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CONSTITUTIONAL LAW--FREEDOM OF SPEECH--PERMISSIBLE EXTENT OF LIMITATION

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COMMENTS

CONSTITUTIONAL LAW—FREEDOM OF SPEECH—PERMISSIBLE EXTENT OF LIMITATION—At the present time this nation is greatly concerned over the state of its political health. Advocates of foreign ideologies are asserting their creeds with ever-increasing vigor. The doctrines

they propound are generally conceded to be inconsistent with American ideals, and their activity has induced a feeling of alarm, sometimes attended by hostile reaction. There have been instances where this reaction has taken the form of demands that the proponents of these ideas be silenced. In these circumstances, it becomes important to examine the power of state and federal governments to restrict their activities, particularly with respect to the freedom of speech guaranteed by the Constitution.

The First Amendment states: "Congress shall make no law . . . abridging the freedom of speech. . . ." The Supreme Court has decided that the word "liberty" as used in the due process clause of the Fourteenth Amendment includes freedom of speech.[1] This fundamental right is thus protected against abridging action by both federal and state governments, including the political subdivisions of the latter. It is clear, however, that in neither case is this freedom absolute. What, then, may a speaker say? How far may he go? To what extent may he be punished for disturbing the public tranquility, and at what point will it be constitutional to impose restraints upon him?

The first important statute in this century which was aimed directly at freedom of speech, and which regulated what a person might say (or write) was the Espionage Act of 1917, together with its 1918 amendment. The 1917 act made it criminal to "make or convey false reports or false statements" which would interfere with the operation of the military or aid the enemy.[2] The same language was contained in the 1918 amendment with additional restrictions, and it was made criminal for any person to "utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of the government of the United States" or its Constitution, flag, military forces, and uniforms.[3] The statute laid down broad prohibitions and six of the many prosecutions for violations of it came before the Supreme Court.[4] With one exception, all of these six cases contained counts of conspiracy to violate the act and were concerned with matter printed,

[1] Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625 (1925).

[2] 40 Stat. L. 219 (1917).

[3] 40 Stat. L. 553 (1918). Repealed, 41 Stat. L. 1360 (1921).

[4] Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247 (1919); Frohwerk v. United States, 249 U.S. 204, 39 S.Ct. 249 (1919); Debs v. United States, 249 U.S. 211, 39 S.Ct. 252 (1919); Abrams v. United States, 250 U.S. 616, 40 S.Ct. 17 (1919); Schaefer v. United States, 251 U.S. 466, 40 S.Ct. 259 (1920); Pierce v. United States, 252 U.S. 239, 40 S.Ct. 205 (1920).

published or distributed by the defendants. The one exception was the case of *Debs v. United States*,[5] involving a public speech made by Eugene Debs in Ohio. The charge was that Debs, in delivering the speech, had intended to obstruct recruiting and enlistment as well as to cause mutiny and refusal of duty in the military forces. Debs admitted his intention and attempts to obstruct the war, and, as in the five other cases mentioned, his conviction was affirmed.

In the first of these cases, *Schenck v. United States*,[6] Justice Holmes announced his classic test for determining what limitations may constitutionally be put upon the freedoms of speech and press.

> "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. It is a question of proximity and degree."[7]

For some reason, Holmes did not employ this standard in either the *Frohwerk* or *Debs* cases, which immediately followed the *Schenck* case, and his failure to do so has been criticized.[8] Whatever the reason may have been, the three subsequent espionage cases made it evident that he had not abandoned the test. In these three cases, both Holmes and Brandeis voted against conviction as in each case they did not think that the test had been satisfied.[9] In spite of the liberality shown by the latter two justices,[10] these decisions all affirmed the constitutionality of the Espionage Act and demonstrated

[5] 249 U.S. 211, 39 S.Ct. 252 (1919).

[6] 249 U.S. 47, 39 S.Ct. 247 (1919).

[7] Id. at 52.

[8] Freund, "The Debs Case and Freedom of Speech," 19 NEW REPUBLIC 13 (1919); see also CHAFEE, FREE SPEECH IN THE UNITED STATES 84 (1941). LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 298 (1943) suggests that criticism "should be tempered by an understanding of the problems of judicial strategy."

[9] Abrams v. United States, 250 U.S. 624, 40 S.Ct. 20 (1919); Schaefer v. United States, 251 U.S. 482, 40 S.Ct. 264 (1920); Pierce v. United States, 252 U.S. 253, 40 S.Ct. 211 (1920).

[10] "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is . . . to get itself accepted in the competition of the market. . . . I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." Holmes, dissenting in Abrams v. United States, 250 U.S. 624 at 630, 40 S.Ct. 20 (1919).

that, at least in time of war, the government may make large inroads upon the freedom to disseminate ideas and opinions.[11]

In the area of state legislation directly aimed at limiting the freedom of speech, the criminal syndicalism statutes are of major importance. These statutes make it a crime to advocate or teach any unlawful methods or terrorism as a means of effecting either political or industrial changes, and also prohibit organizing or joining any group advocating criminal syndicalism as defined in the statutes.[12] The first case under such a statute arose in 1925, and while the defendant was convicted for publishing a manifesto, the Court announced that the freedoms of the First Amendment were included within the due process clause of the Fourteenth Amendment.[13] The manifesto contained utterances advocating violent overthrow of the government and while the Court conceived that there might be no present danger that it would stir persons to accomplish this, yet the publication "threatened breaches of the peace and ultimate revolution."[14] The Court was willing to accept the state legislature's determination that such utterances were inimical to the public welfare.

Two years after this decision, the Supreme Court reviewed three criminal syndicalism cases on the same day. In two of these,[15] it affirmed the constitutionality of the California syndicalism act and convictions under it. In discussing the constitutionality of the act, the Court again showed that it would give great weight to the state legislature's determination that such legislation was necessary to combat an existing evil. In one case, Justice Brandeis wrote a separate opinion containing a masterly exposition of the policy behind, and the operation of, the clear and present danger rule.[16] Holmes concurred in Brandeis' opinion and both concurred with the majority as defendant had failed to show circumstances tending to prove there had been no danger of the substantive evil claimed by the state as justification for the statute. In the third case, the Supreme Court held that the Kansas

[11] The constitutionality of a state statute similar to the Espionage Act was affirmed in Gilbert v. Minnesota, 254 U.S. 325, 41 S.Ct. 125 (1920).

[12] For sample statutes and a study of the forces and factors involved in enacting and repealing these laws, see DOWELL, A HISTORY OF CRIMINAL SYNDICALISM LEGISLATION IN THE UNITED STATES (1939).

[13] Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625 (1925).

[14] Id. at 669.

[15] Burns v. United States, 274 U.S. 328, 47 S.Ct. 650 (1927); Whitney v. California, 274 U.S. 357, 47 S.Ct. 641 (1927).

[16] Whitney v. California, 274 U.S. 372, 47 S.Ct. 647 (1927).

criminal syndicalism statute, as applied to the defendant, was unconstitutional.[17] In this case, it was not shown that the organization for which defendant solicited memberships advocated any crime, violence, or other unlawful action of the types named in the statute. Some years later, the Court likewise held that the Oregon criminal syndicalism law, as applied, was an unconstitutional deprivation of the rights of free speech and assembly.[18] In that case, the Court reversed the conviction of a defendant who had assisted in conducting a meeting held under the auspices of the Communist Party, on the ground that no teaching or advocacy of unlawful acts at the meeting was shown.

These decisions clearly indicate that it is within the power of a state to punish advocacy of, and incitement to, violent action for the overthrow of existing institutions by revolutionary or other unlawful methods. It must, however, appear that there is an existing danger to the state in order for such legislation to be justified. In the earlier cases, the state legislature's determination of that fact appears to have been controlling, but the more recent cases indicate that the Court is now likely to make its own examination of the circumstances and strike down the legislation if it cannot find a clear and present danger. Thus the application of a Georgia insurrection statute to a Communist organizer was held unconstitutional, because the statute was too indefinite and because the violence advocated by the organizer was too distant to be a present threat.[19] Likewise, the Court found that encouraging people not to salute the flag, while it might create disrespect for the government, could not constitutionally be made a crime since it constituted no danger to existing institutions.[20]

Just as the Supreme Court has decided that limits may be put upon freedom of speech for the protection of the government, public institutions, and the law, so it has decided that limits may be put upon that

[17] Fiske v. Kansas, 274 U.S. 380, 47 S.Ct. 655 (1927).

[18] DeJonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255 (1937).

[19] Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732 (1937). "Appellant's intent to incite insurrection, if it is to be found, must rest upon his procuring members for the Communist Party and his possession of that party's literature when he was arrested." Id. at 253. This did not constitute a clear and present danger.

[20] Taylor v. Mississippi, 319 U.S. 583, 63 S.Ct. 1200 (1943). Cf. Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532 (1931). In effect, speech was compelled by holding constitutional a compulsory salute and pledge of allegiance in Minersville School District v. Gobitis, 310 U.S. 586, 60 S.Ct. 1010 (1940), overruled by West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178 (1943).

freedom for the protection of the individual. The latter type of limitation is illustrated by the case of *Chaplinsky v. New Hampshire*.[21] In that decision, the Supreme Court upheld the constitutionality of a statute which prohibited a speaker from calling any person an offensive name in a public place. As construed and applied, the operation of the statute was limited to those cases wherein such name calling might directly tend to cause a breach of the peace. The appellations "damned racketeer" and "damned Fascist", directed at the city marshall, were found by the Court to be "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[22] The Supreme Court thus held that what it characterized as "fighting"[23] words could constitutionally be prohibited. The difficulty with the decision, of course, comes in determining what words are "fighting" words. Terms that might incense one person may leave others unruffled, and what might be a "fighting" word today may well lose its provocative effect tomorrow. Fortunately, the effect of the *Chaplinsky* decision may have been somewhat abated by a later decision in which the Supreme Court described the words "unfair" and "Fascist" as loose language and said they were "part of the conventional give-and-take in our economic and political controversies."[24]

Up to this point, consideration has been confined to statutes that have directly regulated what a speaker might say, what words he might use, or what he might advocate: statutes aimed at controlling the content of his speech.[25] Consideration must be given as well to the many statutes which, while having the accomplishment of some other purpose as their main object, nevertheless have an important effect on limiting the freedom of speech. Of this sort are the statutes designed to preserve and promote the peace, good order and convenience of the community. The fundamental freedom questions raised in the application of some classes of these statutes have been fairly well settled. The constitutionality of statutes requiring licenses or permits to be

[21] 315 U.S. 568, 62 S.Ct. 766 (1942).

[22] Id. at 572. Cf. Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940).

[23] Chaplinsky v. New Hampshire, 315 U.S. 568 at 572, 62 S.Ct. 766 (1942).

[24] Cafeteria Employees Union v. Angelos, 320 U.S. 293 at 295, 64 S.Ct. 126 (1943).

[25] See also Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923) and Bartels v. Iowa, 262 U.S. 404, 43 S.Ct. 628 (1923) which held unconstitutional statutes prohibiting the teaching of any modern language except English in the schools. Note that these cases were decided before the Supreme Court announced the inclusion of First Amendment freedoms within the Fourteenth. Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625 (1925).

obtained in order to hold meetings in public places,[26] to have parades,[27] to make house-to-house solicitations,[28] or to distribute literature[29] have all been passed upon by the Court. The same is true of statutes regulating picketing and the use of placards to publicize the facts of labor disputes.[30] With respect to those statutes which are designed to prevent breaches of the peace, however, the law is still unsettled. Just how much these statutes may limit a public speaker's freedom of speech is a question which so far appears to have defied solution.

The case of *Terminiello v. City of Chicago*[31] raised the question, but the Court, unfortunately, avoided answering it directly. In that case, Terminiello delivered a speech before some eight hundred people in an auditorium while a crowd of over a thousand people outside the auditorium vigorously protested the meeting by both voice and action. In his speech, Terminiello used such expressions as "slimy scum" and "skunks of Jews" and denounced the Roosevelt family, the New Deal, Communism, Morgenthau, and Zionist Jews. The evidence was conflicting as to the extent of his audience's reaction to the speech, but there was no actual clash between his listeners and the crowd outside. He was convicted under a Chicago ordinance[32] for creating a breach of the peace.[33] The Supreme Court of the United States reversed, saying:

> ". . . freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious or substantive evil that rises far above the public inconvenience, annoyance, or unrest. . . .
>
> The ordinance as construed by the trial court seriously invaded this province. It permitted conviction of petitioner if his

[26] Hague v. CIO, 307 U.S. 496, 59 S.Ct. 954 (1939).

[27] Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762 (1941).

[28] Jones v. Opelika, 316 U.S. 584, 62 S.Ct. 1231 (1942), reversed, 319 U.S. 103, 63 S.Ct. 890 (1943); Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870 (1943); Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862 (1943).

[29] Schneider v. State, 308 U.S. 147, 60 S.Ct. 146 (1939); Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438 (1944).

[30] Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736 (1940); Carlson v. California, 310 U.S. 106, 60 S.Ct. 746 (1940).

[31] (U.S. 1949) 69 S.Ct. 894.

[32] "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. . . ." Chicago Rev. Code (1939) §1 (1), c. 193.

[33] Chicago v. Terminiello, 400 Ill. 23, 79 N.E. (2d) 39 (1948).

> speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand."[34]

By thus disposing of the case, the Court did not reach the issue of whether the epithets mentioned were "fighting" words, which they had said in the *Chaplinsky* case were outside the scope of constitutional protection. Nor did the Court indicate the extent to which a speaker might disrupt the public tranquility and still be protected. The opinion of the majority seems to indicate, however, that in cases of this sort, the test to be applied is that of clear and present danger.[35] It must be remembered that the clear and present danger test would make a "breach of the peace" limitation on speech unconstitutional unless the limitation served to ward off a substantive evil that was not only imminent but of a very serious nature.[36] It has been pointed out[37] that in the Illinois courts, Terminiello was found to have breached the peace in five different ways. Whether any one or all of these would have amounted to a sufficiently serious substantive evil to have warranted the limitation one cannot determine from the majority opinion of the Supreme Court. Justice Jackson, in his dissenting opinion, made it clear that he had no doubt that Terminiello's conduct in the existing situation satisfied all the elements of the clear and present danger test.[38]

Assuming that the Court has indicated an intention to apply Holmes' rule in cases of this sort, the quesion arises: is it the best way

[34] Terminiello v. Chicago, (U.S. 1949) 69 S.Ct. 894 at 896. Four justices dissented as they thought the Court had seized upon an improper ground for reversal: one that was not objected to below, nor argued before the Supreme Court. Two of these indicated as well that they were in favor of affirming the conviction.

[35] Note, however, that Douglas' statement of the test, "unless shown likely to produce a clear and present danger," [id. at 896] differs from Holmes' statement, "create a clear and present danger," at note 7, above.

[36] "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 mark the furthermost 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 of 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." Bridges v. California, 314 U.S. 252 at 263, 62 S.Ct. 190 (1941).

[37] 16 UNIV. CHI. L. REV. 328 (1949).

[38] (U.S. 1949) 69 S.Ct. 899. Contrast the opinion of Niemeyer, P.J., dissenting when the case was in the Illinois Appellate Court, 332 Ill. App. 41 (1947).

of determining at what point a speaker may constitutionally be limited? It has been suggested that the test should be abandoned,[39] and that the freedom of the speaker should be made to depend upon whether the content of his speech is concerned with matters affecting the public interest[40] or those affecting matters of private interest only. It is urged that protection of speech involving the former should admit of no exceptions, while protection of speech involving the latter may be subject to such restrictions as the general welfare of the community may require. The classification may have a reasonable basis, but it does not seem to help in determining where to draw the line on statutory restraints. If one surmounts the difficulty of resolving what speech is of public interest, he meets the difficulty of determining how to deal with speech that contains matter of mixed public and private interest. Again, so far as speech of purely private interest is concerned, how is one to measure what the welfare of the community may require? Classification and application of a double standard do not seem to bring the solution of the problem any closer.

The use of the clear and present danger test involves many difficulties too. As well as satisfying all the elements of the test, there is still the problem of determining just how much responsibility should be pinned on the speaker for the actions of the crowd he addresses. If he is guilty of a breach of the peace because the words he uses provoke someone to action against him or his party, then it appears that the speaker can be effectively throttled. On the other hand, if the speaker, even without directly urging action, incites the crowd to massacre members of a minority group or to the riotous destruction of property, then it would seem he should be prohibited from claiming protection under the Constitution. Clearly, some responsibility must be put upon the crowd. Freedom of speech should not be abridged merely to shelter the public from exposure to ideas they may detest and which may provoke them to some action. Nor should it be restricted merely to suit the convenience of law enforcement officials. The problem is one of balancing the fundamental freedom of unimpaired speech against the danger to society that is sometimes likely

[39] MEIKELJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948); Rosenwein, "The Supreme Court and Freedom of Speech—Terminiello v. City of Chicago," 9 LAWYERS GUILD REV. 70 (1949).

[40] Speech which bears, directly or indirectly, upon issues with which voters have to deal: MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 94 (1948).

to result from unbridled oratory. In using the clear and present danger test, the Court must take all the circumstances into consideration. These include the content of the speech, the attitude and reactions of the crowd, the vehemence of the speaker, the nature of the action urged, if any, and what action resulted from giving the speech. In order to find any limitation upon the speaker justified, the Court, in applying the test as it was laid down by Holmes and developed by Brandeis, would have to apprehend an imminent danger and would have to find that the danger was a serious one. "The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state."[41]

There are some members of the Court who dislike the clear and present danger rule.[42] It seems to this writer, however, that the continued existence of freedom of speech depends upon an ordered society, which in turn demands that the freedoms given in the Constitution be not absolute. This being the case there must be some guide to assist both the state and the individual in determining what they may constitutionally do in this field. The clear and present danger test is no magic formula which automatically gives a correct solution in each case to which it is applied, nor should it be. It is only a helpful guide in determining where to strike the balance of social interests. With enlightened application[43] it should assist the judiciary in allowing the preservation of order by national and state governments without unduly infringing upon the freedom of speech guaranteed by the Constitution.

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[41] Whitney v. California, 274 U.S. 357 at 378, 47 S.Ct. 641 (1927).

[42] See discussion of the development of the rule in Green, "The Supreme Court, The Bill of Rights, and The States," 97 UNIV. PA. L. REV. 608 (1949). The author states, at p. 636: "While clear and present danger has now become a formidable weapon for the defense of the First Amendment freedoms, it seems likely to remain formidable only so long as it is wielded by a willing arm." Two of the proponents of the rule have recently died. The opponents of the rule are still on the bench. The new members of the court may determine whether there shall be a "willing arm."

[43] "This is a rule of reason. Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities and from abuse by irresponsible, fanatical minorities. Like many other rules for human conduct, it 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." Brandeis, dissenting in Schaefer v. United States, 251 U.S. 466 at 482-3, 40 S.Ct. 259 (1920).