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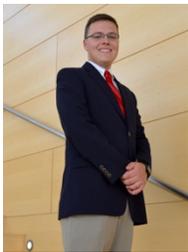
Free Thought, Free Speech, Free Action
Intellectual Individualism According to Robert H. Jackson

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Abstract

What can be said of a man whose life was so vibrant, yet so short? For Associate Justice Robert H. Jackson, words were a craft—his sword and his solace. Though Jackson’s life was cut short by a fatal heart attack, his words remain in his masterful writings, speeches, and opinions. Among the themes Jackson references, sanctity of individual thought—the basis of a functional democracy—is constant. A practical man, Jackson professed that though certain forms of harmful speech and action could be subject to limitation, thought was beyond the control of anyone but the individual. Ultimately, the public’s chief goal is to find items of “social value” through consensus, a result of discussions that welcome a wide range of opinions. Jackson’s views of free thought were strengthened by his time serving as U.S. Chief Prosecutor at Nuremberg; his willingness to pen opinions—particularly individual concurrences or dissents—following Nuremberg seems to be more than a mere matter of coincidence. This paradigm begs the question: what did Jackson find at Nuremberg that so profoundly altered his understanding of the world? The physical atrocities of World War II are upsetting to any empathetic human being; there is no doubt that Jackson was disturbed by the blatant horrors of Nazi rule. Nevertheless, perhaps it was a disdain for utter thoughtlessness—the antithesis of intellectualism—that was Jackson’s true motivation for his love of democracy, free thought, and a practical balance of liberty and order.



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Epigraph

“BUT while I think Congress may make it a crime to take one overt step to use or to incite violence or force against our Government, I do not see how, in the light of our history, a mere belief that one has a natural right under some circumstances to do so can subject an American citizen to prejudice any more than possession of any other erroneous belief. Can we say that men of our time must not even think about the propositions on which our own Revolution was justified? Or may they think, provided they reach only one conclusion -- and that the opposite of Mr. Jefferson's? While the Governments, State and Federal, have expansive powers to curtail action, and some small powers to curtail speech or writing, I think neither has any power, on any pretext, directly or indirectly to attempt foreclosure of any line of thought. Our forefathers found the evils of free thinking more to be endured than the evils of inquest or suppression. They gave the status of almost absolute individual rights to the outward means of expressing belief. I cannot believe that they left open a way for legislation to embarrass or impede the mere intellectual processes by which those expressions of belief are examined and formulated. This is not only because individual thinking presents no danger to society, but because thoughtful, bold and independent minds are essential to wise and considered self-government. Progress generally begins in skepticism about accepted truths. Intellectual freedom means the right to reexamine much that has been long taken for granted. A free man must be a reasoning man, and he must dare to doubt what a legislative or electoral majority may most passionately assert. The danger that citizens will think wrongly is serious, but less dangerous than atrophy from not thinking at all. Our Constitution relies on our electorate's complete ideological freedom to nourish independent and responsible intelligence and preserve our democracy from that submissiveness, timidity and herd-mindedness of the masses which would foster a tyranny of mediocrity. The priceless heritage of our society is the unrestricted constitutional right of each member to think as he will. Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error.”¹

-- Robert H. Jackson

¹ *American Communications Association v. Douds*, 339 U.S. 440-3 (1950).

Introduction

Intellectuals, in their purest form, seek to dissect the uncertain, challenge the known, and improve the human condition. Robert “Bob” Houghwout Jackson was a man fond of both the simple and the complex, the obvious and the unclear, pondering accepted truths and controversial challenges to said truths. In so doing, Justice Jackson balanced arguments with a sense of practicality and wisdom that is seemingly absent in many scholars. Levelheadedness, work ethic, and authenticity were Jackson’s specialties, propelling his ascent to the bench of the Supreme Court. As a man of the pen, Robert Jackson’s words often flowed as though they were those of the founders, due in part to the autonomous spirit of his upbringing in the rustic, unfettered countryside of Western New York. Accomplished academics have considered the influence of Jackson’s childhood on his later life; however, to fully understand Robert H. Jackson’s development, one must consider the fundamental right of free thought. The ability to think individually not only afforded Jackson success, but it shaped the way in which he approached issues of legitimacy, dignity, and the freedom to speak or act. Among Robert Jackson’s opinions, there is a common thread of the sanctity of human thought; namely, though there are necessary limits on the what one may say or do, there is no situation that justifies condemnation of thought. This concept evolved throughout Jackson’s life, incorporating the impacts of technology, war, oppression, and hatred—most prevalent in relation to his time as the United States’ Chief Prosecutor at Nuremberg—to condemn utter thoughtlessness and the elements of human fallibility that present no social value. How, then, did Justice Jackson arrive at such a view of thought, and at what point was it most strengthened? Through Jackson’s numerous Supreme Court opinions, many of which were individual dissents or concurrences, it is possible to detail the development and transformation of his personal philosophy and the lasting relevance it has.

Intellectual Individualism

In *West Virginia State Board of Education v. Barnette*, Justice Jackson set forth a majority opinion that overturned *Gobitis*, in which Jehovah’s Witnesses were denied the right to abstain from saluting the flag in public schools, on the basis of the First Amendment. Jackson was well aware of the patriotic spirit upon which the United States was built—he strongly advocated for the American values of democracy and liberty. Nevertheless, patriotism was, in his view, the product of individual thought, not the other way around. Ultimately, his contention was that “a person

gets from a symbol the meaning he puts into it,"² a realization that echoes the basis of the First Amendment. No level of fear, nationalism, or bigotry could subject the condemnation of a particular line of thought, Jackson argued. And, despite the tribulations of war, Jackson contended:

To enforce [the First Amendment] today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.³

To think for oneself is at the heart of "wise and considered self-government."⁴ It is no coincidence that the Bill of Rights explicitly protects thought and speech from predation by the government, as the net product of independent thought is undeniably positive. So long as a balance of liberty and order is maintained that equally preserves the right for all citizens, there is no practical need for uniformity. Jackson's authoring of the *Barnette* decision not only established the court's opinion, it expounded his personal understanding of democracy and individualism. To wit:

We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. [...] 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.⁵

Between *Barnette* and *American Communications Association v. Douds*, part of which is found at the beginning of this paper, a deep love for intellectual individualism is evident. Not only did Robert Jackson write about individualism, he wrote *because* of individualism. The willingness to write an independent dissent or concurrence in a case is often regarded as negative, but Jackson wrote with conviction and purpose nonetheless. His word was not a last resort; he consciously left it as a lasting message for future generations. Individualism does not mean belligerence, nor

² *West Virginia State Board of Education v. Barnette*, 319 U.S. 632-3 (1943).

³ *Ibid.*, 319 U.S. 637 (1943).

⁴ *American Communications Association v. Douds*, 339 U.S. 442 (1950).

⁵ *West Virginia State Board of Education v. Barnette*, 319 U.S. 641-2 (1943).

does it mean a rejection of the ideas of others. Inevitably, individualism makes for uncomfortable situations and disagreements; however, Jackson realized that for society, the result of a diverse range of opinions is more beneficial than detrimental. Balancing liberty and order in a sensible fashion was Jackson's greatest skill. Likewise, determining a balance between individualism and citizenship required mastery of both candor and sensitivity.

In reading Jackson, one cannot help but appreciate his natural honesty and occasional inclination to make brazen statements, both of which contribute to his authenticity. He was as imperfect as any other human being, but through logic, reason, and careful self-criticism, he found a healthy balance in most every aspect of his life. Being an intellectual individual is not a matter of arrogance or conceit; it means diligent use of the mind, while also recognizing what an endowment individualism is. As Jackson so elegantly put it, "a free man must be a reasoning man, and he must dare to doubt what a legislative or electoral majority may most passionately assert."⁶ To cede to the majority on every issue is an irresponsible use of the mind and a minimization of the capability of the individual. Jackson penned the term 'intellectual individualism' in *Barnette*, included its echoes in nearly every speech and opinion, and, as a man of his own conviction, adopted it as his maxim.

Social Value and Consensus

Despite its numerous benefits, individualism cannot exist entirely on its own. The question then turns to that of collective, societal thought. While individual thought is the basis of self-government, civility rests on individuals agreeing with one another, or at least reaching an accord that respects the value of differing opinions. For Jackson, the answer to this question was rooted in individualism. The individual, independent of the control of others, should naturally attempt to adopt the ideas of others if they are reasonable. *E pluribus unum*, one of the lasting mottos of this great nation, serves as a reminder of Jackson's realization—the same realization of the founders. Though Americans come from diverse backgrounds, reason acts as a binding agent. In order to reach this consensus, speech must contribute to constructive dialogue.

Kunz v. New York was a case involving religious speeches in public, and the constitutionality of mandating permits for said speeches. Permits were issued in a virtually free manner, but they could be revoked in the event of a hearing or review. In the case of Mr. Kunz, his speeches were often laced with inflammatory comments, and his permit was eventually revoked. While the

⁶ *American Communications Association v. Douds*, 339 U.S. 442 (1950).

majority of the court decided that the permit system was unconstitutional, Jackson dissented, arguing that his speech was not socially valuable.⁷ At first glance, Jackson's apparent dismissal of Kunz's right to speak seems troublesome. Controversial, biting, and bold, Jackson wrote:

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.⁸

After considering this excerpt, it is perceivable that Jackson's discount of Kunz's right to free speech was based not on the content of the speech, but on the delivery. Whether or not the permits were a viable idea was not truly Justice Jackson's primary concern. In this case, Jackson was concerned with thought, and its expression. While he saw thought as sacred, Jackson saw this specific expression of thought as a practical disturbance of the peace. In tandem, Jackson noted another common-sense dilemma with Kunz's speech. The use of public space "takes advantage of people's presence on the streets to impose [a] message upon what, in a sense, is a captive audience," as opposed to voluntary audiences in private venues.⁹ Insensitive epithets in the street are likely to cause discord. Order, when equally applied, ensures a fair allotment of liberty to all. When Kunz, in exercising his liberty, acted confrontationally without regard for the ideas of others, he forfeited his right to free speech.

To Jackson, items of social value were not fixed—deeming and maintaining an act as acceptable or unacceptable is the task of the entire citizenry. Even when elected officials set rules, it is the electorate that gives legitimacy to the decision. In this process of forming socially valuable norms, there must be socially valuable discussion, based on individual logic. This use of discussion leads to consensus, which is the utmost form of social value. Though true consensus is never reached, it is the purpose of speech to strive for it. Perhaps this was what Jackson was attempting to convey to the other members of the court in *Kunz*.

A similar case, *Saia v. New York*, dealt with attempted restrictions on speech, specifically regarding the construction of loudspeakers in public parks. The court ruled in similar fashion;

⁷ *Kunz v. New York*. 340 U.S. 290 (1951).

⁸ *Ibid.*, 340 U.S. 311-2 (1951).

⁹ *Ibid.*, 340 U.S. 298 (1951).

once again, Robert H. Jackson dissented. Not only did Jackson see an issue with the added noise disturbing a public space, he noted a threat to the very nature of speech.¹⁰ In his words:

I dissent from this decision, which seems to me neither judicious nor sound, and to endanger the great right of free speech by making it ridiculous and obnoxious, more than the ordinance in question menaces free speech by regulating use of loudspeakers.¹¹

And even if this were a civil liberties case, I should agree with Chief Justice Hughes, writing for a unanimous Court: “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.”¹²

Speech is meant to be the cultivated form of thought expression, contributing new opinions to the public discourse that are reasoned, rational, and refined. And, in the event that an opinion is so radical or nonsensical that it will contribute to consensus, Jackson adds in *Terminiello v. Chicago*:

For I agree with Woodrow Wilson, who said: “I have always been among those who believed that the greatest freedom of speech was the greatest safety, because if a man is a fool, the best thing to do is to encourage him to advertise the fact by speaking. It cannot be so easily discovered if you allow him to remain silent and look wise, but if you let him speak, the secret is out, and the world knows that he is a fool. So it is by the exposure of folly that it is defeated, not by the seclusion of folly, and, in this free air of free speech, men get into that sort of communication with one another which constitutes the basis of all common achievement.”¹³

So, it is not that communal thought and individual thought must—or can—exist alone. There are practical levels of each that allow opportunities for all, the balance of which is determined by those involved in constructive discussion. Allowing the mind to balance the ideas of others with logic, and vice versa, is the framework of any successful civilization; the message Jackson relays is one of balance and careful consideration, rooted in intellectual individualism.

¹⁰ *Saia v. New York*, 334 U.S. 558 (1948).

¹¹ *Ibid.*, 334 U.S. 566 (1948).

¹² *Ibid.*, 334 U.S. 572 (1948).

¹³ *Terminiello v. Chicago*, 337 U.S. 36 (1949).

Thought, Speech, Action Continuum

If items of social value and collective action are the results of discussed ideas, then it is logical to state that from thought comes speech, and from speech comes action. In an ideal, conventional sense, the process occurs in that order, as it promotes individualism and genuine thought. It has been established that to reach consensus, speech must be a bona fide, reasoned form of thought expression. What, then, is the result when one proceeds directly from thought to action, or worse, acts or speaks without thinking?

Justice Jackson abhorred the idea of thoughtlessness. In describing the importance of individualism in *Doubs*, he writes that “the danger that citizens will think wrongly is serious, but less dangerous than atrophy from not thinking at all.”¹⁴ To engage in informed speech or action, one must continually think, examine, and reason. Though this “continuum” of thought, speech, and action was never named by Jackson, he seemed to have an innate understanding of its premise. In the course of his writings, Jackson realized that the custodians of free thought and speech were the citizens. In turn, that discernment implied that the citizens bore a degree of responsibility in not abusing those rights. Arguably, the first step in protecting the right to think freely is to think.

Thoughtlessness has grave societal implications. Aside from simple acts of thoughtlessness, such as recklessly driving a vehicle, mass thoughtlessness can end with the decay of consensus, and a resultant tendency for atrocious acts. In Jackson’s life, careless endangerment of thought and speech were evident in many cases on the court, including *Doubs*, *Terminiello*, and *Barnette*. In those cases, abusing speech by making it obscene or artificial was, in Jackson’s mind, more harmful than any attempt to suppress it. He drew a line condemning the menace of obscenity; however, he did recognize the danger in universal proscription of thought. In that regard, the time Jackson spent at Nuremberg undoubtedly had a great influence on the remainder of his life. The ability of the Nazis to cast aside their individual thoughts in favor of total groupthink may well have been the greatest evil Jackson witnessed.

Though its position on the atrocities of World War II is continually contentious, Hannah Arendt’s *Eichmann in Jerusalem* enumerates a realization that is reminiscent of the continuum. She wrote, “It was sheer thoughtlessness — something by no means identical with stupidity — that

¹⁴ *American Communications Association v. Doubs*, 339 U.S. 442 (1950).

predisposed [Eichmann] to become one of the greatest criminals of that period.”¹⁵ It is unclear whether Eichmann’s actions were truly thoughtless or deliberately evil, and while the view that Eichmann was entirely thoughtless is likely wrong, the broad implications of Arendt’s statements are valid. If citizens allow themselves to stop thinking independently, there is an increased propensity to assent to blatant wrongs. It is impossible to determine whether or not Jackson agreed with Arendt; nevertheless, their shared focus on the dangers of thoughtlessness in relation to World War II is intriguing.

Nazi Germany was an example of hateful speech and hateful action without rational thought. The wrongs committed by the Germans began with an irrational ideology, propagated on the willingness of the public to abandon sensible thought for derogatory words and despicable actions. How intelligent men allowed their independent thoughts to cease remains a mystery, though Jackson’s comments in *Terminiello* provide some explanation.

Unity of purpose, passion and hatred, which merges the many minds of a crowd into the mindlessness of a mob, almost invariably is supplied by speeches. It is naive, or worse, to teach that oratory with this object or effect is a service to liberty. No mob has ever protected any liberty, even its own, but, if not put down, it always winds up in an orgy of lawlessness which respects no liberties.¹⁶

It is keen to note that the mob, guided by the speech and actions of others, acts without thought. Thoughtlessness is not socially valuable, nor does it embody individualistic qualities. In leaving these morsels of philosophy, Robert H. Jackson reveals an original understanding of human nature and an undying worry about attacks on intellectual individualism.

The Nuremberg Paradigm

The impact of Nuremberg on Justice Jackson is difficult to quantify. Even in the absence of concrete data, it is impossible to deny that such an important event in his life had a profound personal impact. His views of democracy, and perhaps even his views on thought, speech, and action, were likely altered or bolstered by his Nuremberg experience. This proposed concept is the Nuremberg paradigm.

¹⁵ Arendt, Hannah, *Eichmann in Jerusalem: A Report on the Banality of Evil*. (New York: Penguin Book, 1963).

¹⁶ *Terminiello v. Chicago*, 337 U.S. 32 (1949)

Although there are instances of Jackson referencing totalitarianism, atrocities, and the value of individual thought, he never included explicit comparisons from the Nuremberg trials in his court opinions on thought, speech, or action. To attempt to look for direct references is fruitless, but it is possible to make inferences by analyzing word choice. A word of interest is “must.” Must, meaning “expressing an opinion about something that is logically very likely,”¹⁷ is a term that assumes a high degree of certainty. So, if the paradigm holds true, a simple word search conducted on Jackson’s opinions before and after Nuremberg should produce a notable difference in the frequency of use. In this endeavor, the paradigm fails due to negligible change in frequency.

While the idea that there is importance in the frequency of word use failed, it is important to recall Jackson’s love of language; the recognition of deliberate word use is a potential way to gain insight. In his majority opinion in *Barnette*, before Nuremberg, Jackson writes:

We must transplant these rights to a soil in which the *laissez-faire* concept or principle of noninterference has withered, at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls.¹⁸

Although the word “must” is used, it is rather obscure. Note the contrast with the following examples, all post-Nuremberg:

But if we maintain a general policy of free speaking, we must recognize that its inevitable consequence will be sporadic local outbreaks of violence, for it is the nature of men to be intolerant of attacks upon institutions, personalities and ideas for which they really care. [...] We must not forget that it is the free democratic communities that ask us to trust them to maintain peace with liberty, and that the factions engaged in this battle are not interested permanently in either.¹⁹

I think that, under our system, it is time enough for the law to lay hold of the citizen when he acts illegally, or in some rare circumstances when his thoughts are given illegal utterance. I think we must let his mind alone.²⁰

But, in a free society, all sects and factions, as the price of their own freedom to preach

¹⁷ *New Oxford American Dictionary*, s.v., “Must,” accessed August 5, 2016. Web.

¹⁸ *West Virginia State Board of Education v. Barnette*, 391 U.S. 640 (1943).

¹⁹ *Terminiello v. Chicago*, 337 U.S. 36-7 (1949).

²⁰ *American Communications Association v. Douds*, 339 U.S. 444 (1951).

their views, must suffer that freedom in others. Tolerance of unwelcome, unorthodox ideas or information is a constitutionally protected policy not to be defeated by persons who would break up meetings they do not relish.²¹

Not only did Jackson choose a definitive use of the word after Nuremberg, he used it in reference to society as a whole. He saw the issues of thought, speech, and action in a broad philosophical sense, allowing their influence to reach beyond the case itself. Though the original concept of a quantitative paradigm may have been incorrect, Jackson's post-Nuremberg clarity offers some qualitative support.

Another intriguing pattern is Jackson's record of concurring and dissenting. FIGURE A identifies a handful of cases involving thought, speech, or action that Jackson wrote opinions in. Note that all but one of the post-Nuremberg opinions listed were independent, meaning that they were not joined by any other Justices. Furthermore, with the exception of *Barnette*, all of the listed opinions were either dissents or concurrences.

Case	Year	Opinion Type	Independent Opinion
<i>West Virginia State Board of Ed. v. Barnette</i>	1943	Majority	No
Prince v. Massachusetts	1944	Dissent	No
<i>Saia v. New York</i>	1948	Dissent	Yes
<i>Terminiello v. Chicago</i>	1949	Dissent	No
<i>American Communications Assoc. v. Douds</i>	1950	Concurrence/Dissent	Yes
<i>Kunz v. New York</i>	1951	Dissent	Yes
<i>Dennis v. United States</i>	1951	Concurrence	Yes

FIGURE A

²¹ *Kunz v. New York*, 340 U.S. 301 (1950).

Nuremberg came at an early point in Jackson's tenure, so it may be objectionable to state that the sheer number of opinions written before or after Nuremberg has any significance. Like the analysis of word choice, this analysis is, to a degree, arbitrary. The sampling of cases in FIGURE A is far from complete, but there is something to be said of the fact that Jackson dissented or concurred, often doing so alone. These concurrences and dissents, each with their own nuances, tell of Justice Jackson's views on thought, speech, and action at different points in his life. While the Nuremberg paradigm remains unproven, it is a curious theory that has the potential to shed new light on Jackson's life through further research.

Conclusions & Further Research

With certainty, Robert H. Jackson was a man of purpose, no doubt the result of his undying love for democracy, individualism, and common sense. He found no reason for censure of any line of thought, though he realized that blasphemous speech or behavior was beyond the freedom of any individual, particularly when it infringed on the liberties of others. Jackson despised thoughtlessness, the force at the core of most offenses to liberty and dignity. He did not know what tragedies and successes would come after his life, but his words, enshrined in court opinions, have lived beyond his years.

Examining the life of a complex man takes a degree of ingenuity. Developing paradigms, recognizing patterns, and pressing the borders of established knowledge are proper first steps, mirroring Jackson's own attempts at understanding human nature. To retrospectively prove these theories, years after the death of Justice Jackson, is no small task, nor can it occur without the contributions of numerous scholars. The importance of intellectual individualism should be considered at greater lengths in further research, specifically as it relates to the Thought, Speech, Action Continuum and the Nuremberg Paradigm, aforementioned as potential topics for research or theses.

If there is one takeaway from studying the life of Justice Jackson, it is that the seeds of knowledge planted today grow to form a greater understanding of the world tomorrow. Leaving a legacy in the written word is conceivably the greatest bestowal a body can give. It is the hope of this research that a new, intellectually independent line of thought might stem from it, contributing to a meaningful discussion of key issues in politics, law, and philosophy.

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