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Membership, Affiliation, and Jencks

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MEMBERSHIP, AFFILIATION, AND JENCKS

In a recent case, *Jencks v. United States*,[1] the United States Supreme Court left undecided certain questions concerning the instructions of the trial court as to membership in and affiliation with the Communist Party. A new trial was awarded to the appellant. The majority was joined by Mr. Justice Burton only because of his reluctance to accept the content of the trial court's instructions. In his concurring opinion, in which he was joined by Mr. Justice Harlan, Justice Burton states: "Were it not for the fact that I believe the trial court committed reversible error in instructing the jury with respect to the meaning of membership and affiliation, I would vacate the judgment below and remand to the trial court . . ."[2]

The trial court gave the following instruction as to membership:

> "In considering whether or not the defendant was a member of the Communist Party, you may consider circumstantial evidence, as well as direct. You may consider whether or not he attended Communist Party meetings, whether or not he held an office in the Communist Party, whether or not he engaged in other conduct consistent only with membership in the Communist Party and all other evidence, either direct or circumstantial, which bears or may bear upon the question of whether or not he was a member of the . . . Party . . ."[3]

Justice Burton criticized these instructions on the ground that they ". . . failed to emphasize to the jury the essential element of membership in an organized group—the desire of an individual to belong to the organization and a recognition by the organization that it considers him as a member."[4]

Concerning the meaning of affiliation, Justice Burton criticized the trial court's utilization of standard dictionary terminology. The trial court had stated: "Affiliation . . . means something less than membership but more than sympathy. Affiliation with the Communist Party may be proved by either circumstantial or direct evidence, or both."[5] Justice Burton felt that this instruction was inadequate since it allowed the petitioner to be convicted" . . . on the basis of acts of intermittent cooperation. It did not require a continuing course of conduct 'on a fairly permanent basis' 'that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith.' "[6] Mr. Justice Frankfurter also agreed that the instructions to the jury were erroneous.[7]

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[1] 353 U.S. 657 (1957).
[2] *Id.* at 678.
[3] *Id.* at 679.
[4] *Ibid.*
[5] *Ibid.*
[6] *Id.* at 679, 680.
[7] *Id.* at 672.

In a dissenting opinion Mr. Justice Clark felt that the instructions were sufficient. However, he continued, "The court is sorely divided on this important issue, and proper judicial administration requires that charges as to what constitutes membership and affiliation in the Communist Party be announced."[8]

Membership

In February of 1956, the United States Court of Appeals for the Ninth Circuit put forth a judicial determination of the term "membership" in the *Fisher case.* That court also criticized the instruction of the trial judge because of his utilizing dictionary definitions employing synonyms. The court of appeals felt that the instruction should have broken the term down into its component parts. Basing its decision upon *Galvan v. Press,*[10] the court said:

> "Membership is composed of a desire on the part of the person in question to belong to an organization and acceptance by the organization. Moreover, certain actions are usually required such as paying dues, attending meetings and doing some of the work of the group."[11]

The appellant in the *Fisher* case contended that he could not be considered a member of the Communist Party if he failed to comply with any of the formal requisites for membership as stated in the constitution of the party. The court indicated that the government had failed to answer this contention in its brief, but then proceeded to ignore the question by announcing that the instruction was erroneous because the jury was not reminded of the component parts of the term "membership".

It would seem that the court in the *Fisher* case would strive for a generic definition of the term, at least in its fundamental components. The court, however, made no definitive statement concerning the contention of the petitioner that membership in the Communist Party must be established by a showing of the fulfillment of the constitutional requirements of the party as to membership.

In another pertinent case, *Ocon v. Guercio,*[12] Ocon, an alien, was charged with a violation of the Immigration and Nationality Act of 1952.[13] Section 24(a)(6) of that act makes it illegal for an alien to become, after entry, a member of the Communist Party. Concerning Ocon's membership in the party, there was testimony taken from two witnesses that Ocon had participated in Communist meetings, that he had spoken to a group at a Communist meeting concerning policies of the party, that he had attended meetings or conferences restricted solely to the members of the party, that he had been seen at picnics, mass meet-

[8] *Id.* at 684 (dissent).
[9] Fisher v. United States, 231 F.2d 99 (9th Cir. 1956).
[10] 347 U.S. 522 (1954).
[11] Fisher v. United States, 231 F.2d 99, 107 (9th Cir. 1956).
[12] 237 F.2d 177 (9th Cir. 1956).
[13] Immigration and Nationality Act of 1952, 66 STAT. 163, 8 U.S.C. §1101 et seq. (1952).

ings, and picket lines sponsored by the party, that he had been seen at party headquarters at various times and that he had paid dues to the party. As to this evidence, the court said: "We hold that there is reasonable, substantial, and probative evidence in the record of appellant's membership in the Communist Party . . ."[14] At the deportation hearings, Ocon was silent, from which an inference was drawn concerning the validity of the charges based upon the testimony. The court commented: "The decision . . . was based on the testimony of the two witnesses plus the inference. It is entirely possible that each witness' testimony would have been enough to support the decision."[15] The Immigration and Nationality Act requires that a decision of deportation be supported by reasonable, substantial, and probative evidence.[16] Therefore, if reasonable, substantial, and probative evidence is admitted concerning one's membership in the Communist Party, then a deportation decision is amply supported. In the *Ocon* case, such evidence was equivalent to the testimony of two witnesses plus an inference; or, as the court mentioned, the testimony alone might have been sufficient.

In searching for the golden thread interwoven through the case law throughout the years, we come upon the time-worn but inescapable terminology, intent. In 1909, a Vermont court indicated that membership in an association is a question of intent.[17] Intent was the primary requisite in the *Galvan* case,[18] and the concept is pointed up most recently in a 1955 decision of the United States Court of Appeals for the First Circuit.[19] In that case the defendant's husband formally entered her name on the rolls of the party. She never intended to join the party, and she took no active part in party activity. The trial judge found that even though she did not intend to join the party, she was a member since, ". . . after she discovered she was enrolled in the party, she took no efforts to disassociate herself."[20] The trial court would have demanded a sharp or definite act of withdrawal from the party without dalliance. The court of appeals rejected this theory, however, agreeing with the trial judge that there was no intent, but then going beyond the definite withdrawal concept by theorizing that without intent there was never any real membership in the party, and since there was no real membership, there was no need for withdrawal.

It might be noted that the court in the above case speaks of *real* membership and seems to equate this with membership that is intended. Another old but often cited case in this regard is *Colyear v. Skeffington*,[21] in which case the court states

[14] Ocon v. Guercio, 237 F.2d 177, 181 (9th Cir. 1956).
[15] *Ibid.*
[16] *Op. cit. supra* note 13, §242(b)(4).
[17] Tarbell and Whitham v. Gifford, 82 Vt. 222; 72 Atl. 921 (1909).
[18] Galvin v. Press, 347 U.S. 522 (1954).
[19] Baghdasarian v. United States, 220 F.2d 677 (1st Cir. 1955).
[20] *Id.* at 679.
[21] 265 Fed. 17 (D. Ct. Mass. 1920).

that ". . . such membership must be a *real* membership in . . . the proscribed organization."[22]

There are many federal statutes which contain the words "membership in the Communist Party", but the one statute which, at first glance, seems to come closest to a definition of membership in the Communist Party is The Communist Control Act of 1954.[23] Section 5 of that act lists thirteen criteria which may be considered by the jury (via the trial judge's instructions) in determining membership in the Communist Party. The legislative history of the Communist Control Act suggests that some of the legislators would have treated section 5 as a definition of membership in the Party. But that suggestion is quickly negated by Senator Humphrey, who introduced section 5 and who regarded such section as establishing rules ". . . by which the court can hear evidence and instruct the jury."[24] The view, therefore, that the Communist Control Act defines membership in the Communist Party ". . . cannot be given much credence."[25]

From what has gone before, it might be concluded that a rather strict or narrow approach is taken as to what constitutes membership in the party. Before becoming certain as to any strict connotation, however, it might be well to keep in mind *Sigurdson v. Landon.*[26] In that case, the court, relying upon the *Galvan* case, pointed out that one does not necessarily have to be a conscious collaborator in the Communist conspiracy but may have been an innocent victim of the conspiracy. Also in *Dickhoff v. Shaughnessy,*[27] where the court was concerned with the question of mere nominal membership in the Party, the court said: "It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will."[28]

Thus, the conclusion is inescapable that there are certain essential requisites when a trial court instructs a jury concerning membership in the Communist Party. Beginning with the fundamental ideas of intent, desire to belong, and acceptance by the organization, we proceed to evidentiary requirements such as those suggested by the Communist Control Act and past decisions. Any future attempt by the courts concerning the real, true, or actual meaning of the term must, of necessity, smack of deficiency. Some writers would suggest that no law

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[22] Colyear v. Skeffington, 265 Fed. 17, 72 (D. Ct. Mass. 1920).
[23] Communist Control Act of 1954, PUB. L. NO. 637, 83d Cong., 2d Sess. (Aug. 24, 1954).
[24] 100 Cong. Rec. 14091 (daily ed. Aug. 17, 1954).
[25] See YALE L. J. 712, 750 (1954-55).
[26] 215 F.2d 791 (9th Cir. 1954).
[27] 142 F.Supp. 535 (S.D.N.Y. 1956).
[28] Dickhoff v. Shaughnessy, 142 F.Supp. 535, 537 (S.D.N.Y. 1956), citing Galvan v. Press, 347 U.S. 522 (1954).

is better than deficient law, to which we must answer *"Melius est Jus Deficiens Quam Jus Incertum."*[29]

Affiliation

In the galaxy of ideas concerning the term "affiliation", our task is no less uncertain. In the area of what was meant by membership, we were able to anchor our concepts to a decision of the United States Supreme Court, the *Galvan* case. In the area of the term affiliation, there is another Supreme Court decision, *Bridges v. Wixon,*[30] which shows the way. The pertinent part of that decision begins with language indicative of the instruction of the trial judge in the *Jencks* case: "[Affiliation] . . . imports . . . less than membership but more than sympathy."[31] But then the court goes on to say:

> "Whether intermittent or repeated, the act or acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the program to fruition."[32]

The *Bridges* case relies heavily upon a 1935 decision, *Kettunen v. Reimer,*[33] which talks about affiliation in the following terms:

> "Affiliation includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith."[34]

This language is identical with the language in *Wheeler v. Third National Bank.*[35]

Finally, we arrive at the most recent determination of the term in the *Fisher* case where the court, in analyzing the definition given by the trial judge, states:

> "The question is whether the definition given by the trial judge was sufficient to get across to the jury the idea of a continuing reciprocal relationship involving duties and responsibilities. The proper test to apply is whether one could be convicted under the instruction which was given who was only in sympathy with the aims of the Communist Party, and who occasionally would, say, distribute literature for it but without any obligation to do so or to continue to do so. He would have connected himself with the Communist Party. He would be its ally."[36]

Even a superficial analysis of the instruction of the trial court in the *Jencks* case will reveal that the court omitted essential elements of the concept of

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[29] "Law that is deficient is better than law that is uncertain."
[30] 326 U.S. 135 (1945).
[31] *Id.* at 143.
[32] *Id.* at 143, 144.
[33] 79 F.2d 315 (2nd Cir. 1935).
[34] *Id.* at 317.
[35] 303 Ky. 300, 197 S.W.2d 606 (1946).
[36] Fisher v. United States, 231 F.2d 99, (9th Cir. 1956).

affiliation, the most important of which were: the element of dependability, a furtherance of the objectives of the proscribed organization, a continuing course of conduct which could not be abruptly ended including reciprocal responsibilities and duties. The *Bridges* test must be applied to all instructions regarding affiliation with the Communist Party.

With reluctance, it must be admitted that the majority opinion in the *Jencks* case has overlooked this important issue. It is with great relief, however, that we are able to recognize that there is such an important problem through the insight of four members of the same court.

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RECENT CASES

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—PUPIL ASSIGNMENT LAWS—The school law of Virginia provides for a Pupil Placement Board charged with the duty of assigning students to schools. In making such assignments, the Board was to consider "the effect of the enrollment on the welfare and best interests of the child and all other children in said school as well as the effect on the efficiency of the operation of said school; the sociological, psychological and like intangible social scientific factors as will prevent, as nearly as possible, a condition of socio-economic class consciousness among the pupils; and such other relevant matters as may be pertinent to the efficient operation of the schools or indicate a clear and present danger to the public peace and tranquility affecting the safety or welfare of the citizens of such school district." The present action was brought by Negro school children and their parents to require the defendants to cease and desist from any practices, customs, or usages in segregating school students. The United States District Court declared the above law to be unconstitutional after considering the obvious intent of the Virginia legislature to maintain segregation. *Adkins v. School Board of Newport News,* 148 F. Supp. 430 (E.D. Va. 1957), *cert. denied,* 26 U.S.L. WEEK 3128 (U.S. Oct. 22, 1957).

The Virginia Pupil Placement law is but one of many similar statutes passed by various southern states in an effort to continue unchanged the former patterns of public school attendance, the total segregation of white and Negro. Thus, as an exercise of the state's police power, these laws are enacted to provide for the public welfare by promoting the health, safety, order and efficient education of the people. ALA. LAWS REG. SESS. c. 31380 (1956) (preamble), FLA. LAWS EXTRAORDINARY SESS. c. 31380 (1956) (preamble). Prior to 1954, there was no need for such assignment laws. Under the doctrine of *Plessy v. Ferguson,* the states were able to continue the practice of segregation so long as equal facilities were provided for all races. *Plessy v. Ferguson,* 163 U.S. 537 (1896). In 1954, however, the controversial doctrine of "separate but equal" facilities was discarded by the Supreme Court, and segregation in the public schools by virtue of race was held to be unconstitutional. *Brown v. Board of Education,* 347 U.S. 483 (1954).