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# Freedom of Speech: Fact or Fiction?

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# COMMENTS

## FREEDOM OF SPEECH: FACT OR FICTION?

"... our liberty depends on our freedom of the mind and that cannot be limited without being lost." *Jefferson*.

### I

During and following every war, restrictions on the individual's basic rights are the prevailing trend. World War I saw thousands of prosecutions under the Sedition Act<sup>1</sup> and state criminal syndicalism statutes.<sup>2</sup> All convictions under these acts called only for an indictment, and the patriotic zeal of the jury did the rest.<sup>3</sup> World War II has been no exception,<sup>4</sup>—congressional investigations of various organizations are a common occurrence, public employees must sign non-communist affidavits and, as was recently observed in the Peekskill incident, a leftist meeting was turned into an open riot by numerous veteran's organizations who decided that the preservation of the ideals of this country rested in their discretion. This problem faced the United States Supreme Court recently in the case of *Terminiello v. Chicago*.<sup>5</sup>

Terminiello, a disciple of Gerald L. K. Smith, was convicted for the use of "fighting words"<sup>6</sup> while addressing an audience sponsored by the Christian Veterans of America. The trial record showed that over 1000 persons picketed the hall and that some threw brickbats and stink bombs, broke windows, and rushed police lines. In his opening remarks, Father Terminiello said:

Now, I am going to whisper my greetings to you, Fellow Christians. I will interpret it. I said, 'Fellow *Christians*,' and I suppose there are *some of the scum got in by mistake*, so I want to tell a story about *the scum*: . . . And nothing I could say tonight could begin to express the contempt for the *slimy scum* that got in by mistake.<sup>7</sup>

1. 40 STAT. 217 (1917), 50 U. S. C. § 33 (1917); Carroll, *Freedom of Speech and of the Press in War Time: The Sedition Act*, 17 MICH. L. REV. 621 (1919); Carroll, *Freedom of Speech and of the Press in the Federalist Period: The Sedition Act*, 18 MICH. L. REV. 615 (1920), 32 HARV. L. REV. 417 (1919).

2. Comment, 84 U. OF PA. L. REV. 390 (1936).

3. Chafee, *Freedom of Speech in Wartime*, 39 HARV. L. REV. 932 (1919); Comments, 90 U. OF PA. L. REV. 598 (1942), 51 YALE L. J. 798 (1942).

4. O'Brien, *Restraints Upon Individual Freedom in Times of National Emergency*, 26 CORN. L. Q. 523.

5. 69 Sup. Ct. 894 (1949).

6. *Chaplinsky v. New Hampshire*, 315 U. S. 568, 572 (1942) (fighting words include the lewd and obscene, the profane, the libelous—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace); cf. *State v. O'Donnell*, 16 N. J. Misc. 393, 200 Atl. 739 (Sup. Ct. 1934) (use of word "scum," breach of peace), *State v. Christie*, 97 Vt. 461, 123 Atl. 849 (1924) (use of words "rats, scabs," breach of peace). *Contra*: *People v. Downer*, 6 N. Y. S.2d 566 (N. Y. City Mag. Ct. 1938) (distribution of anti-semitic literature in Jewish district, not disorderly conduct).

7. *Supra* note 5 at 901.

Evidence showed that this speech stirred the audience not only to cheer and applaud, but also to remonstrations of anger, unrest, and alarm. For the use of these so-called "fighting words"<sup>8</sup> he was arrested and convicted for violation of an ordinance by the use of language tending toward a breach of the peace and fined \$100.00. In successive appeals to the Illinois Court of Appeals<sup>9</sup> and the Supreme Court of Illinois,<sup>10</sup> the conviction was upheld.

Terminiello appealed to the United States Supreme Court on the grounds that the ordinance<sup>11</sup> was an abridgment of the right to speak under the First<sup>12</sup> and Fourteenth<sup>13</sup> Amendments. The trial court charged in construing the ordinance<sup>14</sup> that, "breach of the peace consists of any misbehavior which violates the public peace and decorum, and that the misbehavior may constitute a breach of the peace if it 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."<sup>15</sup> Though no writ of error was taken on the validity of this jury charge, the court<sup>16</sup> chose to look beyond the writ and reversed on the ground that this jury charge was beyond the meaning of free speech as defined by the "clear and present danger" rule, and was in itself unconstitutional.<sup>17</sup> While the Court did not directly hold that Terminiello's words were within the realm of protected speech, the majority opinion in defending itself from a vigorous dissent by Justice Jackson<sup>18</sup> attempted to define what utterances the court shall protect:

... a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.<sup>19</sup>

In substance, the court opined that free speech should only be sacrificed when the interests of public safety are really imperiled, and not when it is barely conceivable that they may be somewhat affected.

In order to more fully appreciate and appraise this decision, it is necessary to re-examine the past cases involving freedom of speech, press, religion and

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8. § 1 (1), ch. 193, Rev. Code 1939, City of Chicago: 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 for each offense.

9. *Chicago v. Terminiello*, 332 Ill. App. 17, 74 N. E.2d 45 (1947).

10. *Chicago v. Terminiello*, 400 Ill. 23, 79 N. E.2d 39 (1948).

11. See note 8 *supra*.

12. U. S. CONST. AMEND I.

13. U. S. CONST. AMEND IV, § 1.

14. See note 8 *supra*.

15. *Supra* note 5 at 895.

16. See note 5 *supra*.

17. See 4 *MIAMI L. Q.* 120 (1949).

18. *Supra* note 5 at 899.

19. *Supra* note 5 at 896.

assembly, beginning with *Schenck v. U. S.*,<sup>20</sup> wherein Mr. Justice Holmes laid down the standard whereby these freedoms may be limited—the “clear and present danger” test.

## II

The Sedition Act,<sup>21</sup> passed by Congress during World War I, made it unlawful to advocate the overthrow of the government, and to interfere with conscription or the war effort. It would seem that the purpose of this statute was to punish for the commission of *acts*, and not for the *mere use of words* which tend toward the fulfillment of these prohibited acts.<sup>22</sup> However in upholding the conviction of Schenck,<sup>23</sup> who violated the Act by publishing a circular urging men not to obey the Conscription Statute, the Court in a unanimous opinion through Mr. Justice Holmes announced the following as a guide in ascertaining when one's speech could be lawfully limited without violating the First Amendment:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words 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 substantial evil that Congress had a right to prevent. It is a question of proximity and degree.<sup>24</sup> (Italics added).

This test was reaffirmed as applied to other cases involving Sedition Statute the same year in the *Debs*<sup>25</sup> and *Frohwerk*<sup>26</sup> cases, but the latter part of 1919 and the year 1920 found a change in Holmes' attitude regarding what speech should come within the sphere of his “clear and present danger” formula.<sup>27</sup> Realizing that the *Schenck*<sup>28</sup> decision immediately followed a horrible struggle between the nations of the world, and that even the steadiness of the judiciary might have been undermined, Justices Holmes and Brandeis vigorously dissented in the *Abrams*,<sup>29</sup> *Schaeffer*<sup>30</sup> and *Gilbert*<sup>31</sup> cases, and at

20. 249 U. S. 47 (1919).

21. See note 1 *supra*.

22. Chafee, *Freedom of Speech in Wartime*, 32 HARV. L. REV. 932, 953 (1919).

23. See note 20 *supra*.

24. *Supra* note 20 at 52.

25. *Debs v. U. S.*, 249 U. S. 211 (1919) (defendant convicted of violating Sedition Act by making speeches against conscription).

26. *Frohwerk v. U. S.*, 249 U. S. 204 (1919) (companion case to *Debs v. U. S.*).

27. See note 20 *supra*.

28. *Supra*.

29. *Abrams v. U. S.*, 250 U. S. 616 (1919) (defendant published pamphlets denouncing the war and urging workers to strike); Chafee, *A Contemporary State Trial—The United States v. Jacob Abram's*, 33 HARV. L. REV. 747 (1920) and Corwin, *Freedom of Speech and Press Under the First Amendment: A Résumé*, 30 YALE L. J. 48 (1920) (pro and con discussion of the *Abram's* case); Wigmore, *Abrams v. U. S.: Freedom of Speech and Freedom of Thuggery in Wartime and Peacetime*, 14 ILL. L. REV. 539 (1920); Comments, 33 HARV. L. REV. 442 (1920), 14 ILL. L. REV. 601 (1920).

30. *Schaeffer v. U. S.*, 251 U. S. 466 (1920) (defendant's newspaper misquoted material concerning the war effort which was damaging to morale).

31. *Gilbert v. Minnesota*, 254 U. S. 325 (1920) (defendant made speeches against conscription).

tempted to set forth a more practical guide by which to apply the "clear and present danger" doctrine:

. . . like many other rules for human conduct, it [the clear and present danger rule] can be applied correctly only by the exercise of good judgment; and to the exercise of good judgment, calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty.<sup>32</sup>

The two dissenters again were presented the opportunity to express their views in the oft-cited *Gitlow*<sup>33</sup> case, where the defendant was convicted of violating a New York statute which made unlawful *the use of certain language* even though the immediate execution of the thought expressed therein was not advocated. Justices Holmes and Brandeis dissented, refusing to hold one liable for the bad tendency of words, declaring that fear is worse than repression. Four years later in the *Whitney*<sup>34</sup> case, these two Justices still found themselves among the minority on the question as to what constitutes protected speech, although they concurred specially because of a procedural defect.

Whitney was a member of the Communist Party, membership in which was held to be a violation of the state criminal syndicalism statute. In attempting to gain acceptance for their views the distinguished liberals stated, "If there be time, to expose through discussion the falsehood and fallacies, to avert the evil [infringement upon free speech] by the processes of education, the remedy to be applied is more speech, not enforced silence."<sup>35</sup> These views soon gained recognition in the *Fiske*<sup>36</sup> case, when the majority of the court in a similar situation reconsidered its previous position and refused to convict for violation of a criminal syndicalism statute merely because of membership in certain organizations which espouse other systems of government. This liberal tendency was continued into the early thirties by the outlawing of other forms of discriminatory legislation.<sup>37</sup>

32. *Supra* note 30 at 482.

33. *Gitlow v. New York*, 268 U. S. 652 (1923); Comments, 36 HARV. L. REV. 199 (1922), 20 ILL. L. REV. 809 (1920), 4 U. OF CINN. L. REV. 211 (1930), 9 U. OF CINN. L. REV. 265 (1935).

34. *Whitney v. California*, 274 U. S. 357 (1927); Comments, 22 ILL. L. REV. 541 (1928), 14 VA. L. REV. 49 (1927).

35. *Id.* at 377.

36. *Fiske v. Kansas*, 274 U. S. 380 (1927); Covington, *The Dynamic American Bill of Rights*, 26 CAN. B. REV. 638 (1948); Willis, *Freedom of Speech and of the Press*, 4 IND. L. J. 445 (1929); Comment, 41 HARV. L. REV. 525 (1928).

37. *Near v. Minnesota*, 283 U. S. 697 (1931) (prior restraint on publication unconstitutional); *Stromberg v. California*, 283 U. S. 359 (1931) (statute which prohibited saluting of red flag unconstitutional); cf. *People v. Burman*, 154 MICH. 150, 117 N. W. 589 (1908). *Contra*: *People v. Immonen*, 271 Mich. 384, 261 N. W. 59 (1935); Cathcart, *Constitutional Freedom of Speech and of the Press*, 21 A. B. A. J. 595 (1935).

With the advent of the Roosevelt court the protection of minorities and civil liberties was accentuated. One of the leading cases at the beginning of this era was *DeJonge v. Oregon*.<sup>38</sup> Defendant was convicted under a criminal syndicalism statute for being a member of the Communist Party and speaking at an orderly rally wherein new members were solicited. In reversing the conviction the Court held that peaceable assembly for lawful discussion cannot be made a crime. In order to determine if the bounds of free speech are exceeded, one must look to the utterance of the speaker and not to the character of the group sponsoring the meeting. This case was followed in *Hendron v. Lowry*,<sup>39</sup> where a paid Negro communist organizer was found guilty of violating a statute which made it a crime to incite to riot. In holding the application of the statute in this instance to be an unwarranted invasion of the right to free expression, the Court declared that the power of the state to abridge freedom of speech and assembly is the exception rather than the rule, and that in order to penalize the utterance of certain words, the legislature must find reasonable apprehension of danger to organized government.

Beginning with *Lovell v. City of Griffin*<sup>40</sup> application of the "clear and present danger" test was extended from cases involving threats to organized government to the broader field of civil liberties, including distribution of religious literature,<sup>42</sup> parades,<sup>43</sup> picketing,<sup>44</sup> breach of peace,<sup>45</sup> contempt by

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38 299 U. S. 353 (1937); 46 YALE L. J. 862 (1937).

39. 301 U. S. 242 (1937); 34 COL. L. REV. 1357 (1934); 35 MICH. L. REV. 1373 (1937).

40. 303 U. S. 444 (1938) (Lovell was convicted of distributing religious literature without first obtaining a permit. In reversing the conviction the court held that liberty of circulation is essential to freedom of expression, and without a means of expounding one's theological views, the right granted by the Constitution is nothing more than an empty gesture).

41. Johnson, *A Study of Supreme Court Attitudes*, 1 WASH. & LEE L. REV. 192 (1940).

42. See note 40 *supra*; *Follett v. Town of McCormick*, 321 U. S. 573 (1944) (payment of license tax held not a prerequisite to dissemination of religious literature); *Martin v. City of Struthers*, 319 U. S. 141 (1943) (ordinance which requires securing of a permit prior to the distribution of religious literature held not a proper exercise of the police power when the purpose was to prevent the disturbance of local citizens; judgment of the community should not be substituted for judgment of the individuals); 8 BROOKLYN L. REV. 236 (1938); 8 GEO. WASH. L. REV. 866 (1940); *Contra*: *Jones v. City of Opelika*, 316 U. S. 584 (1942) (Murphy dissenting, stating that freedom of religion should not be limited to those with means).

43. *Cox v. New Hampshire*, 312 U. S. 569 (1941).

44. *Carpenter's and Joiner's Union of America, Local No. 213 v. Ritter's Cafe*, 315 U. S. 722 (1942); *American Federation of Labor v. Swing*, 312 U. S. 321 (1941); *Milk Wagon Driver's Union v. Meadowmoor Dairies*, 312 U. S. 287 (1941); *Thornhill v. Alabama*, 310 U. S. 88 (1940); Fienberg, *Picketing, Free Speech and "Labor Disputes"*, 17 N. Y. U. L. Q. REV. 385 (1939); *Comments*, 30 CALIF. L. REV. 572 (1942), 15 NOTRE DAME LAW. 241 (1940), 48 YALE L. J. 54 (1936).

45. *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942); *Cantwell v. Connecticut*, 310 U. S. 296 (1940); 22 B. U. L. REV. 446 (1942).

publication,<sup>46</sup> use of amplification devices,<sup>47</sup> flag saluting,<sup>48</sup> and lawful public assemblage.<sup>49</sup>

The court in applying the "clear and present danger" test in the much publicized *Hague*<sup>50</sup> case, recognized the necessity of integrating freedom of assembly with freedom of speech. This decision in effect overruled<sup>51</sup> a long series of cases beginning with *Davis v. Massachusetts*<sup>52</sup> which upheld the municipalities' right to limit public assemblies upon public property. Mayor Hague had passed a vague and indefinite ordinance which prohibited public gatherings if a disturbance of the peace was likely to occur. In affirming the Circuit Court of Appeals decision<sup>53</sup> that the statute was unconstitutional and an infringement upon the First and Fourteenth Amendments, the Court<sup>54</sup> declared that no principle could be more destructive of free speech than to judge the permissibility of a public meeting by any standard of its popularity. The right to hold unpopular meetings and to express dissenting opinions is of the essence of American liberty. The only way to safeguard open discussion is to value freedom of expression in all its forms so highly as never to practice or permit any interference with it. It is the duty of every municipality to make the right of free assembly prevail over forces of disorder, as any other result will allow one group to place a prior restraint upon another by creating a disturbance of the peace. A year later in a picketing case<sup>55</sup> the Court put into words its extension of the "clear and present danger" rule when it stated that:

. . . Abridgement of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.<sup>56</sup>

Protection under the "clear and present danger" rule was next extended

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46. *Pennekamp v. Florida*, 328 U. S. 331 (1946); *Bridges v. California*, 314 U. S. 252 (1941).

47. *Kovacs v. Cooper*, 69 Sup. Ct. 448 (1949); *Saia v. New York*, 334 U. S. 558 (1948).

48. *West Virginia Board of Education v. Barnette*, 319 U. S. 624 (1943); *Faylor v. Mississippi*, 319 U. S. 583 (1943).

49. *Hague v. Committee for Industrial Organization*, 307 U. S. 496 (1939); *Sellers v. Johnson*, 163 F.2d 877 (C. C. A. 8th 1947); *Danskin v. San Diego Unified School District*, 28 Cal.2d 536, 171 F.2d 885 (1946).

50. *Hague v. Committee for Industrial Organization*, 307 U. S. 496 (1939); Clark, *Municipal Regulation of Outdoor Public Assembly*, 25 A. B. A. J. 741 (1939); Heller, *Freedom of Assembly*, 25 MARQ. L. REV. 1 (1940); Comment, 17 MICH. L. REV. 609 (1939); 52 HARV. L. REV. 320 (1938); 33 ILL. L. REV. 845 (1939); 14 ST. JOHN'S L. REV. 157 (1938).

51. *Fraenkel, One Hundred and Fifty Years of the Bill of Rights*, 23 MINN. L. REV. 719 (1939); 25 A. B. A. J. 7 (1939).

52. 167 U. S. 43 (1897).

53. See note 50 *supra*.

54. *Ibid.*

55. *Thornhill v. Alabama*, 310 U. S. 88 (1940); Comment, 28 CALIF. L. REV. 733 (1940).

56. *Id.* at 104.

to the dissemination of religious literature by various minority groups.<sup>57</sup> To this end the majority of the Court has stringently examined local legislation which requires the procurement of a permit as a condition precedent to distribution of printed matter, and concluded that free communication of views may only be suppressed when there is a "clear and present danger" to the public peace and tranquility and not under the guise of conserving desirable conditions.<sup>58</sup>

The present day conception of the Holmes formula was finally spelled out in 1941.<sup>59</sup> After an excellent discussion and development of the "clear and present danger" test, Mr. Justice Black laid down the following definition of this tried and accepted principle:

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. Those cases do not purport to make the furthestmost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or the press'. It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow . . . neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression.<sup>60</sup> (Italics added.)

As further evidence of its intent to follow this new standard in cases involving restrictions on one's basic rights, the Court in *Hartzell v. U. S.*<sup>61</sup> acquitted the defendant of the same sedition act under which so many citizens were

57. See note 40 *supra*.

58. *Cantwell v. Connecticut*, 310 U. S. 296 (1940); *People v. Northum*, 41 Cal. App.2d 219, 106 P.2d 433 (1940); *State ex rel. Singelton v. Woodruff*, 153 Fla. 84, 13 So.2d 704 (1943); *accord*, *Stapleton v. Mitchell*, Atty. Gen., 60 F. Supp. 51 (D. Kan. 1945) (statute unconstitutional which required payment of license fee for union organizers); *In re Whitney*, 57 Cal. App.2d 167, 134 P.2d 516 (1943) (ordinance requiring securing of permit before making a speech unconstitutional); *Trujillo v. City of Walsenburg*, 108 Colo. 427, 118 P.2d 1081 (1941) (ordinance requiring permit to hold parade unconstitutional as too arbitrary); *cf.* *People v. Kieran*, 26 N. Y. S.2d 291 (Nassau County Court 1940) (this and the following three cases upheld the rights of Jehovah's Witnesses to solicit membership through public parades, playing of phonographs, speaking against flag-saluting, and playing of loudspeaker); *Zimmerman v. State*, 77 Crim. App. 374, 141 P.2d 809 (Okla. 1943); *Miller v. State*, 75 Crim. App. 428, 133 P.2d 223 (Okla. 1943); *State v. Langston*, 195 S. C. 190, 11 S. E.2d 1 (1940). *But cf.* *Fitts v. City of Atlanta*, 121 Ga. 567, 49 S. E. 793 (1905) (conviction for making speech without permit upheld); *Watters v. City of Indianapolis*, 191 Ind. 671, 134 N. E. 482 (1922) (ordinance prohibiting display by person in public of any banner, sign, etc., not violation of free speech); *Almassi v. City of Newark*, 8 N. J. Misc. 420, 150 Atl. 217 (C. P. 1930) (conviction for distributing circulars on public road without permit upheld); *City of Buffalo v. Till*, 192 App. Div. 99, 182 N. Y. Supp. 418 (4th Dept. 1920); *City of Duquesne v. Fincke*, 269 Pa. 112, 112 Atl. 130 (1920). *Contra*: *Commonwealth v. Plaisted*, 148 Mass. 375, 19 N. E. 224 (1889); *City of Washburn v. Ellquist*, 242 Wis. 609, 9 N. W.2d 121 (1943).

59. *Bridges v. California*, 314 U. S. 252 (1941) (conviction of contempt by publication reversed); 45 MICH. L. REV. 513 (1947).

60. *Id.* at 263.

61. 322 U. S. 680 (1940); *cf.* *Dunne v. U. S.*, 138 F.2d 137 (C. C. A. 8th 1943) (defendants convicted under 1941 federal statute similar to Sedition Act—54 Stat. 670 (1940), 18 U. S. C. A. §§ 9-11 (Supp. 1948)).



deprived of their liberty during World War I. Soon afterwards the high tribunal refused to hold a labor organizer guilty of violating a statute which made all labor organizers register before soliciting membership. They opined that in order to determine what boundary governs where the individual's freedom ends and the state's power begins, one must look to the character of the right, not to the limitation. Any attempt to restrict one's liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger.<sup>62</sup>

Again in 1946, the Court positively asserted its stand on personal liberties.<sup>63</sup> In reversing the contempt conviction of a newspaper editor for interfering with the administration of justice, the Court held that whether you use the words *clear and present* or *grave and immediate* danger, or *real and substantial* threat, the question is always one of balancing the desirability of free discussion against the necessity for a fair adjudication of justice, and in all borderline cases, freedom of speech should weigh heavily. The doors of permissible public comment should be hesitantly closed for they are self-locking. When you close *these* doors you throw the key away and the only way to open them is by force.

### III

How then does this discussion and development of the "clear and present danger" test apply to the facts at hand in the case of Father Terminiello? Was his speech within the redefined area of protected freedom of expression?

As enunciated in the *Bridges*<sup>64</sup> case, speech may not be restrained, unless the *substantial evil* to be avoided is extremely serious. The danger to have been eluded in the instant case was the imminent threat of mob violence, both within and without the auditorium. However, an examination of the record reveals that all, or nearly all, of the parties present were aware of the principles of the sponsoring Christian Veterans of America and their keynote speaker, Terminiello. An intent to hold a private and peaceful assembly was manifested by the requirement of invitations to gain admittance, though the method employed in their distribution was haphazard.<sup>65</sup> While there were several of the hostile faction within range of Terminiello's vile remarks, the vast multitude of his antagonistic opponents were outside of the hall and beyond hearing distance. This latter group were themselves guilty of breaching the peace before Terminiello ever uttered his defamatory statement, in fact

62. *Thomas v. Collins*, 323 U. S. 516 (1945).

63. *Pennekamp v. State of Florida*, 328 U. S. 331 (1946); Comment, 41 Ill. L. Rev. 690 (1947); *Craig v. Harney*, 331 U. S. 367 (1947) (cites *Pennekamp* and *Bridges* cases); *Graham v. Jones*, 200 La. 137, 7 So.2d 688 (1942). *Contra*: *Francis v. Virgin Islands*, 11 F.2d 860 (C. C. A. 3d 1926).

64. See note 59 *supra*.

65. *Chicago v. Terminiello*, 332 Ill. App. 17, 74 N. E.2d 45 (1947) (dissenting opinion).

before he even appeared at the scene. Who then was guilty of provoking the *substantial evil* which the courts have the duty to prevent under the *Bridges*<sup>66</sup> definition of the "clear and present danger" dictate? It would seem that rather than chastising the speaker, such situations demand vigorous measures against the opposition. As was reasoned in a recent write-up of the instant case, "if the police are unable to manage opportunistic trouble-making, free speech rights are meaningless."<sup>67</sup>

The main contention of the strongly worded minority opinion is that the effect of this decision is to strip a municipality of its police power and manner of maintaining the public order and decorum. In support of this view Mr. Justice Jackson expounded:

The choice is not between order and liberty. It is between liberty with order and anarchy without either. 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.<sup>68</sup>

But this view not only contemplates limiting free speech when two opposing ideologies clash, but enables one faction to deprive the other of its basic right to freedom of assembly. Without the right of assembly, guarantees of free speech are empty gestures, since if no public forum is available, the right to speak freely is of little or no consequence. Professor Chafee's thoughts on this subject might well be called in as a rebuttal to Mr. Justice Jackson's fears, "The state must meet violence with violence . . . but against opinionous agitation, bombastic threats, it has another weapon—language. Words as such should be fought with their own kind, and force called in against them only to head off violence when that is sure to follow the utterances before there is a chance for counter-argument."<sup>69</sup>

#### IV

Ever since Holmes' decision in the *Davis*<sup>70</sup> case, the right to freely assemble has been more narrowly construed than the other freedoms.<sup>71</sup> In upholding the right of a city to regulate the use of public property under their police power, Holmes failed to recognize the interdependent relationship of freedom of assembly to freedom of thought.<sup>72</sup> It seems reasonable that the

66. See note 59 *supra*.

67. Comment, 16 U. CHI. L. REV. 328, 332 (1949).

68. *Supra* note 5 at 911.

69. Chafee, *A Contemporary State Trial—The United States v. Jacob Abram's*, 33 HARV. L. REV. 747, 773 (1920).

70. See note 52 *supra*.

71. Jarrett, *Mund, The Right of Assembly*, 9 N. Y. U. L. Q. REV. 1 (1931); Stamps, *Freedom of Assembly*, 11 KAN. CITY L. REV. 187 (1943); Comment, 47 YALE L. J. 405 (1938).

72. See Justice Pound, dissenting, *People v. Atwell*, 232 N. Y. 96, at 104, 133 N. E. 364, at 367 (1921). Comment, 42 HARV. L. REV. 265 (1928).

state under its police power should act in behalf of the health, safety, welfare, and morals of its citizens, but in doing so it should not restrict their inalienable rights; for the police power is subservient to these rights.<sup>73</sup> Thus the *Davis*<sup>74</sup> case, in instituting controls on these inalienable rights, but neglecting to provide means to combat an arbitrary or discriminatory exercise of police power, greatly exceeded constitutional boundaries.<sup>75</sup>

It was not until the *Hague*<sup>76</sup> case that freedom of assembly was restored as cognate to the privilege of free speech. Two very recent cases which reiterate this principle are, *Danskin v. San Diego Unified School District*<sup>77</sup> and *Sellers v. Johnson*.<sup>78</sup> In the latter case, the district court<sup>79</sup> upheld the right of a municipality to refuse to issue a permit to hold a meeting where there was fear of mob violence, basing their decision on the "clear and present danger" test. The Circuit Court of Appeals<sup>80</sup> in reversing and upholding the right of assemblage said: "The fundamental right to assemble, to speak, and to worship cannot be abridged merely because persons threaten to stage a riot or because peace officers believe or are afraid that breaches of the peace will occur if the rights are exercised. If this were possible unpopular groups might find themselves virtually inarticulate."<sup>81</sup> Although the *Danskin*<sup>82</sup> case is distinguishable on its facts, wherein the defendant was refused the use of a public auditorium because he was unwilling to sign an affidavit stating that he was not in favor of the violent overthrow of the government, the court followed the liberal view set forth in the *Bridges*<sup>83</sup> and *Hague*<sup>84</sup> cases. The San Diego School District was enjoined from prohibiting Danskin the use of the auditorium, the court reasoning that the very nature of a democracy implies a right on the part of its residents to peaceably assemble for the discussion of public affairs. As early as 1882<sup>85</sup> it was recognized that municipal officers have no authority to ban a lawful assemblage on the ground that the views to be there expressed are so unpopular that rioting may occur. If lawless elements in the community choose to resort to riot rather than ignoring such propaganda or meeting it by sound argument, it is the duty of the police to protect the lawful assemblage and to repress those who unlawfully attack it. One legal writer remarked that in the long run the public order

73. *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937).

74. See note 52 *supra*.

75. Comment, 23 CALIF. L. REV. 180 (1935).

76. See note 50 *supra*.

77. 28 Cal.2d 536, 171 P.2d 885 (1946); Comment, 26 NEB. L. REV. 416 (1947); 35 CALIF. L. REV. 120 (1947).

78. 163 F.2d 877 (C. C. A. 8th 1947), *reversing* 69 F. Supp. 778 (S. D. Ia. 1946); 61 HARV. L. REV. 537 (1948); 27 NEB. L. REV. 437 (1948).

79. 69 F. Supp. 778 (S. D. Ia. 1946).

80. 163 F.2d 877 (C. C. A. 8th 1947).

81. *Id.* at 881.

82. See note 77 *supra*.

83. See note 59 *supra*.

84. See note 50 *supra*.

85. *Beatty v. Gillbanks*, 9 Q. B. D. 308 (1882).

may best be served by risking a little disorder: "To let off steam may scorch the ceiling; it does not blow off the roof."<sup>86</sup> Since freedom of speech cannot be interfered with by direct legislation, freedom of assembly should find this same protection from prior restraint.<sup>87</sup>

## V

That society must be preserved is the tenet upon which the "clear and present danger" rule rests. But surely we, whose heritage is the unorthodox origin of our society, should realize that the validity of this contention is dependent upon the nature of the society involved. The American concept of society is one of self-government which provides the people almost unlimited liberty to peaceably bring about changes. Few would deny that this is a form of government worthy of protection. But self-government, to be preserved, requires that those to whom it belongs be able to exchange and consider ideas as freely as those to whom they delegate the power to act.<sup>88</sup> Thus it would seem that the right of the government to preserve society, though necessary to the continued existence of the right to free speech, is subservient to it. This ideal has been well stated by Mr. Justice Holmes, the "Great Dissenter," who in his usual role said:

. . . if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.<sup>89</sup>

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86. Comment, 47 YALE L. J. 404, 431 (1938).

87. 10 WIS. L. REV. 298 (1935).

88. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948); but note that this is not meant to imply that the immunity from libel and slander actions granted to Congress should be extended to the public, *id.* at 18.

89. U. S. v. Schwimmer, 279 U. S. 644, 654 (1928).