5-24-1954

Address Delivered at the Westside Jewish Community Center Entitled "The Right to Dissent"

Follow this and additional works at: http://digitalcommons.law.ggu.edu/carter

Part of the Judges Commons

Recommended Citation


This Article is brought to you for free and open access by the The Jesse Carter Collection at GGU Law Digital Commons. It has been accepted for inclusion in The Jesse Carter Collection by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.
In France, in the year 1694, was born a great philosopher, François Marie Voltaire. To him is attributed this statement: "I do not believe a word you say, but I will defend to the death your right to say it." In those few words, written many years ago, and which may never have been heard by the Framers of our Constitution and its amendments, we find the genesis of the right of freedom of speech. Both the Constitution of the United States and the Constitution of California provide that we shall have freedom of speech. The United States Constitution, in its First Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech..." The California
Constitution (Art. I, § 9) provides that "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. . . ."

In the light of these long-established and time-honored declarations which lie at the very foundation of a democracy, it should not even be necessary to speak to you tonight on the "right to dissent." But, unfortunately, it is necessary. The necessity arises because of fear. The average citizen is afraid to speak a controversial thought, afraid to be himself; afraid to be different; afraid to differ from what he thinks the majority thinks; afraid to believe as he chooses. This is a terrible thing to have happen in a democracy like ours. Remember the words of the Declaration of Independence: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the
pursuit of happiness; . . ." And Thomas Jefferson, in his first inaugural address declared: "If there be any among us who would wish to dissolve this union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." Yet today he who would dare to give expression to a concept or philosophy contrary to that on which the established order is based, is not only suspect but is branded as a bad security risk and even a traitor to his country. This is because, at the present time, due to hysteria, generated by chaotic world conditions, men tend to distrust their neighbors, their friends and even their relatives. We hear constantly that we are threatened with subversion from within and without. Perhaps we are. But if we are, that is all the more reason that loyal Americans should work together toward a united front rather than acting like mad dogs at each other's throats. In a world where suspicion and distrust run rampant, there can be no confidence that one individual may
depend on another to come to his rescue if he needs rescuing. In other words, there can be no cooperation between men who distrust each other. Again, quoting from the Declaration of Independence, "to secure these rights [which I have just enumerated] governments are instituted among men, deriving their just powers from the consent of the governed...." In a democracy, we unite and consent to be governed and the government derives its powers from us. If we do not agree with the government, we have the right to disagree; we have the right to say what we think is wrong and why we don't like it. Disagreement among men in any field is a healthy thing -- so long as men feel free to argue the merits of any subject, there will be improvement and progress. If there is no freedom of speech, or right to dissent, there can be no improvement or progress. And where there is no right to state one's views, which may differ from the views of the majority, there can be no democracy.
totalitarian form of government, there is no right to disagree, and if any person should be so bold and so ill-advised as to try it, we have all heard and read that he is quietly and promptly obliterated. Americans are much too tender hearted and squeamish to liquidate those whose philosophies and ideas differ. We just wouldn't know how to either live under or run such a form of government. We chose, long ago, to have a democratic form of government and all things taken into consideration, it has worked well since 1789. Let us keep it working that way. America has been through many great wars to defend its way of life -- the right to think and speak, through its citizens, as it chooses. I see no reason why the present hysteria should change our minds, or our way of life.

Doctors tell us that before a cure can be found, the cause of the illness must be discovered. If America is presently ill, the cause thereof is fear. And what are we afraid of? We are told that we are afraid of subversion. The dictionary defines subversion as something that subverts, ruins,
overthrows. Has America never been threatened before? Has it ever succumbed, or been ruined, or overthrown? We all know that it has not. If I remember correctly during the first great World War, there was much talk of strange fellows whom we called "Bolshie's" or "Huns" being abroad in the United States who were threatening to overrun the United States and to demolish us by getting rid of the second generation by giving them chocolate candy containing ground glass. That sounds absurd now, doesn't it? It really is just a matter of degree.

At that time the channels of communication were not so widespread and efficient as they are in these days of radio, television, cable and telegraph. So we were not kept quite so well and promptly informed of the subversive dangers threatening us as we are today. I do not say there is no danger; I do say that allowing ourselves to become so hysterical over it that we forget that these are the United States of which we are citizens, is more dangerous to a free people who live in a democracy than any threat from without. As President Eisenhower said there is

-6-
no natural force in the world stronger than the voluntary cooperation of free men.

The evil which is abroad today is, of course, the threat of Communism and it is this which is causing us to be so afraid. When people are afraid, they lose their perspective, their power to think and reason, and an unthinking, unreasoning people tend to become panic-stricken. People who are panic-stricken cannot unite and cooperate to fight the enemy -- they are divided among themselves. As Abraham Lincoln said: "A country divided against itself cannot stand."

In order to fight a fear, one must name it, recognize it for what it is, and then plan the proper attack. The way to learn about a fear is to know everything there is about it bring it out in the open and expose it. If we are to know all about that which we are fighting, we must have freedom of speech, and through freedom of speech, we must have education.

In the 1930's, before there was any threat to the guarantee of freedom of speech, boys and girls in college were taught all
about the various political philosophies of the world, and, being so taught, they learned that a democratic way of life was the most productive of opportunity and happiness for all. It has always been my opinion that to forbid something, absolutely, is to heighten one's curiosity about it, while to bring things into the open and learn, through discussion, of the evils and advantages inherent in the subject matter, is to allow the average thinking person to know, for himself and of his own knowledge, that the evils outweigh the advantages and conclude that he, too, will forbear from taking part in any such activity. A person cannot make a choice, if he has no knowledge on which to base a choice. To acquire knowledge, one must be permitted to learn all about every alternative. If we abridge freedom of speech, in any way, we are, at the same time, abridging freedom of thought, expression and education. And if education is curtailed, we cannot have a thoughtful people who will choose for themselves. In order to choose for themselves they know all the alternatives of a democratic way of life.
The essence of a democracy is that men and women shall
voluntarily work together for the common good and reconcile
their differences by the application of the democratic process.

We all know that in America, by constitutional
provision, we have the rule that the government of this
country shall be divided into three parts: The executive,
legislative and judicial branches, and that these three branches
shall remain separate and apart one from the other. By its
Congressional investigations, the legislative branch is,
theoretically, questioning to aid in its legislative functions.
This is the only purpose for which such investigations are
permitted. Anything else would be an unlawful and
unconstitutional encroachment on the judicial branch of the
government. In this present-day atmosphere of fear and hysteria,
it seems to me that everyone concerned has lost sight of the
purpose for which these investigations are conducted, and, as
a result, we have now added to our fears by such phrases as
"guilt by association," "guilt by doubt" and "guilt by

-9-
inference." If one is accused of a crime, we have state and federal grand juries for the purpose of investigating the alleged crimes. If there are spies in our country, we have law enforcement agencies and army and navy intelligence corps to ferret them out and make their reports to the Congressional committees which may then propose corrective legislation. Every state and the federal government has established procedure for bringing criminals to justice. I read an article not long ago by a man who was investigated because his sister-in-law, whom he had seen but twice in his life, was said to have once worked for a communist agent. He was completely exonerated. But he lost his position because of the investigation. Some years later, after moving to a different state and obtaining a new position, he was fired because his sister-in-law was being investigated because she was his sister-in-law and he had once been investigated because of that very relationship! This is what I mean by hysteria and fear. We have lost sight of the fundamental basis of justice -- that every man is innocent until
proven guilty. If every person is to fear and distrust his neighbor and refuse to speak out in defense of that in which he believes, we shall have come nearer to what Dorothy Thompson calls "an informer in every factory, apartment house, office and block, [and] of children informing on their parents and teachers; just a little nearer to the end of all mutual trust, all social happiness, all freedom."

Because of the methods now being used by investigating committees, with the resultant loss of position, and prestige, the adverse publicity, the unfair and unjust criticism leading to distrust and suspicion of persons who are presumed wholly innocent until proven guilty, freedom of speech is as effectively silenced as if it were illegal. As Paul Hoffman (Chairman, Studebaker Corporation) said, "When I say we must be willing to speak out for freedom I mean quite specifically to speak out for every one of the rights defined in our basic document, the Bill of Rights." It is every American's duty and responsibility to see that the Constitution and its Bill of Rights is protected and preserved

to the end that our democracy will continue to serve us well.

Dissents are indicative of health, and that applies, I think, to every field of endeavor. The commanding officers of our army will tell you that something is wrong when the soldiers don't complain about the food, the quarters, the uniforms and the officers. Some of the complaints are unwarranted and unjustified; others are constructive and lead to better conditions. However, it should be most apparent that the right to complain is an integral part of our democracy and is not found in any dictatorship or totalitarian form of government.

In addition to the "guilts" I have enumerated, we have another strange phenomenon in this country of "guilt by controversy." The term "controversial" was once the breath of life in this country. But today we have reached the point where a Methodist Bishop was denied the privilege of hiring a hall not because he was a Communist, because he had been completely cleared of that as well as of being subversive. He was denied the right, which really amounted to the right of
free speech, because he was "too controversial." This country has heretofore welcomed controversial speech. We have had debates on the major subjects of the day from our grammar schools on through our colleges and universities through our adult working life. Some of the greatest American literature stems from the debates of Webster, Clay and Calhoun. The subject matter of those debates was certainly controversial since it was human slavery -- a matter having to do with all the freedoms we of this generation have always taken for granted. The proponents and opponents of slavery had deep and conflicting ideas on the subject but no one doubted their right to speak as they chose.

If you will pardon a personal reference, I have been called the "dissenter" on the Supreme Court of California. So was Oliver Wendell Holmes known when he was on the Bench of the Supreme Court of the United States. Mr. Justice William O. Douglas of the Supreme Court of the United States wrote that "Disagreement among judges is as true to the character of
democracy as freedom of speech itself. The dissenting opinion is as genuinely American as Otis' denunciation of the general warrants, as Thomas Paine's, Thomas Jefferson's, or James Madison's briefs for civil liberties. "

I feel that I not only have the right, but a duty, to dissent. I feel that the public has a right to know what my views and beliefs in the various fields of the law are and that it is my duty to see that those views are a matter of public record through published dissenting opinions. To say merely, "I dissent," or "I disagree" is not sufficient -- the dissenter should give his reasons so that his interpretation of the law may be known to the lawyers on the losing side and to the public at large, so that, should the majority of the people so decide, corrective measures may be taken later to obviate the injustice which they feel has been done by the majority decision in any case where a dissent is filed. There are two sides to almost every question; an attorney cannot always be on the winning side nor can any single member of the general public
always rely on being on the side of the majority.

To give you an illustration of what I mean, I feel that a majority of the Supreme Court of California has nullified by interpretation, the remedial provisions of the Workmen's Compensation Act which was designed to protect employees who suffer industrial injuries as a result of the serious and wilful misconduct of their employers. The Workmen's Compensation Act was adopted by California after a bitter battle. It was won by those who believed as Governor Hiram W. Johnson stated "that industry should bear the burden of its accidents, that its maimed and its injured should not be cast forever upon the scrap heap of humanity. . . . It was realized that the frightful burden of accident should not be wholly upon him least able to bear it. . . ." Six months after the Act was in operation, it was universally praised by its former opponents. I would not be doing my duty to the working men and women of this state if I did not fight, with every weapon at my command, to reject any attempt to strike down or nullify this great humanitarian law.
On the other hand, the dissenting opinion plays a protective role insofar as injudicious legislation is concerned, in pointing out wherein such legislation is unconstitutional. To prevent laws enacted by the Legislature from making too great inroads into the rights of the individual guaranteed by the Constitution, is the plain, but often neglected, duty of the courts. Many laws have been passed which would have abridged freedom of speech, and religion, had they not been declared unconstitutional by the courts. Some of these laws have been, at first, declared to be constitutional by court decisions which were overruled a few years later by a more liberal and probably a more enlightened court. In cases involving civil liberties, many of the dissents of Holmes and Brandeis are now accepted as sound law. The dissenting opinion also serves as a brake on reactionary tendencies of some judges to hold unconstitutional legislation enacted for the betterment of the public health, morals and welfare. There are numerous examples of laws passed for the public good which have necessarily encroached, to some
extent, upon private rights. Many laws enacted for the protection and betterment of men and women employed in the nation's industries have been involved in cases where the dissent later became the law. A well-known example of a dissent of this character involved the minimum wage law which provided for decent wages, hours and working conditions for women and children. The first case to come before the Supreme Court of the United States, in which a clear-cut decision was reached, was Adkins against the Children's Hospital (261 U.S. 525) decided in 1923, where the court was divided five to three in holding that there was no connection between hours worked and wages paid to women and children, and the public health, morals or welfare such as would justify destroying by law the freedom of contract of the employers and the women who worked for them. In that case, Chief Justice Taft and Mr. Justice Holmes wrote dissenting opinions. Mr. Justice Holmes pointed out that Congress had the power to pass restrictive laws which interfered with freedom of contract to the end that conditions
leading to ill health, immorality and the deterioration of the race might be obviated. In 1937, fourteen years later, West Coast Hotel Company against Parrish (300 U.S. 379) was decided and the earlier case was overruled by a five to four vote in line with the dissent of Mr. Justice Holmes that the liberty protected by the Constitution was not an absolute right, but a right or liberty qualified by what was best for the health, safety, morals and welfare of the people.

In 1947, a majority of the Supreme Court of California held that this state could, constitutionally, by statute, exclude aliens who were residents of this state from fishing in its coastal waters (Takahashi v. Fish & Game Commission, 30 Cal.2d 719). I dissented. The case was taken to the Supreme Court of the United States and decided there in line with my dissent.

Another illustration of a dissent becoming the law is found in the flag salute cases. The United States Supreme Court first held (Minersville School Dist. v. Gobitis, 310 U.S. 586) that a statute requiring a compulsory flag salute by school children
was constitutional in that it did not abridge freedom of religion. Four years later, the case was overruled by West Virginia Board of Education against Barnette (319 U.S. 624) by a decision which held in line with the dissent in the earlier case that such a statute did abridge freedom of religion.

I mention these few illustrations to you, from a list of many, to show you that the dissent in any field of endeavor, or line of thought, promotes the common welfare. A dissenter in any court is insurance that cases, whatever they may be, will not be hastily passed over. So long as there are dissenters, the other justices will consider carefully their own views on any particular subject and all cases will be thoroughly examined. I welcome dissents to my own opinions; the dissent tests its soundness. If I am right, then the dissent makes my position stronger. If I am wrong, the dissent should point the way for the correction of the error by the present or some future court. A court decision which cannot stand the strong light of a vigorous dissent should never stand as the decision of the court.
If we do not dissent when we honestly do not agree, we regiment ourselves into a conformity which is not good for the nation at large. The great strides forward this country has made in every field were not made by men and women who were afraid to think and express independent ideas, or by those who wanted only to conform to what was considered the "proper" or correct thing a hundred or so years ago. Our scientists have looked for the new, the different and the ideal. They have failed time and again to find what they were looking for, but they have not been afraid of failure. We must not be afraid to try over and over again, if necessary, to make our democracy work. And democracy cannot work if its safeguards are overthrown and destroyed. I have tried to explain to you tonight that the rights guaranteed by the First Amendment are the strongest of our national and state safeguards and we should guard them as our most precious heritage. For without freedom of speech, thought, press and religion, democracy cannot endure.