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Freedom of Speech v. Breach of the Peace

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Conclusion

No more appropriate summary of the state of the authorities could be devised than the words of Dean Ames with which this discussion was opened.[64] Re-emphasizing then; express trusts are enforceable in equity at the suit of the cestui que without regard to the adequacy of the remedy at law. However, as to constructive trusts, while equity has the power to act, it will not; unless a fiduciary or quasi-fiduciary relation is involved, or unless relief at law would be inadequate because the chattel is unique or the defendant-wrongdoer is insolvent. So too, if the wrongdoer by parting with the plaintiff's goods has received title to other property in exchange, chancery will not stay its hand and will not ". . . be overnice in balancing the efficacy of one remedy against the efficacy of another, when action will baffle, and inaction may confirm, the purpose of the wrongdoer." [65] In such a case whether there be an adequate remedy at law or not, the res will be followed, or the substituted chattel will be impressed with a trust. As a general proposition, however, it remains true that while a constructive trust may exist, having been brought into being by the defendant's conduct, it will not be enforced by equity unless the remedy at law is for some reason inadequate.

Freedom of Speech v. Breach of the Peace

"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." [1] Thus did Mr. Justice Roberts, speaking for a unanimous court, declare the scope of permissible speech afforded by the Federal Constitution.

The First Amendment has always guaranteed this right against curtailment by the federal government. In addition, the Supreme

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[64] See note 7 *supra*.

[65] Falk v. Hoffman, 233 N. Y. 199, 202, 135 N. E. 243, 244 (1922). As has been indicated *supra*, no good reason appears why equity should be "overnice in balancing" the remedies when the wrongful acquirer retains the chattel. Nevertheless, the courts have done so.

[1] Cantwell v. Connecticut, 310 U. S. 296, 310 (1940).

Court, during the past 25 years, has come to regard the right of free speech as one of those fundamental rights included within the liberties protected from state action by the Fourteenth Amendment.[2] Since that time the Court has had many occasions to pass on the problem of state invasion of this inherent liberty. A reading of these cases, especially those of the past decade, will readily demonstrate that on no other question is the court so irreconcilably divided.[3] All members of the Court agree that freedom of speech is not absolute or unlimited. Where a substantial interest of the state requires protection, the right to prevent or punish is conceded. It is on the question of what is a substantial interest, *i.e.*, one of sufficient importance to require the subordination of this constitutionally protected right and the manner or method by which the state exercises its control, that the members have come to the parting of the ways. The divergent views are explainable to some extent on the basis of the individual opinions of the justices as to the role of the Supreme Court in a federal system.[4] The line of demarcation separating valid state action from that which is unconstitutional is a tenuous and wavering one but a line there is. It has been delineated by the cases so as to serve as a guide for the local governing bodies. In this connection it is essential to distinguish the fact situations under consideration. What rights are involved? Usually free speech is not the only issue; more often, freedom of religion, freedom of assembly or freedom of the press is also in question. What interest motivated the state? Was it preservation of the peace,[5] prevention of fraud,[6] protection of business,[7] prevention of littering,[8] revenue

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[2] Chaplinsky v. New Hampshire, 315 U. S. 568 (1942); Cantwell v. Connecticut, 310 U. S. 296 (1940); DeJonge v. Oregon, 299 U. S. 353 (1937); Near v. Minnesota, 283 U. S. 697 (1931); Gitlow v. New York, 268 U. S. 652 (1925).

[3] See Terminiello v. Chicago, 337 U. S. 1 (1949); Kovacs v. Cooper, 336 U. S. 77 (1949); Saia v. New York, 334 U. S. 558 (1948).

[4] Mr. Justice Frankfurter has consistently reiterated his belief in a policy of vigilant judicial self-restraint in civil liberty cases. *See* Kovacs v. Cooper, 336 U. S. 77, 89 (1949) (concurring opinion); West Virginia State Board of Education v. Barnette, 319 U. S. 624, 648 (1943) (dissenting opinion); Carpenters & Joiners Union v. Ritters Cafe, 315 U. S. 722 (1942). Mr. Justice Douglas and Mr. Justice Black, while adhering generally to a doctrine of limited judicial power with respect to state economic regulation, contend for a very strong policy of judicial intervention whenever state action affects civil liberties. Terminiello v. Chicago, 337 U. S. 1 (1949); Jones v. Opelika, 316 U. S. 584, 608 (1942); Federal Power Comm. v. Natural Gas Pipeline Co., 315 U. S. 575, 601 (1942).

[5] Chaplinsky v. New Hampshire, 315 U. S. 568 (1942).

[6] Cantwell v. Connecticut, 310 U. S. 296 (1940).

[7] International Brotherhood of Teamsters v. Hanke, 339 U. S. 470 (1950); Carpenters & Joiners Union v. Ritters Cafe, 315 U. S. 722 (1942).

[8] Schneider v. New Jersey, 308 U. S. 147 (1939) (the desire to prevent littering of the streets was insufficient to justify an ordinance which prohibited a person lawfully on the street from handing literature to one willing to receive it). *But cf.* Prince v. Massachusetts, 321 U. S. 158 (1944) (the state's interest in protecting children from economic exploitation prevailed over appellant's right to distribute religious literature on the streets).

raising,[9] maintenance of tranquillity on the public streets?[10] What method was used to curtail the constitutional rights? Prior general restraint,[11] permit system,[12] subsequent punishment?[13] The words of Mr. Justice Jackson are especially pertinent here. ". . . the moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself. . . ."[14]

On January 15, 1951, the Supreme Court handed down three decisions which will further serve to distinguish the permissible scope of state regulation from that which is clearly invalid. It should be noted at the outset that the substantial interest alleged to need the protection of the regulation in each of these cases was the preservation of peace and good order of the community.

The case of *Feiner v. New York*[15] involved a conviction for disorderly conduct. Feiner, a university student, was addressing an open air meeting on a street corner in Syracuse, New York. The purpose of the speech was to publicize a meeting of the Young Progressives of America to be held later that evening. Feiner delivered his speech in the small shopping area of a predominantly Negro neighborhood. He stood on a box and with the aid of a loud speaker spoke to a crowd of about 75 persons, composed of Negroes and whites. The police received a telephoned complaint concerning the meeting and two officers were detailed to investigate. They arrived at the scene and observed the proceedings from the opposite corner for some minutes.

In the course of his speech Feiner referred to the Mayor of Syracuse as a "champagne-sipping bum; he does not speak for the negro people," to President Truman as a "bum", to Mayor O'Dwyer as a "bum", and to the American Legion as a "Nazi Gestapo." Feiner also indicated in an excited manner that "the negroes don't have equal rights; they should rise up in arms and fight for their rights."

The crowd was restless and there was some angry muttering. Some of the onlookers made remarks to the police about their inability to handle the crowd and at least one threatened violence if the police did not act. There was not yet a disturbance but, in the words of the arresting officer whose story was accepted by the trial judge, he "stepped in to prevent it from resulting in a fight, after all there was angry muttering and pushing." The police officer twice requested Feiner to stop speaking, and upon his failure to do so, he was arrested and charged with disorderly conduct.

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[9] Murdock v. Pennsylvania, 319 U. S. 105 (1943).
[10] Kovacs v. Cooper, 336 U. S. 77 (1949).
[11] Martin v. Struthers, 319 U. S. 141 (1943).
[12] Cantwell v. Connecticut, 310 U. S. 296 (1940).
[13] Terminiello v. Chicago, 337 U. S. 1 (1949).
[14] Kovacs v. Cooper, 336 U. S. 77, 97 (1949) (concurring opinion).
[15] 71 Sup. Ct. 303 (1951).

The New York Court of Appeals unanimously affirmed his conviction[16] and the Supreme Court with three dissents[17] affirmed on the ground that the community, in maintaining peace and order on its streets, violated none of Feiner's constitutional rights. The Court observed that Feiner was neither arrested nor convicted for the making or the content of his speech or for the use of loud speaking equipment, but rather for the reaction which the speech actually engendered. In the interest of public safety he could be required to desist; failure to do so upon request was the basis of the crime.

The case of *Kunz v. New York*[18] involved a New York City ordinance[19] which required the issuance of a permit by the police commissioner as a prerequisite to the making of religious speeches in the public streets. Kunz was an ordained Baptist minister. In 1946 he applied for and was granted a permit for public preaching.[20] Because of the numerous complaints received, a hearing was held by the police commissioner at which Kunz's permit was revoked. The revocation was based on evidence that he had ridiculed and denounced other religious beliefs at his meetings. At these meetings, Kunz preached, among many other things of like tenor, that "the Catholic Church makes merchandise out of souls," that Catholicism is "a religion of the devil," and that the Pope is "the anti-Christ." The Jews he denounced as "Christ-killers," and he said of them, "All the garbage that didn't believe in Christ should have been burnt in the incinerators. It's a shame they all weren't." Kunz justified these outrageous attacks as being part of his religious beliefs. He felt it to be his duty to go into the streets and there denounce other religions. It was readily apparent that he intended to continue his vituperative utterances. Kunz sought no judicial review of the revocation; therefore, it was not in issue before the Supreme Court.

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[16] People v. Feiner, 300 N. Y. 391, 91 N. E. 2d 316 (1950).

[17] Black, J., and Douglas, J., wrote separate dissenting opinions. Minton, J., concurred in the latter's.

[18] 71 Sup. Ct. 312 (1951).

[19] ADMINISTRATIVE CODE OF THE CITY OF NEW YORK § 435-7.0, c. 10. "a. *Public worship*—It shall be unlawful for any person to be concerned or instrumental in collecting or promoting any assemblage of persons for public worship or exhortation, or to ridicule or denounce any form of religious belief, service or reverence, or to preach or expound atheism or agnosticism, or under any pretense therefor, in any street. A clergyman or minister of any denomination, however, or any person responsible to or regularly associated with any church or incorporated missionary society, or any lay-preacher, or lay-reader may conduct religious services, or any authorized representative of a duly incorporated organization devoted to the advancement of the principles of atheism or agnosticism may preach or expound such cause, in any public place or places specified in a permit therefor which may be granted and issued by the police commissioner. . . ."

[20] The New York Court of Appeals had construed the ordinance as requiring the issuance of a permit on the initial application. Such permits, however, are only valid for the calendar year in which issued. A new one must be procured each year. People v. Kunz, 300 N. Y. 273, 276, 90 N. E. 2d 455, 457 (1950).

He did, however, apply for a new permit in 1947 and 1948. Both applications were refused, no reason being given. On September 11, 1948, Kunz was arrested for speaking without a permit at Columbus Circle, and was fined ten dollars for violating the ordinance.

The Supreme Court, with one dissent,[21] held the ordinance to be unconstitutional. "We have here, then, an ordinance which gives an administrative official *discretionary* power to control *in advance* the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights. . . . It is sufficient to say that New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no *appropriate standards* to guide his action." [22] (Italics added).

The case of *Niemotko v. Maryland* [23] involved a question similar to that dealt with in the *Kunz* case, *i.e.*, a prior restraint. Appellants were members of the religious sect known as Jehovah's Witnesses. They scheduled Bible talks in the public park of the city of Havre de Grace, Maryland, for four consecutive Sundays.

Although there was no ordinance prohibiting or regulating the use of this park, it had been the custom for organizations desiring to use it for meeting to obtain a permit from the park commissioner. Conforming with this practice, appellant requested permission for the use of the park on the four Sundays; this permission was refused. The appellant appealed to the city council and filed a written request for permission. After a hearing, this request was also denied.[24] Two of the scheduled Sundays having passed, the appellants proceeded to hold their meeting on the third Sunday. No sooner had Niemotko opened the meeting than the police, who had been ordered to the park by the mayor, arrested him. On the following Sunday, appellant Kelley was arrested before he began his lecture. Both were charged and convicted of disorderly conduct. Clearly the only disorderly conduct was the attempt to speak without a permit, although there was no ordinance prohibiting or regulating the use of the park, but only an "amorphous practice" whereby authority to grant permits for the use of the park was in the complete discretion of the park commissioner and the city council. The Supreme Court unanimously held that the lack of standards in the license-issuing "practice" rendered that practice a prior restraint in contravention of the Fourteenth Amendment, and that the completely arbitrary and discriminatory refusal to grant a permit was a denial of equal protection.

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[21] Mr. Justice Jackson was the sole dissenter.

[22] 71 Sup. Ct. 312, 314, 315 (1951).

[23] 71 Sup. Ct. 325 (1951).

[24] The opinion of the court makes it clear that the permit was refused because of the municipal authorities' disapproval of the views of the Witnesses.

In the field of civil liberties, the usual presumption of constitutionality has been discarded [25] and there are even indications that a contrary presumption may be indulged in.[26] This, though a limitation on permissible restrictions of free speech, is nonetheless a recognition of the power in the states to regulate its unbounded exercise in the interests of the community. One of the most vital interests requiring regulation is that of maintaining peace and order on the public streets. Such was the interest alleged in each of the three principal cases.

There is no dissent from the proposition that the successful reconciliation of order and liberty is essential to the existence of a democratic society. Of necessity civil liberties depend upon the maintenance of peace and order. There is dispute, however, as to how this reconciliation may be achieved.

Well over thirty years ago, Mr. Justice Holmes formulated the oft-discussed and much abused "clear and present danger" test. "The question in every case is whether the words used 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." [27] Perhaps the clearest insight into the practical application of this test may be found in the words of Mr. Justice Black. "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." [28]

The *Feiner* case involved the application of this "clear and present danger" test. The conviction was based on a finding that a clear

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[25] Thomas v. Collins, 323 U. S. 516 (1945); Bridges v. California, 314 U. S. 252 (1941); Schneider v. New Jersey, 308 U. S. 147 (1939); Herndon v. Lowry, 301 U. S. 242 (1937). The words of Mr. Justice Jackson in West Virginia State Board of Education v. Barnette, 319 U. S. 624, 639 (1943), are especially enlightening on this issue. ". . . It is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."

[26] *See* United States v. C.I.O., 335 U. S. 106, 140 (1948) (concurring opinion); Bridges v. Wixon, 326 U. S. 135, 165 (1945).

[27] Schenck v. United States, 249 U. S. 47, 52 (1919).

[28] Bridges v. California, 314 U. S. 252, 263 (1941).

danger of disorder was threatened. The Supreme Court in affirming quoted with approval from *Cantwell v. Connecticut*:[29] "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears, the power of the State to prevent or punish is obvious. . . ."[30] Without doubt the three dissenting judges in the *Feiner* case would approve of this general principle. Their disagreement here, however, was as to the finding of such imminent threat of riot or uncontrollable disorder. Moreover, they were of the opinion that greater police protection should have been afforded the speaker before requiring him to desist in the interest of public safety. "The police of course have power to prevent breaches of the peace. But if, in the name of preserving order, they ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him. . . ."[31] Mr. Justice Black was particularly bitter in his dissent.[32] Not only did he feel that there was not sufficient evidence of imminent riot, but also that the police failed to attempt, in the first instance, to proceed against those members of the crowd who would precipitate violence.[33] To him the majority decision marked a dark day for civil liberties in our nation.

The case of *Terminiello v. Chicago*[34] appears to represent the high-water mark in the exercise of power by the Supreme Court

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[29] 310 U. S. 296, 311 (1940). There the petitioner had stopped two pedestrians and requested permission to play to them a phonograph record. This permission was granted. The record strongly criticized the religious faith of the two listeners and so enraged them that they were tempted to strike the petitioner. The Court held that "Although the contents of the record not unnaturally aroused animosity . . . in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state. . ." the petitioner's communication did not constitute a breach of the peace.

[30] *Id.* at 308.

[31] 71 Sup. Ct. 303, 310 (1951).

[32] ". . . this conviction makes a mockery of the free speech guarantees of the First and Fourteenth Amendments. The end result of the affirmance here is to approve a simple and readily available technique by which cities and states can with impunity subject all speeches, political or otherwise, on streets or elsewhere, to the supervision and censorship of the local police. I will have no part or parcel in this holding which I view as a long step toward totalitarian authority." *Id.* at 308.

[33] *Cf.* Terminiello v. Chicago, 337 U. S. 1 (1949); Hague v. C.I.O., 307 U. S. 496 (1939). In Sellers v Johnson, 163 F. 2d 877 (8th Cir. 1947), the Circuit Court of Appeals on finding that local police authorities had not sufficiently evidenced their inability to control the crowds and to suppress disorder granted an injunction restraining the local police officials from interfering with the petitioners' right to speak and assemble.

[34] 337 U. S. 1 (1949). For an able discussion of the *Terminiello* case, see Note, 24 ST. JOHN'S L. REV. 83 (1949).

to invalidate state action which impinges on the right of free speech.[35] It would seem that the *Feiner* case represents if not a retreat, at least a step in the direction toward attributing a greater weight to the determination of the individual state court. The opinion of Mr. Chief Justice Vinson, writing for the majority, gives clear support to this view. "Nor in this case can we condemn the considered judgment of three New York courts. . . . The findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech." [36] This reliance apparently was the turning point of the case, and it is submitted that it represents a proper approach to the general problem. The regulation of street disorders is essentially a local matter and some measure of freedom should be permitted to the local governing agencies in their efforts to cope with the situation. Review by the Supreme Court in extreme cases will serve as a deterrent to abuse of this power. One condition should be required, however, before the state may interfere with lawful speech. All *reasonable* protection should first be accorded to the speaker before demanding that he cease.

It is clear that what Feiner said he had a right to say; for his words were not of that class termed "fighting words." [37] Undoubtedly his speech was unpopular and may have angered some of the listeners. But this alone is not sufficient reason for commanding him to stop without first proceeding to give him the utmost protection possible under the circumstances. A contrary rule would permit the silencing of any speaker, popular or otherwise, by the agitation and violence of a vociferous and militant minority.[38] One high function of the police is to protect these lawful gatherings so that the speakers may exercise their constitutional rights.

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[35] The Supreme Court in an unprecedented approach reversed a state court conviction on grounds that were neither objected to in the lower courts nor urged in the Supreme Court. A reversal on such a basis was not in accord with any principle governing review of state court decisions by the Supreme Court. See dissenting opinion of Frankfurter, J. *Id.* at 8.

[36] 71 Sup. Ct. 303, 306-307 (1951).

[37] Chaplinsky v. New Hampshire, 315 U. S. 568, 571 (1942). "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

[38] See Brief for Committee on the Bill of Rights of the American Bar Association as *Amicus Curiae*, in Hague v. C.I.O., 307 U. S. 496, 678-682 (1939). "To 'secure' the rights of free speech and assembly against 'abridgement' it is essential not to yield to threats of disorder. Otherwise these rights of the people to meet and of speakers to address the citizens so gathered, could not be merely 'abridged' but could be destroyed by the action of a small minority of persons hostile to the speaker or to the views he would be likely to express."

The *Feiner* case involved one method of infringement on the right of free speech, *i.e.,* subsequent punishment. The *Kunz* and *Niemotko* cases deal with another method, *i.e.,* prior restraint. Feiner was permitted to speak until the violent reaction set in; Kunz and Niemotko were prohibited in the first instance, Kunz because of the fear, in the light of his past acts, that violence would otherwise result; Niemotko because the city officials disagreed with his views.

The precise ground on which the *Kunz* and *Niemotko* cases were decided can be stated as follows: The ordinance in one case and the "practice" in the other both vested complete power in an official to prohibit certain forms of speech with no narrowly defined standards limiting this power. This unrestrained discretion was fatal.[39]

The limited holding of the *Kunz* case would appear, by implication, to recognize the power in the state to employ a permit system, at least where speeches of a religious nature are involved. Certainly the concurring opinion of Mr. Justice Frankfurter would give support to this conclusion, as would the dissenting opinion of Mr. Justice Jackson.

The principal case in the field of prior restraints is that of *Near v. Minnesota,*[40] wherein a statute permitting an injunction restraining publication of a newspaper was held invalid. But there freedom of the press was involved. Such right involves essentially different considerations, for newspapers reach a different segment of the population in different surroundings and do not involve use of the public streets. The danger of disorder resulting from a publication is far less serious than that where street speaking is involved. Few are the mobs that have been whipped to a frenzy by a newspaper publication, but countless are the riots resulting from street corner agitation.

The big problem in the exercise of prior restraints is just what limitations or restrictions are permissible. This question was not directly answered in the *Kunz* and *Niemotko* cases. Certainly the state is permitted to control the time, place and manner of speaking by nondiscriminatory regulation.[41] It would seem to be an unwarranted conclusion to construe the principal cases as limiting the power of the states to these elements. Rather it appears that the Court implies that it would uphold a censorship of the content of speeches, religious in nature, provided that the statute was so nar-

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[39] The approach of the court in the *Kunz* case would account for the dissent of Mr. Justice Jackson. The majority looked to the statute and saw on the face thereof an unconstitutional burden on free speech. What is possible under the statute, was the majority approach. Mr. Justice Jackson, in pursuing a factual inquiry, looked to what had been done under the statute and found no abuse.

[40] 283 U. S. 697 (1931).

[41] Cox v. New Hampshire, 312 U. S. 569 (1941) (the Supreme Court sustained an ordinance requiring a license for the holding of an organized parade. The purpose of the regulation was to prevent the confusion that would result from unregulated parading.); Cantwell v. Connecticut, 310 U. S. 296 (1940).

rowly drawn as to eliminate the possibility of abuse. The words of Kunz were clearly "fighting words," those which by their very nature inflict injury or tend to incite a breach of the peace. As such they were beyond the pale of constitutional protection.[42] A "clear and present danger" would be presented and the state should be permitted some measure of freedom in its efforts to meet the problem and this, though a prior restraint be imposed.

How much more conducive to public peace and tranquillity is the system provided for by the ordinance in the *Kunz* case (the question of narrow standards aside), than the ordinary breach of the peace case where the public is subjected to an imminent threat of riot? It would appear that the practice set up under the ordinance, *i.e.*, compulsory issuance of the first permit, procedure for the filing and hearing of complaints, impartial hearing, and judicial review, is a much more efficient system and one less open to abuse than the procedure followed in the *Feiner* case. Much more beneficial is the procedure for the orderly filing and hearing of complaints than one wherein the offended listener must either submit to the indignity or precipitate a riot. The offended passers-by (who in a sense may be regarded as a captive audience, since they cannot escape the sting of shouted words as they walk in the streets) should not be forced to choose between such obnoxious alternatives in order to escape from words that hurt like rocks.

The rule contended for above should, of course, be limited to the field of religious speaking and not be applicable to speeches of a political nature, and this because essentially different considerations are involved. The temper and receptiveness of the listener, the perspective of experience, the apathy of the seasoned voter, and the probability of abuse by the politically entrenched opposition in the case of political speeches are not present in the case of religious polemic and vilification. Speeches of the latter variety do not appeal to the rational processes of the human mind. They ". . . do not spring from reason and can be answered by none. . . ."[43] They are not of such necessary importance as to require the subordination of the state's interest to constitutional right. One should not—in the name of the Constitution—be given license to tear at the most delicate and sensitive of human feelings. Subsequent punishment is clearly inadequate for the crushing missiles have by then done their deadly work, and the public has been threatened with riot and violence.

Taking it as conceded, for the purpose of discussion, that a permit system affecting content is permissible, we come then to the extremely practical question of just what standards will the court re-

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[42] "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution. . . ." Cantwell v. Connecticut, 310 U. S. 296, 309-310 (1940).

[43] Mr. Justice Jackson dissenting in the *Kunz* case, 71 Sup. Ct. 312, 317 (1951).

quire for the guidance of those charged with the responsibility of enforcing the plan. The majority opinion in the *Kunz* case gives no indication of what these standards must be, a fact which Mr. Justice Jackson greatly laments in his dissenting opinion. ". . . I do not see how this Court can condemn municipal ordinances for not setting forth comprehensive First Amendment standards. This Court never has announced what those standards must be, it does not now say what they are, and it is not clear that any majority could agree on them. In no field are there more numerous individual opinions among the Justices. The Court as an institution not infrequently disagrees with its former self or relies on distinctions that are not very substantial. . . . It seems hypercritical to strike down local laws on their faces for want of standards when we have no standard . . . ."[44]

The concurring opinion of Mr. Justice Frankfurter clearly demonstrates his appreciation of the problem confronting the local legislatures, but he did not deem it a function of the Court ". . . to formulate with particularity the terms of a permit system which would satisfy the Fourteenth Amendment. . . ."[45] His suggestions were negative in nature. "No doubt, finding a want of such standards presupposes some conception of what is necessary to meet the constitutional requirement. . . ."[46] It is regrettable that the Court failed to furnish a criterion more substantial in character than this nebulous standard.

Conclusion

The *Feiner* case represents what is deemed to be a new development, or at least demonstrates that considerable reliance will be placed on an element not found in many of the prior civil rights cases. A majority of the present members of the Court would give great respect to the determination of the state courts, especially where, as in the *Feiner* case, there has been a unanimous affirmance by both the intermediate and final appellate courts, which courts have in the past shown a high regard for First Amendment rights.

The *Kunz* and *Niemotko* cases evidence the policy of the Court to strike down legislation or "practices," involving prior restraints, without reference to the fact situations, where unrestrained discretion is granted to the enforcement officers. The very possibility of abuse, which was feared in the *Kunz* case, materialized in the *Niemotko* case. This possibility of abuse is regarded as obnoxious.

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[44] *Id.* at 322.
[45] Mr. Justice Frankfurter concurring in Kunz v. New York, 71 Sup. Ct. 303, 334 (1951).
[46] *Ibid.*