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Current Decisions in Constitutional Law

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Freedom of Speech and The Need for Public Order
Terminiello v. City of Chicago, 69 S. Ct. 894

"Underneath a little issue of Terminiello and his hundred dollar fine lurk some of the most far-reaching constitutional questions that can confront a people who value both liberty and order"—(JACKSON, J.)

The importance of the Terminiello case lay in the promise it held. It seemed as though a precise and grave issue would be answered by the court. The facts in this case presented dramatically a problem that has arisen in almost every community. When men speak in public halls or on the streets, expressing ideologies that are to our way of thinking dangerous or hostile, when they incite people to anger or unrest or riot, shall they be suppressed or punished? What does freedom of speech, guaranteed by the First Amendment, mean? Shall we grant it to those who would deny it to us or who seek by their speech to change our institutions? The case contained the hope of an answer that yet remains unfulfilled.

The facts of the case can only be understood by reading the opinions of the Illinois Appellate Court, 74 N.E. 2d 45, the Illinois Supreme Court, 71 N.E. 2d 2, and the minority opinion of Justice Jackson. Terminiello, advertised as a Catholic priest, was brought to Chicago to address a gathering which had been called by Gerald L. K. Smith. The auditorium was filled to capacity with over 800 persons present. Outside of the auditorium a crowd of about 1000 persons violently protested against the meeting. There were disturbances within the auditorium and outside. The crowd was angry and turbulent. The Illinois court found that Terminiello had called members of the audience "scum" and other abusive words; that he used abusive language and incited an actual breach of the peace within the auditorium. The court further held that his conduct in scheduling an address invited a storm of protest which resulted in innumerable acts of violence and that by his provocative and inflamatory utterances he instilled in his audience the fear of revolution; that he indulged in hate-mongering against racial groups; that all of this speech tended to incite the majority of his audience to immediate violence against the angry mob outside.

Terminiello, after jury trial, was found guilty of disorderly conduct in violation of a city ordinance of Chicago and fined $100.00. The conviction was affirmed by the Illinois Appellate Court and the Illinois Supreme Court, but the United States Supreme Court reversed, the majority refusing to answer whether the content of petitioner's speech was composed of derisive

fighting words which were beyond protection of the Constitution. Instead, the majority discovered in the record one instruction which it held to be error. The trial court had charged that "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". The majority held that the ordinance as construed by the state court permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. The court said the petitioner was not convicted under a statute so narrowly construed that it only punished conduct constituting "fighting words". Petitioner might have been convicted under parts of the ordinance which make it an offense merely to invite dispute or create a condition of unrest. Under the *Stromberg* case, 51 S. Ct. 532, a general verdict cannot be sustained where it might rest upon one part of a statute which is unconstitutional and where it might well be that the defendant was convicted under that part.

Dissenting Opinions Reveal Significance of Case

In dissent, Chief Justice Vinson and Justice Frankfurter castigate the majority for reversing a sentence upon a constitutional ground that was not urged in any of the state courts nor argued before the Supreme Court. The charge to the jury was not a bit of abstraction. The fact is that the Illinois courts construed the ordinance as punishing only the use of "fighting words". The minority held that the petitioner's speech had been found by the jury to come within such category. Justice Jackson pointed out that, when the trial judge instructed the jury, he was not speaking of harmless or abstract conditions, but referring to the concrete behavior and consequences disclosed by the evidence. The true significance of the case is brought to light when reading the evidence cited by Jackson in dissent.

Jackson insists upon a judgment on the merits of the case. To him the court has substituted a dogma of absolute freedom for irresponsible and provocative utterances. He does not deny the legal right of an American to advocate any kind of ideology or to express any sentiments. Where, however, speech is made in the context of violence and disorder and provokes immediate breach of the peace, it cannot claim constitutional immunity. The state and the city have the right and duty to prevent and punish rioting. In some cases the authorities must deal with speech as also an offense. There was here, he argues, no prior censorship or suppression upon Terminiello. The state does not punish him to silence the ideology he expresses or to discriminate against him or the facts which he represents. Freedom of speech exists only under law and Terminiello's theoretical right to speak would have no reality if Chicago should withdraw its protection when the crowd threatens Terminiello. Should society have nothing to say, then, about his behavior which may force others into dangerous action?

To Jackson the case represents not an isolated conflict of political, racial or ideological opponents, but a world-wide conflict between organized groups of revolutionaries. To him the record shows their strategy to master the streets. The opinion of the majority has sterilized the power of local authorities to preserve the peace.

It is hard to accept the charge of Jackson that the majority has "substituted a dogma of absolute freedom for irresponsible and provocative utterances", for the truth is that the court did not reach the issue which Jackson dealt with. If the decision means anything it means that freedom of speech will be constitutionally protected even where it invites dispute, creates dissatisfaction with conditions as they are, or even stirs people to anger. It is based upon the concept that only through free debate and free exchange of ideas does government remain responsive to the will of the people. The majority does suggest that freedom of speech is not absolute. When the need for public order conflicts with freedom of speech then it is still the "clear and present danger" test, formulated many years ago, which expresses the limitation to this freedom. Thus the court in this case says that speech will be "protected unless shown likely to produce a clear and present danger of a serious substantive evil that arises far above public inconvenience, annoyance or unrest".

Reflections on The Case

I should like to comment briefly upon the real problem in this case. In talking of freedom of speech we know that we must distinguish between speech that involves the public interest as against the private interest. Mr. Chafee analyzed the two interests in the "freedom of speech" which is protected by the First Amendment. There is the individual interest for men to express their opinions on matters important to them if life is worth living, and the social interest in attainment of truth. The difference between these two interests can be understood by comparing such cases as the *Cantwell* case, 60 S. Ct. 900 and the *Chaplinsky* case, 62 S. Ct. 766. It seems clear that where speech serves individual or private interest it may well be under legislative control. We know, for example, that obscene, abusive language, and fighting words, may be restrained. In such cases there is no social interest in the attainment of truth. The speech is not an expression of ideas in which the public has an interest. We also know that speech may be more than the expression of thought, but a form of action. "Every idea is an incitement". Freedom of speech must mean more than freedom to indulge in academic discussion. We know that all incitement to action may not be abridged or punished.

Let us consider the Terminiello case as though the speech expressed ideas in which the public had an interest. Although it incites to action, can it ever be abridged and how shall we reconcile the clash between the need for public order and the importance of free discussion in our society? The clear and

present danger test which is again reaffirmed in the opinion seems somehow inadequate. Where do we draw the line to mark-off the statements of Terminiello which are permissible and which are not so? Does not the formula become purely subjective depending upon the judge? Behind the lines can we say that to Judge Douglas, who did not answer the question, there was really not a clear and present danger of a serious evil to justify punishment, while to Judge Jackson it was undisputed? The test does not inform us what kinds of speech can claim freedom.

If we are to suppress speech which is in the public interest because the speaker knows it will result in violent protest, would this not be previous censorship? Could we even have real freedom of discussion on public issues where the reaction of an audience would become so inflamatory or violent as to incite to breaches of peace? Should we not hold the audience responsible rather than the speaker and would not society lose if we were to suppress ideologies expressed in a context of great emotion? Professor Chafee has sought to clarify the test as follows:

> "The principle on which speech is classified as lawful and unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth. Every reasonable attempt should be made to maintain both interests unimpaired and the great interest of free speech should be sacrificed only when the interest in public safety is really imperiled and not, as most men believe, when it is barely conceivable that it might be slightly affected". *Free Speech in the United States,* Page 35.

But a serious scholar, Alexander Meiklejohn, *(Free Speech and Its Relation to Self-Government)* criticizes this doctrine. Where the speech is a matter of public discussion, where it is a search for truth even though public safety becomes imperiled, the search should not be checked. This is the price of our self-government. To him, the First Amendment relates to the freedom of public discussion and there can be no abridgment of this freedom even when it incites to anger or violence. "When men decide to be self-governed, to take control of their behavior, the search for truth is not merely one of a number of interests which may be balanced on equal terms against one another", he says on page 69. "We have decided to be self-governed. We have measured the dangers and the values of the suppression of the freedom of public inquiry and debate and on the basis of that measurement, having regard for the public safety, we have decided that the destruction of freedom is always unwise, that freedom is always expedient". (Page 65).

Traditionally, the cases on freedom of speech do not embody this concept of Meiklejohn, but if the clear and present danger test is really only a personal yardstick we might well reconsider its meanings in a period when we are characterizing any thought which is not orthodox as dangerous.