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Constitutional Law - Clear and Present Danger Test Applied to Overbroad Unlawful Assembly Statute. Owens v. Commonwealth, 211 Va. 633, 179 S.E.2d 477 (1971)

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part of a church-related school. Secular aid is permissible only if government is not overly involved with religion.

Although the new concept of excessive entanglement is more clearly defined in *Lemon* the Court has not provided adequate guidelines against which the many remaining questions may be judged.[26] Government is heavily entangled with religious schools in such areas as lunch programs, medical clinics, teacher certification, textbook loans, and transportation. These forms of secular assistance involve government with religion, yet not excessively The reasons why this is so are obscure. Furthermore, the line dividing permissible from impermissible entanglement is unclear. To clarify an area of the law that is fast becoming as muddled as a Serbian bog the Court should abandon the doctrine of excessive entanglement and rely, instead, upon *Schempp* and *Allen.* Aid to the secular portion of a religious school should be permissible so long as the purpose or primary effect of the aid program does not directly advance religious teaching.

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Constitutional Law—CLEAR AND PRESENT DANGER TEST APPLIED TO OVERBROAD UNLAWFUL ASSEMBLY STATUTE. *Owens v. Commonwealth,* 211 Va. 633, 179 S.E.2d 477 (1971)

The appellants, members of an unruly crowd who ignored a police order to disperse, were convicted of the statutory offense of remaining at the place of an unlawful assembly after having been lawfully warned to disperse.[1] On appeal, they claimed that the statute was an impermissible infringement upon their first amendment right "peaceably to assemble." [2]

The Supreme Court of Appeals of Virginia reversed, holding that the

26. Whether a particular program, such as the "voucher" plan, results in excessive entanglement can only be determined on a case-by-case analysis. In *Lemon,* the Court examined "the character and purposes of the institutions which [were] benefited, the nature of the aid that the state provide[d], and the resulting relationship between the government and the religious authority" 91 S. Ct. at 2112. Other factors examined were whether the program was innovative, self-perpetuating and self-expanding. *Id.* at 2117

1. VA. CODE ANN. 18.1-254.4 (Supp. 1971): *"Remaining at a place of riot, rout, or unlawful assembly after warning to disperse.*—Every person except public officers and persons assisting them, remaining present at the place of any riot, rout, or unlawful assembly after having been lawfully warned to disperse, shall be guilty of a misdemeanor."

2. U.S. CONST. amend. I: "Congress shall make no law . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . "

statutory definition of unlawful assembly[3] was unconstitutional since it tended to include activities protected by the first amendment without requiring a clear and present danger of violent conduct.[4] The statute, in effect, made unlawful the assembly of persons entertaining the mere intent to engage in violent conduct, even when force and violence or the means to effect them were absent.[5]

The *Owens* court was required to balance the regulatory powers of the state against the first amendment right of peaceable assembly This balancing process called for the application of two constitutional principles: the "clear and present danger" doctrine and the concept of "overbreadth." The former was first postulated in *Schenck v. United States*[6] and elucidated by Justice Holmes in *Abrams v. United States:*[7]

> It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights [of other individuals] are not concerned.[8]

After some twenty years in judicial limbo, the doctrine was reincarnated in the 1940s, culminating in *Terminiello v. Chicago*[9] The

3. VA. CODE ANN. 18.1-254.1(c) (Supp. 1971) defines unlawful assembly: "Whenever three or more persons assemble with the common intent or with means and preparations to do an unlawful act which would be riot if actually committed, but do not act toward the commission thereof, or whenever three or more persons assemble without authority of law and for the purpose of disturbing the peace or exciting public alarm or disorder, such assembly is an unlawful assembly" *See generally* Note, *Virginia's Legislative Response to Riots*, 54 VA. L. REV. 1031, 1048 (1968), which suggests that the Virginia statute might be successfully challenged.

4. Owens v. Commonwealth, 211 Va. 633, 179 S.E.2d 477, 481 (1971)

5. 179 S.E.2d at 479.

6. 249 U.S. 47 (1919). The Court was concerned with conspirators committing seditious acts by mailing printed circulars in violation of the Espionage Act of 1917: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52. *See* 45 J. URBAN L. 474 (1967).

7. 250 U.S. 616 (1919).

8. *Id.* at 628.

9. 337 U.S. 1 (1949). The Court agreed to the applicability of the test to the validity of a conviction of a clergyman for a virulent address in an auditorium before hundreds of people, protested by an equal number gathered outside. A prior case illustrative of the Holmes formula is Thomas v. Collins, 323 U.S. 516 (1945), where the Court held that petitioner's first amendment rights were restricted beyond the state's power to do so as no immediate clear and present danger was shown by an address to a peaceful audience, regardless of the fact that the petitioner had failed to obtain a permit. *See also* Cantwell v. Connecticut, 310 U.S. 296 (1940), where the plaintiff's rights were held violated by a statute requiring a license to solicit money for religious organizations

Terminiello Court explained that proper application of the doctrine resulted in a narrowly-drawn standard which would preserve a broad freedom of expression.[10]

A retreat from this broad posture was evidenced by *Dennis v. United States*[11] which held that words which created a high probability of serious danger in the future could be suppressed even though no present danger existed. The clarity which marked the *Terminiello* version of "clear and present danger" was forever lost, as the Court began to vacillate between broad approval of state regulation under an independent "balancing of interests" standard,[12] and a narrow standard based on *Terminiello*[13]

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because of a lack of clear and present danger of immediate threat to public safety or order.

10. 337 U.S. at 4. The Court held that the statute involved was an unconstitutional limitation on the content of expression stating,

> [a] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute is nevertheless protected against censorship or punishment, unless shown likely to produce clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our constitution for a more restrictive view.

11. 341 U.S. 494 (1951). The Court rationalizes,

> Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. If, then, this interest may be protected the literal problem which is presented is what has been meant by the use of the phrase "clear and present danger" of the utterances bringing about evil within the power of Congress to punish.
>
> Obviously the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If the government is aware that a group is aiming at its overthrow, is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances will permit, action by the Government is required.

Id. at 509.

12. Konigsberg v. State Bar of California, 366 U.S. 36, 63 (1961), where Justice Black contended that the balancing test could be used to justify almost any government action which might be suppressing first amendment rights. Most commentators now assume that the danger test includes some measure of interest balancing, but at the same time many writers and judges consider the test an oversimplification of the need to balance individual interests with group interest. *See* Barenblatt v. United States, 360 U.S. 109 (1959); Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg and Beyond*, in THE SUPREME COURT REVIEW 56-58 (P. Kurland ed. 1969).

13. Edwards v. South Carolina, 372 U.S. 229 (1963). Petitioners who sang patriotic

Most recently, in *Brandenburg v. Ohio*,[14] the Court's approach has merged the *Terminiello* and *Dennis* treatment of "clear and present danger." "Danger" must still be present, but need not be immediate if it is "imminent." [15]

The clear and present danger doctrine is intimately related to the concept of overbreadth. If a statute is held violative of first amendment rights for failing to exclude conduct which does not present a "clear and present danger," the statute is overbroad.[16] Overbreadth refers to substantive due process requirements where the prohibitive provision may be so broad as to inhibit constitutionally protected activity [17]

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and religious songs in a non-violent demonstration on the state capitol grounds won a reversal of their conviction for common law breach of the peace.

14. 395 U.S. 444 (1969). *See* Linde, *"Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163 (1970).

15. The Court stated:

> These later decisions [*Dennis* and *Yates v. United States*, 354 U.S. 298 (1957)] have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action. (Emphasis supplied)

395 U.S. at 447

16. One of the earliest and most oft-cited cases involving overbreadth is Thornhill v. Alabama, 310 U.S. 88 (1940). In that case an inadequately narrowed statute prohibiting picketing at certain places of business was judged to be invalid on its face. The Court used the following language:

> The very existence of a penal statute such as that here, which does not aim specifically at evils within the allowable area of state control, but sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or press results in a continuous and pervasive restriction of all freedom of discussion that might reasonably be regarded as within its purview.

Id. at 97 *Contra*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

17. Stated otherwise, "overbreadth may be conceptualized as legislative failure to focus explicitly and narrowly on social harms which are the valid concern of government and are the justification for interfering with expressive activities." Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 859 (1970).

The court's second holding in *Owens* concerned the issue of standing. There are basically two methods of review available to the court to eliminate overbreadth. The first is a traditional and restrained approach in which the statutory infringement on rights is cut out case by case. The newer and more aggressive method arose from the systematic failure of the other method of adjudication to protect first amendment rights adequately. In employing the latter method the reviewing court asks, regardless of the petitioner's constitutional standing: Is the statute too sweeping in its coverage? If so, it is declared invalid on its face. This method provides a short circuit process of eliminating unconstitutional statutes and forcing legislation; it also focuses directly on the need for precision in drafting statutes. In short, it aims at correcting any imbalance in interests as rapidly as possible. *Id.* at 844-52.

In considering the overbreadth concept, the Court has invoked four criteria under which a questioned statute may become a constitutionally impermissible regulation: 1) insufficiency of the state interest sought to be protected;[18] 2) lack of objectivity and clarity in the statutory language;[19] 3) no limitation on the discretion of those responsible for enforcement;[20] and 4) in penal statutes, absence of a requirement of knowledge or intent to obstruct a state interest.[21]

In recent cases the Court has been more straightforward on the issue of standing than in the early cases like Thornhill v. Alabama, 310 U.S. 88 (1940), holding now that appellants have standing even though their particular conduct may have been sanctionable. In Dombrowski v. Pfister, 380 U.S. 479 (1965), the Court states, "[W]e have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity We have fashioned this exception to the rules governing standing" because of the danger of allowing a statute susceptible to improper application to exist. 380 U.S. at 486-487 *See also* United States v. National Dairy Products, 372 U.S. 29 (1963); NAACP v. Button, 371 U.S. 415 (1963); United States v. Raines, 362 U.S. 17 (1960).

18. *Compare* Adderly v. Florida, 385 U.S. 39 (1966), where petitioners were convicted of trespass with a malicious and mischievous intent upon the premises of the county jail contrary to statute where it was held that the state has the power to preserve the property under its control for the use to which it was lawfully dedicated, *with* Cox v. Louisiana, 379 U.S. 536 (1965), where state interests did not outweigh the individual interest.

19. Baggett v. Bullitt, 377 U.S. 360 (1964); Connally v. General Construction Company, 269 U.S. 385 (1925). This factor is common to both the concepts of overbreadth and vagueness. The concept of vagueness rests on the principle that procedural due process requires fair notice and proper standards for adjudication. The main issues involved are whether the penal statute's provisions are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its consequences and to apprise the judge of standards by which to determine guilt. If the language is so obscure as to elude a man of common intelligence it is unconstitutional.

20. *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569 (1941), where the power of a parade licensing board was held too broad and arbitrary

21. Adderly v. Florida, 385 U.S. 39, 42-43 (1966); Cox v. Louisiana, 379 U.S. 536 (1965), where a Louisiana statute regulating picketing in or near a court house "with intent to interfere" with the administration of justice, was upheld as valid on its face. There are certain limitations on this type of review. First, only those statutes which lend themselves to numerous impermissible applications should be struck down on their faces. This concept, which has been called the "substantial overbreadth rule," seems implicit in the cases and proceeds on the theory that a law which is not substantially overbroad is unlikely to have a drastic inhibitory effect. Note, *supra* note 17, at 918.

Interest balancing also tempers the overbreadth doctrine as it does the danger test. In relation to overbreadth, interest balancing translates to "reasonableness." *Id.* at 911-13. As the Court states in *Cox v. Louisiana*, "It is, of course, undisputed that appropriate, limited discretion under properly drawn statutes or ordinances concerning the time, place, duration or manner of use of the streets for public assemblies may be

The overbreadth cases illustrate a consistent demand for narrowly drawn, precise statutory language.[22] Vagueness[23] and inadequacy of statutory standards defining proscribed conduct[24] have been condemned.

Prior to *Owens*, the Virginia Supreme Court of Appeals had but one opportunity to consider the issues raised by the above decisions. In *York v. City of Danville*[25] and its companion, *Thomas v. City of Danville*,[26] the Virginia court adhered closely to the *Terminiello* version of "clear and present danger," and read the word "present" quite literally Those cases, arising prior to passage of the unlawful assembly statute,[27] involved the review of a restraining order obtained by the city to prevent violations of the disorderly conduct statute in connection with certain demonstrations allegedly designed to upset the peace and tranquility of the community.[28] The court acknowledged the overbreadth of the restraining order,[29] and required that it be modified. The breadth of the statute itself, however, was not in issue.

It should come as no surprise that the *Owens* court, relying on its holding in *York* and *Thomas*, struck down the unlawful assembly statute since no requirement of "clear and present danger" appeared in the statutory definition. The case is significant not for that ruling but for its rigid adherence to the *Terminiello* definition of clear and present danger, disavowing any concept of future or imminent danger as a

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vested in administrative officials, provided that such limited discretion " is exercised fairly and non-discriminatorily. 379 U.S. at 558.

22. Edwards v. South Carolina, 372 U.S. 229 (1963). Demonstrators' convictions for common law breach of the peace were reversed, the Court explaining that if they had been considering "convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct should be limited or proscribed " there might have been a different result.

23. Gregory v. Chicago, 394 U.S. 111 (1969). The Court held a disorderly conduct ordinance to be violative of constitutional rights. In his concurring opinion Mr. Justice Black emphasized that "sweeping, dragnet statutes that may, because of vagueness, jeopardize First Amendment freedoms " cannot be used to regulate conduct. *Id.* at 117-18.

24. Coates v. Cincinnati, 91 S. Ct. 1686 (1971) Petitioners were convicted under an ordinance prohibiting three or more persons from assembling and conducting themselves "in a manner annoying to persons passing by "

25. 207 Va. 665, 152 S.E.2d 259 (1967)

26. 207 Va. 656, 152 S.E.2d 265 (1967).

27. VA. CODE ANN. § 18.1-254.1(c) (Supp. 1971) became effective in April 1968.

28. Thomas v. City of Danville, 207 Va. 656, 657, 152 S.E.2d 265, 266 (1967)

29. *Id.* at 664, 152 S.E.2d at 270.

ground for regulation of conduct.[30] Virginia is thus placed on the libertarian side among courts which have construed similar statutes.[31]

Confronted with language which overly inhibited individual freedoms, the *Owens* court demanded more specificity and narrowness so as not to produce a chilling effect on first amendment liberties. The court has thus placed on the Virginia legislature the burden of adding the element of clear and present danger in order to validate the statutory definition of unlawful assembly.[32]

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30. The *Brandenburg* decision is not mentioned by the *Owens* court; rather it relied solely upon *Terminiello* and its Virginia progeny, which necessitated a highly critical attitude toward state regulation of first amendment liberties.

31. Of the few state and federal courts which have considered the question, most have closely followed the Supreme Court's guidance in regard to the danger test and overbreadth. In Carmichael v. Allen, 267 F. Supp. 985, 997 (N.D. Ga. 1967), the petitioners challenged a dragnet type disorderly conduct statute which censured any acts "tending to disturb the good order, morals, peace or dignity of the city." The court held this language to be even broader than that attacked in *Edwards* or *Terminiello*. Such condemnation of a generalized statute is in keeping with the Court's trend. A statute requiring a parade permit for any street assemblage was similarly rejected in Baker v. Bindner, 274 F Supp. 658, 662 (W.D. Ky 1967). The section was declared unconstitutional as it did not set a sufficient standard by which the issuer should judge qualifications. The Washington, D.C., riot statute was challenged unsuccessfully in United States v. Jeffries, 45 F.R.D. 110, 115-18 (D.D.C. 1968), where the appellants claimed vagueness and overbreadth. The court held the statute to be clear and precise, aimed at punishing specific conduct, and strict enough in its requirements to pass the clear and present danger test. These three cases illustrate an attitude as liberal as the Supreme Court and the Virginia Supreme Court of Appeals in regard to the preservation of individual liberties.

The following cases serve to demonstrate a contrary attitude. In 1961, the Georgia unlawful assembly statute, which made it a misdemeanor to assemble "*for the purpose of* disturbing the public peace" (emphasis supplied), was challenged for vagueness in Wright v. Georgia, 217 Ga. 453, 122 S.E.2d 737 (1961). The Georgia court, which did not cite any applicable Supreme Court decisions, upheld the statute contending that it provided a clear standard in intelligible language. *Id.* at 741. A California court upheld that state's assembly statute in *In re* Bacon, 240 Cal. App. 2d 34, 49 Cal. Rptr. 322 (Dist. Ct. App. 1966). The statute, like Virginia's, proscribed mere intent without requiring clear and present danger. The court essentially ignored the overbroad language of the statute, reasoning that the petitioners had abused their rights to the point of sacrificing them. *Id.* at 335-36.

32. "It is the function of the judiciary to interpret statutes. Rewriting them is the function of the legislature." Caldwell v. Commonwealth, 198 Va. 454, 459, 94 S.E.2d 537, 540 (1956)