Marc Antony's funeral oration to stir the audience inside the hall to counter-violence. If the Court had applied the clear and present danger test, Terminiello's conviction would have been sustained. Rioting was a substantive evil and the plain facts of the case showed that the danger of rioting "in *response* to the speech"[58] was clear and immediate.

56. *Id.* at 3.

57. *Id.* at 23.

58. *Id.* at 26. (Italics supplied.) This was not altogether true. The mob outside had been ready to riot before Terminiello reached the scene; and since the crowd had been unable to hear what was being said inside the auditorium, it is improbable that Terminiello's actual words incited them

Jackson charged the Court with forgetting that "freedom of speech exists only under law and not independently of it."[59] Rights left at the mercy of a howling mob were rights destroyed. Liberty could not be strengthened by refusing to separate its use from its abuse. Restating one of the recurrent principles of his free speech opinions, Jackson warned: "The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[60]

In 1952 the Supreme Court reviewed another effort of Illinois to punish what it considered breach of the peace.[61] Joseph Beauharnais, leader of the White Circle League, had circulated scurrilous anti-Negro literature, part of which was a request for the city of Chicago "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons by the Negro . . . ."[62] Beauharnais had also called for a million "self-respecting" white people to unite, and claimed that "if persuasion and the need to prevent the white race from becoming mongrelized by the Negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the Negro, surely will."[63] The state prosecuted and convicted Beauharnais under a criminal statute which made it illegal to distribute, publish, or present material which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion," or exposes such groups "to contempt, derision, or obloquy, or which is productive of breach of the peace or riots . . . ."[64]

Accepting Illinois' assertion that this was a "group libel" law, the Supreme Court by a five to four division affirmed Beauharnais' conviction. For the majority Felix Frankfurter stressed the significance of group identity in human life, both in terms of the individual's loyalties and more important his opportunities. "[I]f an utterance directed at an individual may be the object of criminal [libel] sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State."[65]

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further, though his presence undoubtedly did contribute to the mood of the mob.

59. *Id.* at 31.
60. *Id.* at 37.
61. Beauharnais v. Illinois, 343 U.S. 250 (1952).
62. *Id.* at 252.
63. *Ibid.*
64. ILL. ANN. STAT. c. 38, § 471 (1935).
65. Beauharnais v. Illinois, 343 U.S. 250 (1952).

Black, Douglas and Reed dissented on the grounds that the Illinois law was an abridgment of free speech. Jackson filed the fourth dissenting opinion, one which has been called the "most balanced and matured"[66] statement of his free speech views. Unlike the other members of the minority, he did not feel that the statute necessarily violated first or fourteenth amendment rights. His objections were less broad and more technical. Jackson agreed with the majority

> that a State has power to bring classes "of any race, color, creed, or religion" within the protection of its libel laws, if indeed traditional forms do not already accomplish it. But I am equally clear that in doing so it is essential to our concept of ordered liberty that the State also protect the accused by those safeguards the necessity for which is verified by legal history.[67]

Two of these safeguards which had not been accorded Beauharnais were the right to prove the truth of his allegations and to argue that his statements were constitutionally privileged as a petition for redress of grievances.[68] Jackson specifically disclaimed any implication that the defendant could have proved the truth of his remarks, nor did the Justice express an opinion regarding the privilege question; but he did feel that these were legitimate defenses which should be open to all people.

A third protection Jackson said Beauharnais had been denied was that of the clear and present danger rule. This test was particularly fitted for the settlement of such minor controversies. Illinois had shown only that Beauharnais' pamphlet had a tendency toward breach of the peace. This was not enough. "Group libel statutes represent a commendable desire to reduce sinister abuses of our freedoms of expression—abuses which I have had occasion to learn can tear apart a society, brutalize its dominant elements, and persecute, even to extermination, its minorities."[69] But, in spite of his support of this type of legislation, Jackson could not overlook the fact that "in these, as in other matters, our guiding spirit should be that each freedom is balanced with a responsibility, and every power of the State must be checked with safeguards."[70]

Sedition

The edges of the three-fold distinction among free speech cases which was set up in the introduction to this paper begin to blur

66. Freund, *Individual and Commonwealth in the Thought of Mr. Justice Jackson*, 8 STAN. L. REV. 9, 19 (1955).
67. 343 U.S. 250, 299 (1952).
68. See Jackson's similar concern in his dissenting opinion in United States v. Harriss, 347 U.S. 612 (1954); and his vote in United States v. Rumely, 345 U.S. 41 (1953).
69. 343 U.S. 250, 299 (1952).
70. *Id.* at 304-05.

when the field of sedition is reached. In a sense this offense can be thought of as an example of an individual or a group pitted against society as a whole, or in a narrower sense it can refer to a struggle against a particular regime and thus perhaps represent a conflict between freedom and authority. Jackson's opinions reflected this ambivalence, but on the whole he tended to place activity of American Communists within the former category.[71]

Dennis v. United States was the most important of the Communist-free speech cases in which Jackson participated.[72] It was an appeal from the conviction of eleven party leaders for violation of the Smith Act in conspiring to form a political party to teach violent overthrow of the government. The Supreme Court granted limited review, restricted to questions of the constitutionality of the Smith Act, and by a six to two vote held the act valid.

Jackson was with the majority, but he wrote his own concurring opinion. In other free speech cases he had insisted on the use of the clear and present danger test, but he categorically refused to apply that test to a case involving a threat of the magnitude of the Communist Party. "I would save it, unmodified, for application as a 'rule of reason' in the kind of case for which it was devised,"[73] that is, for relatively trivial incidents such as hot-headed street speeches or parades behind a red flag. But to divine whether the speech and teachings of a group on the scale of the Communist movement constituted a clear and present danger would necessitate the gift of prophecy. "The judicial process simply is not adequate to a trial of such far-flung issues. The answers given would reflect our own political predilections and nothing more."[74]

71. The question of censorship of obscene and/or immoral literature and speech presents the same double problem of classification since obscenity and immorality are such malleable terms. Jackson wrote an opinion in only one such case, Musser v. Utah, 333 U.S. 95 (1948), and did not reach the merits even there. This makes it difficult to give a close analysis of his thoughts in this area. He did, however, in general vote against censorship efforts: Superior Films, Inc. v. Department of Educ., 346 U.S. 587 (1954); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Gelling v. Texas, 343 U.S. 960 (1952) (per curiam). But Jackson showed no qualms about punishing "obscenity" which he considered obscene. See Douglas v. City of Jeannette, 319 U.S. 157 (1943); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). He also voted to sustain a New York law directed against crime magazines, Winters v. New York, 333 U.S. 507 (1948); and probably was one of those who wished to uphold New York's branding Edmund Wilson's *Memoirs of Hecate County* obscene, Doubleday and Co. v. New York, 335 U.S. 858 (1948), affirming the New York decision by a four-four vote.

72. 341 U.S. 494 (1951). Compare the *Douds* cases, *infra* note 97. Jackson had taken no part in Schneiderman v. United States, 320 U.S. 118 (1943), or Bridges v. Wixon, 326 U.S. 135 (1945), though he did refer in his *Dennis* opinion to the majority's views in these two cases as "naive." 341 U.S. 494, 568-69 n. 12. In Dunne v. United States, 320 U.S. 790 (1943), the Supreme Court had denied certiorari.

73. Dennis v. United States, 341 U.S. 494, 568 (1951).

74. *Id.* at 570.

Instead, Jackson believed that use of speech to work up a public desire to commit a crime could be punished, no matter what the odds against the success of the effort. The vehicle he used to elaborate this approach was the law of conspiracy. Antitrust and labor litigation had settled the point that Congress could make it a crime to conspire with others to commit acts which if done by a single person would be lawful. Since the government was not forbidden by the Constitution to outlaw sedition, neither was the Government forbidden "to punish its teaching or advocacy, and the end being punishable, there is no doubt of the power to punish conspiracy for the purpose."[75]

Jackson's conspiracy doctrine was attacked both on and off the Court, and he himself admitted it to be a dangerous instrument capable of being perverted into a dragnet for persecution. But he felt the law of conspiracy had become so ingrained in American jurisprudence as to apply even in free speech cases and cited Justice Black to back his position.[76] Jackson could see no reason to exclude the Communist Party from its sanctions, particularly since the Court had earlier refused to excuse the free speech claims of newspapers and labor unions against conspiracy charges. "I happen to think it is an awkward and inept remedy, but I find no constitutional authority for taking this weapon from the Government. There is no constitutional right to 'gang up' on the Government."[77]

As has been pointed out,[78] Jackson's conspiracy doctrine leaves little, if any, protection to free speech in this area—but "this area" is that of seditious speech, urging as a policy-end the overthrow of the government by force, or of forming a political party to further violence against the existing government. Chief Justice Vinson's opinion in *Dennis* tended to treat advocacy and incitement as one and the same thing; but whatever the shortcomings of the various majority opinions in *Dennis*, it is difficult to see how one may assert a constitutional, as contrasted with a moral, right to urge

75. *Id.* at 575.

76. The reference was to Justice Black's opinion for the Court in Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

77. 341 U.S. 494, 577 (1951). A year earlier in the American Communications Ass'n v. Douds, 339 U.S. 382, 433 (1950), Jackson had laid down almost the same conspiracy doctrine, but this seems to have passed largely unnoticed. In defense of his position Jackson was able to say, correctly, that conspiracy was the main issue in the *Dennis* case: the Smith Act was in part a conspiracy statute; the defendants had been indicted on a conspiracy charge; and they had been convicted on that conspiracy count. For earlier views on conspiracy, sedition, and free speech in which Jackson had joined, read the dissenting opinions in Hartzel v. United States, 322 U.S. 680 (1944), and Keegan v. United States, 325 U.S. 478 (1945). However, in his concurring opinion in Krulewitch v. United States, 336 U.S. 440 (1949), Jackson expressed deep hostility to the whole conspiracy theory.

78. PRITCHETT, *op. cit. supra* note 1, at 75-76.

revolution as a course of action and not merely as an abstract doctrine. There are three crucial problems for democratic society here. First, is it wise or even desirable to reject the concept that security is best protected by freedom and to establish a policy outlawing incitement to sedition, or is it more expedient to ignore such incitement? Second, assuming a statute forbidding this kind of speech is adopted, does the government wish to prosecute in a particular situation? Both of these are questions with which, theoretically at least, courts should not concern themselves. The third problem, and this one is properly judicial, is whether in a specific instance a defendant actually did try to incite others to use violence or to form an organization to do so. And neither the Court nor Jackson passed on the sufficiency of the evidence against Dennis and his cohorts, leaving this to a later and calmer day.[79]

Although his views on the rights of Communists were harsh, Jackson was quick to disassociate himself from any endorsement of the wisdom of the Smith Act. "While I think there was power in Congress to enact this statute and that, as applied in this case, it cannot be held unconstitutional, I add that I have little faith in the long-range effectiveness of this conviction to stop the rise of the Communist movement. Communism will not go to jail with these Communists."[80]

In conceding broad power to political authority to punish sedition, Jackson did not intend to write a blank check. In 1943 he had joined the unanimous opinion in *Taylor v. Mississippi*[81] which had voided a year old state statute aimed at the Jehovah's Witnesses. This act had outlawed the teaching of, among other things, refusal to salute the flag. Speaking through Justice Roberts, the Court invalidated this as an abridgment of the right to communicate beliefs and opinions about public affairs.

III

Freedom of Belief

Where speech encouraged revolt, incited to riot, invaded the privacy of others, interfered with a fair trial, or slandered other men's reputations, Jackson appreciated the necessity of some sort of government intervention, and he deferred to the judgment of local authorities as to how best these conflicting rights could be balanced. But there were certain areas from which government was excluded:

79. The Court did pass on this issue after Jackson's death, Yates v. United States, 354 U.S. 298 (1957), and found the evidence insufficient.

80. 341 U.S. 494, 577-78 (1951).

81. 319 U.S. 583 (1943).

freedom of thought, belief, religion, or speech which did not threaten the rights of others. As he wrote in 1945:

> [I]t cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind. . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us . . . . Nor would I.[82]

It was in the second *Flag Salute* case that Jackson wrote his finest opinion in favor of first amendment liberties. Instead of basing his opinion on freedom of religion, he relied on broader freedoms of belief and of silence. The Court was dealing, he emphasized, "with a compulsion of students to declare a belief,"[83] and to express "an attitude of mind."[84] Jackson pictured the decisional alternatives in concise terms: "To sustain the compulsory flag salute we are required to say that the Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."[85]

Where Jackson hesitated in other cases to upset the judgment of local officials, here he reversed local determinations with firmness, almost with gusto. "There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution."[86] The crucial factor behind this difference in approach was clearly stated:

> The freedom asserted by these appellees does not bring them into collision with the rights asserted by any other individual . . . . [T]he refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. *The sole conflict is between authority and rights of the individual.*[87]

Freed from the duty of respecting a balance between conflicting rights of individuals or groups, Jackson was able to meet Frankfurter's dissent, probably the most brilliant and moving plea for judicial self-restraint ever to come from the high bench. Jackson answered: "We act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialities as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed."[88]

82. Thomas v. Collins, 323 U.S. 516, 545 (1945) (concurring opinion).
83. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943).
84. *Id.* at 633.
85. *Id.* at 634.
86. *Id.* at 638.
87. *Id.* at 630. (Italics supplied.)
88. *Id.* at 640. In the closing sentences of his concurring opinion in Sweezy

As if he and Frankfurter were conducting a literary as well as a forensic duel, Jackson proceeded to strike off phrases as eloquent as those in the dissenting opinion:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[89]

Then in even sharper language he stated the essence of the liberal creed: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[90]

Jackson's concern for freedom of belief could sometimes be stretched to such an extreme that on one occasion Edward S. Corwin accused him of having taken "leave of common sense."[91] The case which brought about Corwin's remark was *United States v. Ballard*,[92] which involved the trial of two leaders of the "I Am" cult for using the mails to defraud. Here Jackson conceded that he thought the Ballards, known by several aliases including Jesus, George Washington, and St. Germain, had peddled "humbug, untainted by any trace of truth,"[93] and that if he could somehow have voted to sustain their conviction without creating a precedent he would have done so. But he felt the case raised serious issues of freedom of religion and belief.

The Ballards were charged with preaching a doctrine they knew to be false; but, Jackson argued, to prove the Ballards knew their doctrine to be false the government would first have to prove that the doctrine was false; and this was an impossible task. No court could discover whether a religious teacher was sincere in his mysticism; even the most orthodox of religious men "are sometimes accused of taking their orthodoxy with a grain of salt."[94] With a touch of cynical humor Jackson added: "Religious symbolism is even used by some with the same mental reservations one has in teaching of

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v. New Hampshire, 354 U.S. 234, 267 (1957), Mr. Justice Frankfurter expressed much the same views as had Jackson in this passage.

89. West Virginia v. Barnette, *supra* note 83 at 638.

90. *Id.* at 642.

91. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 201 (10th ed. 1948).

92. 322 U.S. 78 (1944).

93. *Id.* at 92 (dissenting opinion).

94. *Id.* at 95.

Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges."[95]

The most important aspect of the case was that the Constitution had placed matters of religion beyond the reach of government. "[T]he price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish." Jackson urged the Court to dismiss the indictment and "have done with this business of judicially examining other people's faiths."[96]

In 1950 the *Douds*[97] cases brought about a clash between Jackson's hatred of the Communist Party and his enshrinement of freedom of belief. Some members of the Court were able to make a clean choice between the two, but Jackson clung to the tradition of Solomon. After a long lecture on the special nature of Communism as a political movement, he concurred in so much of the Court's opinion as sustained the power of Congress to extract from labor union officials an oath of nonmembership in the Communist Party. "I cannot believe that Congress has less power to protect a labor union from Communist Party domination than it has from employer domination . . . . Our Constitution is not a covenant of nonresistance toward organized efforts at disruption and betrayal, either of labor or of the country."[98]

But Jackson dissented against the authority of Congress to compel these people to foreswear "belief" in violent overthrow of the government. "Thought control is a copyright of totalitarianism, and we have no claim to it." Echoing his *Flag Salute* opinion, he stated: "A free man must be a reasoning man, and he must dare to doubt what a legislative or electoral majority may most passionately assert."[99] Jackson saw the American constitutional system as allowing the government to punish a man only for illegal acts, or, on occasion, words, but "we must let his mind alone."

Despite these noble sentiments, Jackson was not completely consistent in espousing freedom of belief. In 1945 he had supplied the fifth vote to sustain Illinois' denial of the right of Clyde W. Summers to practice law because of his pacifist beliefs.[100] Justice Reed's majority opinion was based on the *Schwimmer*[101] and *Macintosh*[102] cases, which had held that the United States could bar aliens from

95. *Id.* at 94.
96. *Id.* at 95. However, Jackson raised doubts in Douglas v. City of Jeannette, 319 U.S. 157, 169-170 (1943), about the financial status of the Jehovah's Witnesses.
97. American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Osman v. Douds, 339 U.S. 846 (1950).
98. American Communications Ass'n v. Douds, *supra* note 97 at 433-34.
99. *Id.* at 442.
100. *In re* Summers, 325 U.S. 561 (1945).
101. United States v. Schwimmer, 279 U.S. 644 (1929).
102. United States v. Macintosh, 283 U.S. 605 (1931).

naturalization if they refused to pledge military service. If willingness to fight were so important that the federal government could deny citizenship to pacifists, Reed thought that a state could forbid such persons to practice law in its courts.

Speaking for himself, Douglas, Murphy, and Rutledge, Justice Black dissented bitterly. As if pointing up Jackson's desertion of his former holy cause, Black used the verb or noun form of "belief" fifteen times in five and a half pages to emphasize the main issue in the case.

Unfortunately Jackson was denied the opportunity to purge himself of this inconsistency. He, of course, had not been on the Court when the *Schwimmer* and *Macintosh* cases had been decided, and even Chief Justice Stone, who had dissented from the latter decision, had felt bound by them when the *Summers* case was argued. And when these two naturalization precedents were directly challenged and overruled[103] by a majority of the Court, Jackson was at Nurnberg and could take no part in the reversal. But if he had been on the Court, one would hope that he would have treated his *Summers* vote in the same charming and candid manner in which he had disposed of an earlier error, by quoting from an English judge: "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion."[104]

IV

Without a doubt Jackson put other values at least on a par with, if not ahead of, freedom of expression.[105] As he dissented in 1949: "We cannot give some constitutional rights a preferred position without relegating others to a deferred position; we can establish no firsts without thereby establishing seconds."[106] While one suspects with good reason that Jackson's personal scale of values would have placed the right to privacy on the same sort of pinnacle to which the Court libertarians had elevated free speech, there were other considerations which to a certain extent overrode the individual value choices allowed in each specific case: the role which Jackson saw the Supreme Court filling in the American system of government and the role he envisioned himself as playing on the Court.

The key to these two roles is found in the pair of books which

103. Girouard v. United States, 328 U.S. 61 (1946).

104. McGrath v. Kristensen, 340 U.S. 162, 178 (1950).

105. In addition to the values already noted, one should include federalism. See, for example, his opinion for the Court in Collins v. Hardyman, 341 U.S. 651 (1951). For a fuller discussion of this point see Jaffe, *Mr. Justice Jackson,* 68 HARV. L. REV. 940, 942-43 (1955).

106. Brinegar v. United States, 338 U.S. 160, 180 (1949). If this is illiberal, it has peculiar support: Jackson's dissent was concurred in by Justice Murphy, sitting for the last day on the Supreme Court.

framed Jackson's judicial career. He finished writing the first[107] about a year before he was appointed as Associate Justice, and the second was still in manuscript when he died.[108] But despite the fourteen years which separated the publication of these two volumes, they focus on the same vital subject, the function of the Supreme Court; and the theme of the two books is almost identical. The finale continues the basic melody of the overture: self-restraint must be the leitmotif of the judiciary.

It is easier to form a coherent concept of the role of an institution than to play a consistent part in the working of that institution. A man cannot confine himself to a single role and Jackson was no exception. At times he was the Court's conscience,[109] and even occasionally the Court's jester.[110] But if Jackson did see himself as playing a role on the bench, it was that of the hard-headed realist, that of the sensible, almost cynical lawyer turned politician, then turned tough-minded judge.

Brilliant and ambitious, Jackson had seen his gubernatorial campaign fizzle; then FDR's decision to seek a third term collapsed whatever presidential hopes he may have had; and the 1940 Democratic Convention seemed totally disinterested in him as a vice-presidential candidate. He had temporary consolation in the fact that the Chief Justiceship remained a real possibility. But this too was snatched away, not once, but twice. Jackson came to the Court chastened by frustration.[111] He knew of *realpolitik*, having learned by his own scars; and his second loss of the Chief's chair must have increased his frustration and bitterness.[112] Against this background, the utopian idealism of Justice Murphy could hold no appeal for him;[113] nor

107. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS (1941).

108. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1955). William P. Murphy has an incisive review of this book at 9 VAND. L. REV. 112 (1955).

109. Shaughnessy v. Mezei, 345 U.S. 206, 218-28 (1953) (dissenting opinion).

110. *E.g.*, Leiman v. Guttman, 336 U.S. 1, 11 (1949); United States v. Women's Sportswear Ass'n, 336 U.S. 460, 464 (1949).

111. For details consult GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 199-205 (1958). THE ICKES DIARIES (1953-54) have numerous scattered references to Jackson's New Deal political career. For his presidential hopes, see also BURNS, ROOSEVELT: THE LION AND THE FOX 412 (1956); TUGWELL, THE DEMOCRATIC ROOSEVELT 490 (1957).

112. It was immediately after the appointment of Fred Vinson as Chief Justice to succeed Harlan Fiske Stone that Jackson unleashed his blast from Nuremberg against Justice Black. For a pro-Black account, read FRANK, MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS 123-31 (1949); for a pro-Jackson view, GERHART, *op. cit. supra* note 111, at 235-77 (1958).

113. The reversal of liberal roles on the bench between Murphy and Jackson provides an interesting pair of examples to support Frankfurter's contention that donning the judicial robe does change a man, Public Utilities Commission v. Pollak, 343 U.S. 451, 466 (1952) (separate opinion). When Attorney General, Jackson found one of his most pressing tasks was to stop the prosecutions of radical groups which his predecessor, Frank Murphy, had

could he be deeply attracted to the academic purity of Frankfurter's approach. Jackson's keenest insight was into the political realities of Court decisions, and he played his part well enough to be labeled by one responsible critic as evidencing something of "Mephistopheles."[114]

Like his books, Jackson's opinions show a strong belief in self-restraint and an acute awareness of the weaknesses and strengths of the Court's position. Time and again he bowed to legislative or executive judgment. This was made easier by the fact that he often approved that judgment, yet sometimes he did not. But agreement or disagreement did not change his belief that the Court could best maintain its prestige by standing aloof from those situations where elected officials were forced to balance competing rights,[115] insuring only that there had been no efforts at censorship or discrimination.[116]

Jackson had seen the Court in its nakedness and in its power during the New Deal fight, and unlike some later observers[117] had been convinced that Roosevelt had finally beaten the judges at their own game.[118] But Jackson was too shrewd to have mistaken paucity of

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begun. Jackson felt that Murphy had actually been attacking these people's rights to freedom of speech and belief. GERHART, *op. cit. supra* note 111, at 193-210, and particularly 183, 198.

114. Roche, *The Utopian Pilgrimage of Mr. Justice Murphy*, 10 VAND. L. REV. 369 (1957). Consult the memorandum sent by Jackson to Chief Justice Stone regarding assigning the opinion in Smith v. Allwright, 321 U.S. 649 (1944), to Justice Frankfurter. Jackson pointed out that since Frankfurter was a Jew, a New Englander, and a person not associated with the Democratic Party, his authorship would make this decision, overturning the white primary, doubly unpalatable to the South. Deploring the existence of these prejudices, Jackson nevertheless suggested that another member of the Court be asked to write the opinion. The details are set forth in MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 615 (1956).

115. Compare Jackson's similar respect for local balancing judgment in the later picketing cases, especially in International Bhd. of Teamsters v. Hanke, 339 U.S. 470, 478-79 (1950), where he joined Frankfurter's opinion that, without agreeing or disagreeing with a state's judgment, "we cannot conclude that Washington, in holding the picketing in these cases to be for an unlawful object, has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice." See the similar opinion in Hughes v. Superior Court, 339 U.S. 460 (1950). Jackson's other free speech-picketing cases are quite unexceptional. He came to the Court after Thornhill v. Alabama, 310 U.S. 88 (1940), had equated peaceful picketing with free speech, and seemed to go along with this trend. Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943); Bakery Drivers Union v. Wohl, 315 U.S. 769 (1942). But this no more meant a carte blanche than did any of Jackson's other votes. He voted against the right to picket in Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942); Local 10, Plumbers v. Graham 345 U.S. 192 (1953); and Building Service Employees v. Gazzam, 339 U.S. 532 (1950).

116. *Cf.* Niemotko v. Maryland, 340 U.S. 268 (1951), and Jackson's explanation of his vote in this case in his opinion in Kunz v. New York, 340 U.S. 290, 310 n.9 (1951). See also Fowler v. Rhode Island, 345 U.S. 67 (1953).

117. BURNS, *op. cit. supra* note 111, at 315; TUGWELL, *op. cit. supra* note 111, at 399.

118. Equally as important, Jackson was not convinced that the Court's detached position really gave it a better perspective than the legislative or

power for absence of strength. He visualized the Court's wisest strategy as one of marshalling its meager resources and using them at important junctures. As he wrote before leaving the Executive Department, by exercising self-restraint the Court "does not thereby become paralyzed. It simply conserves its strength to strike more telling blows in the cause of a working democracy."[119] Carrying out this policy of massing forces, where he saw state or federal officials moving into areas which were none of their concern, or attempting to discriminate, or trying to censor unwanted ideas—and where he thought the Court's writ would effectively run—Jackson leaped into the fight with a vigor which outstripped that of the most ardent activists on the bench.

This habit of throwing himself wholeheartedly into battle, no matter which side he was on, was one of Jackson's most marked characteristics. His opinions reflect Jackson the Advocate as much as they do Jackson the Judge.[120] This tendency toward advocacy, coupled with a petulant pen and personality, not only made understanding Jackson more difficult, it also hampered the full development of his judicial philosophy. It could almost turn his self-restraint into nihilism,[121] or spur his activism to disputations regarding the wisdom of local policies. At times it caused him to battle men of straw, to overlook obvious alternatives to the horns of the dilemma he was proposing, or even to neglect qualifications he usually considered crucial. In the doorbell case, he never conceded that rights to privacy could have been well protected under normal laws of trespass. In *Kunz* he ignored Frankfurter's concurring opinion which pointed out that the Court was not forbidding New York to control violence on its streets, rather it was ruling that the state could not meet this evil by the equal evil of a permit system which provided no safeguards against censorship. And in *Terminiello* Jackson passed over in silence the fact that the speaker had actually addressed an audience in a rented hall to which listeners had been admitted by ticket only.

Nor did his concern with advocacy allow Jackson to plod along in his opinions, carefully explaining and distinguishing his former self so that a facade of consistency might be maintained. But on one

executive departments. "In no major conflict with the representative branches on any question of social or economic policy has time vindicated the Court." JACKSON, *op. cit. supra* note 107, at x.

119. *Id.* at 285.

120. Gerhart has aptly entitled his biography of Jackson: AMERICA'S ADVOCATE. Compare the remarks of Barnett, *Mr. Justice Jackson and the Supreme Court*, 1 WESTERN POLITICAL Q. 223, 242 (1948): "Jackson is primarily a brilliant and powerful advocate . . . ."

121. Korematsu v. United States, 323 U.S. 214, 242-48 (1944) (dissenting opinion). Jackson's opinion in the *Dennis* case, *supra* note 73, in the last analysis rested on a doctrine of *désistment*. See Freund, *Individual and Commonwealth in the Thought of Mr. Justice Jackson*, 8 STAN. L. REV. 9, 19 (1955).

of those rare occasions when he did pause to recount his past votes, he was able to present a picture which showed his behavior had not been as erratic as his critics claimed:

> I adhere to views I have heretofore expressed, whether the Court agreed . . . or disagreed . . . that our Constitution excludes both general and local governments from the realm of opinions and ideas, beliefs and doubts, heresy and orthodoxy, political, religious or scientific. The right to speak out, or to publish, also is protected when it does not clearly and presently threaten some injury to society which the Government has a right to protect. . . . But I have protested the degradation of these constitutional liberties to immunize and approve mob movements, whether those mobs be religious or political, radical or conservative, liberal or illiberal . . . or to authorize pressure groups to use amplifying devices to drown out the natural voice and destroy the peace of other individuals. . . . And I have pointed out that men cannot enjoy their right to personal freedom if fanatical masses, whatever their mission, can strangle individual thoughts and invade personal privacy. . . . A catalogue of rights was placed in our Constitution, in my view, to protect the individual in his individuality, and neither statutes which put those rights at the mercy of officials nor judicial decisions which put them at the mercy of the mob are consistent with its text or its spirit.[122]

This was written before the *Dennis* case and certainly that decision required some modification of this summary. But Jackson did not live to articulate a more elaborate statement of his views. Indeed, even had he been spared a term on the bench as long as that of Holmes, it is unlikely that he would have taken time to make a minute analysis of his first amendment philosophy. It was as a critic that Robert H. Jackson had written most of his free speech opinions, and critics are seldom system builders.

And Jackson was no more a creative leader than he was a builder of systems. He did not possess the personal magnetism of a Marshall or a Hughes necessary to "mass the Court" behind his ideas. Nor did he even have such skill as that of his arch enemy, Hugo Black, to form a cohesive minority bloc within the Court. True to the Kipling quotation which he always kept on his office wall, Jackson travelled alone. But in his loneliness, and perhaps because of his own political frustrations, he had tried to warn his fellow judges of the limited nature of their proper role, even where the first amendment was concerned. "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added."[123]

Jackson would have had the Court move cautiously, exercising a maximum of self-restraint in those areas where elected officials had

122. American Communications Ass'n v. Douds, *supra* note 97 at 443-44.
123. Douglas v. City of Jeannette, 319 U.S. 157, 181 (1943).

to balance competing rights of individuals or groups. But where the judiciary possessed primary responsibility for decision, *i.e.*, where he visualized the conflict as between liberty and authority, Jackson would have brought to bear all the carefully hoarded powers of the Court as well as his own plentiful supply of sarcasm to drive government officials off the sacred preserve.

His was the strident voice of the judicial realist; often it was a voice crying in the wilderness, and sometimes the wilderness was self-made. But in his opinions Jackson faced up to many of the problems free speech creates for a democratic government. His more conventional libertarian colleagues may have frankly confronted these difficulties in the judicial conference or in the privacy of their chambers, but they did not do so in their written opinions. That he had the verbal facility and intellectual courage to admit and openly examine the perplexing magnitude of these problems was Jackson's strength, and in this candor lies his contribution to the judicial process.