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NOTES AND COMMENT

FREEDOM OF SPEECH AND THE TERMINIELLO CASE

On the evening of February 7, 1946, the Rev. Arthur W. Terminiello addressed a group of more than 800 people in a Chicago auditorium. Outside, a crowd of about 1,000 persons that had gathered to protest the meeting had been transformed into a howling, turbulent and unmanageable mob. As he spoke, window-panes were being shattered by bricks and other missiles hurled from outside, doors battered in, and ice-picks, rocks and bottles thrown at police stationed at the doors. Cursing and other threatening utterances, easily audible inside the auditorium, emanated from without during the entire session. It was in this electrifying atmosphere that the defendant proceeded to deliver an explosive and infuriating speech, vehemently denouncing those outside and certain other individuals and groups in the most vicious terms of contempt imaginable. The response from his audience, friendly for the most part, was instantaneous and many became aroused and enraged. For this speech the defendant was charged with disorderly conduct in violation of a city ordinance of Chicago.[1] In the instructions to the jury the trial court stated that a "breach of the peace" may consist of any misbehavior which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."[2] The jury found him guilty and the highest court in Illinois sustained the conviction.[3] However, on May 16, 1949, the United States Supreme Court by a 5-4 decision held that the city ordinance as construed by the Illinois courts had deprived the defendant of the right of free speech given him by the Federal Constitution and reversed his conviction.[4]

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[1] "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city . . . shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense." § 1(1), c. 193, Rev. Code 1939, City of Chicago.

[2] Terminiello v. Chicago, 69 Sup. Ct. 894, 895 (1949).

[3] Chicago v. Terminiello, 400 Ill. 23, 79 N. E. 2d 39 (1948), *aff'g* 332 Ill. App. 17, 74 N. E. 2d 45 (1947).

[4] Terminiello v. Chicago, 69 Sup. Ct. 894 (1949). Mr. Justice Vinson and Mr. Justice Frankfurter wrote dissents to the effect that since the instruction of the trial court in question was not in issue in the state courts it could not be passed upon by the Supreme Court. Mr. Justice Jackson dissented on the merits.

The decision occasioned an unusual amount of excitement and much attention was focused on it by the press.[5] The legal profession was also stirred to action and the Federal Bar Association of New York, New Jersey and Connecticut passed a resolution to arrange a forum in which the decision would be interpreted to the lay public.[6] Though in some quarters the decision met with approval,[7] the general reaction was one of dismay and it was felt that the Supreme Court had taken an extreme step that was apt to lead to unfortunate consequences. Sharp criticism of the case was forthcoming from leaders of certain religious congregations.[8] Comment from other sources was that the decision had added confusion to the already perplexing problem of what constitutes the legal limits of free speech.[9] Many expressed the fear that the decision would enable a rabble-rousing agitator to speak unmolested regardless of the turbulence caused by his words and that the order so vital for the retention of our civil liberties would thus be susceptible to obliteration.[10] To determine whether or not such apprehension is justified is the sole object of what follows.

The right to freedom of expression has as its constitutional basis the First Amendment to the Federal Constitution.[11] The First Amendment secures this right against invasion by the United States and through the Fourteenth Amendment this protection is extended

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[5] *The Terminiello Decision*, Editorial, N. Y. Times, May 21, 1949; *Douglas and Jackson*, Editorial, N. Y. Herald Tribune, May 19, 1949; *Free Speech is Fine, But*, Editorial, N. Y. Daily News, May 18, 1949.

[6] Mr. Emil K. Ellis, chairman of the Association's bill of rights committee and sponsor of the motion, stated that "the decision had been widely misinterpreted both by the public and with few exceptions by the press." N. Y. Times, May 27, 1949, p. 19, col. 5.

[7] "The decision was praised by Roger N. Baldwin, executive director of the American Civil Liberties Union, who argued that otherwise any meeting could be broken up 'where opponents alleged that it was likely to rouse them to violent protest.'" Time, May 30, 1949, p. 14, col. 2.

[8] "Assailing the decision of the United States Supreme Court in the case of Rev. Arthur W. Terminiello, involving free speech, Rabbi William F. Rosenblum in Temple Israel, 210 West Ninety-first Street, held yesterday that the majority of the court 'overlooked the fact that every citizen is entitled to be protected from slander and libel.'" N. Y. Times, May 22, 1949, p. 39, col. 1.

[9] "Between them, the majority and minority had managed to confuse further the complex line which defines the reasonable limits to freedom of speech." Time, May 30, 1949, p. 14, col. 3. The majority "confused though it did not destroy, local prevention and punishment of 'fighting words' inciting to riot." Krock, *In the Nation*, N. Y. Times, May 19, 1949, p. 28, col. 5.

[10] "A lot of good people have got the notion that rabble-rousing is indorsed, on the theory that the doctrine of free speech is illimitable." *Douglas and Jackson*, Editorial, N. Y. Herald Tribune, May 19, 1949. "At the present time almost nobody but the Communists will profit by this ruling . . . . Every agitator nailed for inciting to riot from now on can be expected to lean heavily on the Terminiello decision." *Free Speech is Fine, But*, Editorial, N. Y. Daily News, May 18, 1949.

[11] U. S. CONST. AMEND. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ."

to include infringement by a state.[12] While it is the Fourteenth Amendment which applies directly to state action, nevertheless the specific limiting principles of the First Amendment usually govern in all cases involving freedom of speech.[13]

The right to speak as one pleases is far from being an absolute right.[14] "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." [15] These are extreme cases and are of little aid in the quest to determine the constitutional limits of free speech. It is when we leave these obviously unprotected classes of speech that the real problem becomes apparent. The right to free speech is not absolute, but where is the point at which permissible deprivation begins? The line of demarcation is a fluctuating one and the Supreme Court has abstained from attempting a precise delimitation. The nearest approach to a concrete test appears in the precedent-making statement of Mr. Justice Oliver Wendell Holmes that "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." [16] The term "clear and present danger" has many connotations, of course, and the court in any given instance must subjectively determine what is a "clear and present danger" to a large degree unaided or perhaps unhampered by precedent.[17] What to one court or judge may be a "clear and present danger" may not be to another court or judge. Thus in several instances we see Mr. Justice Holmes, the originator of the rule, differing with his colleagues as to its application.[18] That no hard and fast rule will be laid down seems certain and any possible attempt to do so inadvisable. Changing social, economic and political conditions would make an inflexible criterion impractical.

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[12] "The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state." Schneider v. Irvington, 308 U. S. 147, 160 (1939).

[13] *See* West Virginia State Board of Education v. Barnette, 319 U. S. 624, 639 (1943).

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

[15] *Id.* at 571.

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

[17] "This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present . . . ." Mr. Justice Brandeis, concurring in Whitney v. California, 274 U. S. 357, 374 (1927).

[18] See Mr. Justice Holmes, dissenting in Gitlow v. New York, 268 U. S. 652, 672 (1925), and Abrams v. United States, 250 U. S. 616, 624 (1919).

The "clear and present danger" test has been applied in many diverse situations. It has been used to reverse convictions for contempt of court arising out of the publication of newspaper editorials.[19] Its application has resulted in the invalidating of a state statute which penalized individuals for disseminating propaganda tending to encourage disloyalty to the state and national government.[20] Picketing of another's premises has been upheld on the ground that it presents no "clear and present danger." [21] An espionage act [22] and a deportation statute [23] were both held to be subject to this rule. On the affirmative side, it has been utilized in sustaining the validity of a criminal syndicalism act.[24]

The extent to which the Supreme Court has gone in recent years to protect freedom of speech is rather remarkable. Enforcement of a statute requiring the registration of individuals who solicit membership in unions was held to be an unconstitutional restraint of free speech.[25] Ordinances vesting local officials with discretion as to when public meeting places [26] or amplifying devices [27] may be used have been held invalid. In *Marsh v. Alabama* [28] the court struck down a statute which made it unlawful to remain on the premises of another after having been warned not to do so, reasoning that as between property rights and civil liberties the latter occupy the preferred position. Even the United States Government is powerless to exclude from its property groups bent on propagating their views.[29]

The question that now arises is whether the *Terminiello* case has snapped the elastic concept of liberality manifested by the foregoing decisions. Has the Supreme Court been so zealous in its role as guardian of the constitutional liberties of the American people that it has overplayed its part and let free a means by which the very ideals it seeks to protect may be destroyed?

Though it is our opinion that at times in the past the present Supreme Court has been overly protective of the right to free speech, particularly in such cases as *Marsh v. Alabama,* it is nevertheless felt that on the issue of free speech the *Terminiello* decision is thoroughly sound and logical, entirely consonant with precedent, and that its possible consequences have been tremendously over-exaggerated. Misconception of the holding in the case is caused by taking into con-

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[19] Pennekamp v. Florida, 328 U. S. 331 (1946); Bridges v. California, 314 U. S. 252 (1941).

[20] Taylor v. Mississippi, 319 U. S. 583 (1943).

[21] Thornhill v. Alabama, 310 U. S. 88, 105 (1940).

[22] Hartzel v. United States, 322 U. S. 680 (1944).

[23] *See* Bridges v. Wixon, 326 U. S. 135, 157 (1945) (concurring opinion).

[24] *See* Whitney v. California, 274 U. S. 357, 372 (1927) (concurring opinion).

[25] Thomas v. Collins, 323 U. S. 516 (1945).

[26] Hague v. C.I.O., 307 U. S. 496 (1939).

[27] Saia v. New York, 334 U. S. 558 (1948).

[28] 326 U. S. 501 (1946).

[29] Tucker v. Texas, 326 U. S. 517 (1946).

sideration only the character of the defendant's speech and the circumstances surrounding it and the decision of the court which allowed his apparent misbehavior to go unpunished.[30] On the issue of free speech, this case decides but one thing, and that is that a man cannot be penalized merely because his speech either stirred people to anger, invited public dispute or brought about a condition of unrest. The conviction was reversed because the trial court's instruction to the jury permitted the defendant to be found guilty on any one of the foregoing grounds. Thus the whole case turned on the instruction to the jury. The Supreme Court did not decide that his speech was one for which he could not be constitutionally punished. Indeed, the court expressly stated that it was not ruling on that point.[31]

In this light it is difficult to argue that the decision was an erroneous one. It cannot be denied that the right of free speech would be severely curtailed if every remark producing either anger, dispute or unrest were punished. The Supreme Court has repeatedly held that much more must be present before a restriction of speech will be sanctioned. There must exist a "clear and present danger" of a substantive evil, and that substantive evil "must be extremely serious and the degree of imminence extremely high before utterances can be punished." [32] Assuredly, "a condition of unrest" falls far short of meeting the quoted requisites of a "substantive evil." In *Cantwell v. Connecticut* [33] the petitioner had stopped two pedestrians and requested permission to play to them a phonograph record. The 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 Supreme 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" [34] the petitioner's communication did not constitute a breach of the peace. (Emphasis supplied.) Arousing "animosity" then is not in and of itself a "clear and present danger" and it would seem that the quoted extract from the *Cantwell* opinion furnishes ample justification for the majority holding in the *Terminiello* case.

Thus the *Terminiello* decision is perfectly in harmony with previous rulings of the Supreme Court, a feature that is disturbingly

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[30] By the fact that Terminiello's "conviction for disorderly conduct in what was plainly the worst sort of incitement to violence is now reversed, the Supreme Court has placed itself in the position of approving a reprehensible act." *Douglas and Jackson,* Editorial, N. Y. Herald Tribune, May 19, 1949.

[31] Terminiello v. Chicago, 69 Sup. Ct. 894, 895 (1949).

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

[33] 310 U. S. 296 (1940).

[34] *Id.* at 311.

absent from many present day decisions of that court.[35] The unpredictability of the Supreme Court and the frequency of utterly irreconcilable and bitterly-worded dissenting opinions have brought about great confusion in many instances.[36] There can be no doubt but that the highly persuasive and pulverizing dissent of Mr. Justice Robert H. Jackson in the case under discussion[37] is responsible for much of the anxiety evidenced in the press and elsewhere. Ruthlessly attacking the majority opinion, he concluded that "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[38] For reasons already stated we do not feel that this admonition is necessary, nor do we agree with his statement that the majority opinion promulgates a dogma "of absolute freedom for irresponsible and provocative utterance which almost completely sterilizes the power of local authorities to keep the peace as against this kind of tactics."[39] Had the prosecution been merely for the use of "fighting words," a conviction undoubtedly would have been upheld on the ground that it produced "a clear and present danger" which took the speech without the realm of constitutional guaranties.[40] The State of Illinois is not deprived of its power to keep the peace by this decision, because if the instruction to the jury had been couched in the indicated terminology its authority would have been given prompt recognition.

It is somewhat ironical that this case should have been erroneously criticized as tying the hands of law-enforcement officials, for had there been efficient police action on the evening of defendant's speech there probably would have been no need for his arrest. He attempted to deliver an address to an audience sympathetic to his views and an auditorium had been hired for that purpose. Certainly

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[35] "Under our constitutional system, moreover, an undiscriminating disregard of *stare decisis* by our Supreme Court in the interests of particular classes, groups, or philosophies has a peculiarly deleterious and disturbing effect." Editorial, *Precedent and Certainty in Law and Life*, 34 A. B. A. J. 919, 920 (1948).

[36] "The present fragmentation of the Court diminishes its prestige and substitutes for what was once regarded as the sacred oracular voice of an impersonal institution a babel of confused and jangling human tongues. It introduces a strong element of instability and unpredictability into the law that causes great concern and perplexity to counsel charged with the responsibility of advising clients and to the lower courts." Palmer, *Present Dissents: Causes of the Justices' Disagreements*, 35 A. B. A. J. 189 (1949).

[37] This 15 page, 8,000 word dissent is "one of the most sharply-worded opinions of recent years." Coleman B. Jones, N. Y. Herald Tribune, May 19, 1949, in the second of two articles discussing the Terminiello case.

[38] Terminiello v. Chicago, 69 Sup. Ct. 894, 911 (1949).

[39] *Id.* at 906.

[40] Cantwell v. Connecticut, 310 U. S. 296, 308 (1940), wherein it was stated that "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."

he was fully entitled to do this under the constitutional guaranty of free speech. However, an unruly and hostile crowd had gathered to protest the meeting in which he was to participate and even before his arrival it had approached the verge of unrestrained violence. Through either careless indifference or an inaccurate appraisal of the seriousness of the situation, police protection for the defendant was grossly inadequate and during his talk the mob outside got completely out of hand. Had there been proper police protection the defendant probably would not have been prompted to speak as he did, nor would his words have had the explosive effect they actually had. When bricks and every other sort of dangerous missile are being hurled in on an audience it is much more easily stirred to violent action than is one which listens in an atmosphere more approaching serenity. When one has something to say he should not be silenced merely because aggressive adversaries threaten to riot if he attempts to speak. In such cases police protection should be afforded to insure the right to speak freely. Assuming that when such protection is absent one should frame his utterances so as not to provoke a breach of the peace, it is nevertheless felt that law enforcement officers are much to blame in making such a restraint of speech necessary. More concisely, it is an unfortunate situation where one is not able to speak freely because protection against undisciplined antagonists has not been furnished. The defendant's right to speak was being interfered with and he endeavored to take the law into his own hands. Though his action, of course, cannot be completely condoned, it would seem that a great portion of the blame should be imputed to the inadequate police protection responsible for the creation of the tumultuous arena in which he found himself.

In the present world-wide clash of ideologies, civil liberties are more sacred than ever to the people of the United States. Any possible infringement upon them or threat to their existence should be scrutinized with the utmost degree of caution. It is no wonder then that the reaction to the *Terminiello* decision was so pronounced. However, as we have endeavored to point out, the *Terminiello* case does not jeopardize our precious constitutional liberties; rather it is a reminder that the Supreme Court is still their ever vigilant and ardent defender.[41]

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[41] In view of the fact that the trial court's instruction to the jury was not in issue at any time in the state courts or when the case was argued before the Supreme Court, it may well be that this case will become significant for enlarging the scope of the appellate jurisdiction of the Supreme Court rather than for any adjudication on the question of free speech.