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CONSTITUTIONAL LAW-FREEDOM OF SPEECH

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RECENT DECISIONS

CONSTITUTIONAL LAW—FREEDOM OF SPEECH—Defendant addressed a crowd of people, white and Negro, on a public sidewalk for the purpose of urging them to attend a certain meeting. During the course of his speech he "'called Mayor Costello [of Syracuse] a champaign [*sic*] sipping bum and President Truman a bum. He referred to the American Legion as Nazi Gestapo agents—he also said the fifteenth Ward was run by corrupt politicians and that horse rooms were operating.'"[1] He also appealed to the Negroes to rise up and fight for equal rights. The police were called but at first merely observed the gathering. Angry mutterings were heard as the crowd became divided in its sentiments toward the speaker. Pedestrians were unable to pass without going out into the street. Finally, after the police gave defendant several ineffective warnings to stop talking, he was arrested and convicted of disorderly conduct in violation of a state statute,[2] over his objection that his freedom of speech had been unconstitutionally denied. On appeal to the New York Court of Appeals, *held,* affirmed. The constitutional guarantee of freedom of speech does not make this right absolute. Conviction for disorderly conduct does not infringe upon this right where the speaker on a public street encourages his audience to become divided into hostile camps, interferes with traffic, and deliberately agitates and goads the crowd and police officers into action. *People v. Feiner,* 300 N.Y. 391, 91 N.E. (2d) 316 (1950).[3]

Freedom of speech was first declared by the United States Supreme Court to be a fundamental right protected by the due process clause of the Fourteenth

[1] Principal case at 395.

[2] Criminal Code and Penal Law of New York (Clevenger-Gilbert 1948) §722. "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: 1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior; 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; 3. Congregates with others on a public street and refuses to move on when ordered by the police; . . ."

[3] Since the writing of this decision note, the United States Supreme Court has affirmed, in a six-three decision, Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303 (1951).

Amendment in the *Gitlow* case, decided in 1925.[4] In the same opinion the Court recognized that this right was not absolute, but rather subject to police power regulation. Since this significant decision, the Court has zealously protected freedom of speech. The "evil tendency" test, under which it is simply necessary to determine whether utterances "are . . . inimical to the general welfare and involve . . . danger of substantive evil"[5] in some specific manner, was the Court's first test for determining whether or not speech could be properly restricted. From time to time various members of the Court have advocated the "clear and present danger" test as a better criterion for protecting the right of free speech without an additional evil effect upon general welfare, since this test requires a showing of causal relationship of the utterance to an evil result before speech can be restricted.[6] Another limitation which has been imposed upon the right of free speech, very similar to the "clear and present danger" test, is the "fighting words" test, whereunder a person does not have a right to use language which would provoke his listener to violence.[7] The principal case appears to employ a combination of the "clear and present danger" and "fighting words" test insofar as it holds that defendant had no right to turn the members of the crowd against each other to a point where open hostility and violence appeared probable. The United States Supreme Court has already held, on facts quite similar to those of the principal case, that a defendant's right of free speech was unconstitutionally abridged.[8] Defendant Terminiello was there arrested for creating a breach of the peace, under an ordinance almost identical in wording to the statute in the principal case, after making a most abusive speech in a private hall, inciting, not his audience, but members of minority groups outside the hall, to acts of violence. The Supreme Court there held the trial court's broad construction of the ordinance, to the effect that breach of the peace included speech which "'stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance'"[9] was invalid without, therefore, having to decide the question of whether or not the content of the speech carried it outside the scope of the constitutional guarantee. The "fighting words" test presumably was not applicable, since those to whom the speech was directed were not the ones aroused to violence. This, plus the fact that the speech took place in a private hall, provided a ground of distinction upon which the court in the principal case could distinguish the *Terminiello* decision, for defendant here spoke on

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

[5] Id. at 668.

[6] This test first appeared in Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247 (1919), where the Federal Espionage Act was in question. The test was later placed upon a constitutional level by Justice Holmes' dissent in Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625 (1925). See also Justice Jackson's dissent in Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894 (1949), and Justice Brandeis' concurring opinion in Whitney v. California, 274 U.S. 357, 372, 47 S.Ct. 641 (1927). At the present time it is not clear how much support this test has among members of the Supreme Court.

[7] Chaplinsky v. New Hampshire, 315 U.S. 568 at 571-572, 62 S.Ct. 766 (1942); Cantwell v. Connecticut, 310 U.S. 296 at 308-310, 60 S.Ct. 900 (1940).

[8] Terminiello v. Chicago, supra note 6, (five-four decision).

[9] Terminiello v. Chicago, supra note 6, at 3.

a public sidewalk, thus obstructing traffic, and agitated a crowd of mixed sympathizers and opponents with intent to create a breach of the peace. These are probably valid distinctions which may facilitate limitation of the scope of the *Terminiello* case, should the Supreme Court so desire.[10]

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[10] Certiorari granted May, 1950. People v. Feiner, 339 U.S. 962, 70 S.Ct. 987, affd. 1951. See note 3 supra.