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same rule would be made applicable in the House? The possibility that legislation passed without a record vote might be "invalidated" was suggested by the dissent.[32]

If the Court continues to follow the policy of several of its previous decisions,[33] to the effect that the enrolled bill[34] is conclusive evidence of enactment, and that no other evidence is admissable to establish that the bill was not lawfully enacted, such a proposition as is envisioned by the dissent would seem to be without foundation.

LINDSAY C. WARREN, JR.

Constitutional Law—Freedom of Speech—Conflict with Power of State to Control Breaches of the Peace

There are inherent inconsistencies between the power of the state to punish breaches of the peace and the constitutional protections of the First Amendment. The case of *Terminiello v. Chicago*[1] exemplifies the problem of weighing the sometimes conflicting social interests in the maintenance of public order and in the free expression of ideas.

The case arose out of an address by Terminiello before an audience of over eight hundred. About one thousand persons, opposed to his espoused doctrine of racial and religious supremacy, had gathered about the auditorium in protest. A police detail, assigned to the meeting, was unable to prevent several disturbances and minor acts of violence. The speech itself viciously attacked various political and racial groups. The general setting, then, was an address, pseudopolitical in nature, but scurrilous and opprobrious in content, delivered in an auditorium surrounded by an angry and turbulent crowd.

Terminiello, after jury trial, was convicted of violating an ordinance[2] of the City of Chicago by making an improper noise or diversion tending to a breach of the peace.

The trial court charged that "misbehavior may constitute a breach

[32] Christoffel v. U.S., 338 U.S. 84 (1949).

[33] Field v. Clark, 143 U.S. 649 (1891); Lyons v. Woods, 153 U.S. 649 (1894); Harwood v. Wentworth, 162 U.S. 547 (1896); Twin City Bank v. Nebeker, 167 U.S. 196 (1897); Hubbard v. Lowe, 226 F. 135 (S. D. N. Y. 1915); *see* Coleman v. Miller, 307 U.S. 433, 457 (1939) (concurring opinion); Flint v. Stone Tracy, 220 U.S. 107, 143 (1910); *cf.* Leser v. Garnett, 258 U.S. 130 (1922); U.S. v. Ballin, 144 U.S. 1 (1892).

[34] An enrolled bill generally refers to a bill which purports to have passed both houses of the legislature, and which has been signed by the presiding officers of the two houses. The Supreme Court of the U.S. includes not only process of enactment within the legislature itself, but also signature by the President and filing with the Secretary of State.

[1] 69 Sup. Ct. 894 (1949).

[2] "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 . . . shall be deemed guilty of disorderly conduct . . ." , City of Chicago, REV. CODE 1939, c. 193, §1(1).

of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." The defendant took no exception to that instruction, but maintained that the ordinance as applied to his conduct violated his right to free speech under the Federal Constitution. The Illinois appellate courts found that the speech was composed of derisive, "fighting" words, which carried it outside the scope of the constitutional guarantees, and affirmed the conviction.[3]

The United States Supreme Court did not reach the "fighting words" issue, but held the trial court's instruction to be a binding construction of state law, permitting conviction of the defendant if his speech invited public dispute or brought about a condition of unrest, and, thus construed, the ordinance was unconstitutional. That defendant took no exception to the charge was held to be immaterial since he had attacked the ordinance as a whole, and the verdict being a general one, it could not be determined that the defendant was not convicted under the unconstitutional construction of the statute.[4]

Mr. Justice Jackson dissented on the ground that the court, in lifting the charge to the jury out of its context, had considered it as an abstraction, and that the charge, when given, took color from the realities surrounding the delivery of the address. Accordingly, the jury had found a breach of the peace of a nature not entitled to constitutional protections.[5]

The First Amendment is unequivocal in its expression that "Congress shall make no law . . . abridging the freedom of speech."[6] And, by virtue of the due process clause of the Fourteenth Amendment, this freedom is protected from impairment by the states.[7]

But all speech is not protected. Certain classes of speech, including the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words are punished because "their very utterance inflict injury or tend to incite an immediate breach of the peace."[8]

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

[4] The court relies upon Stromberg v. California, 283 U.S. 359 (1931), where a statute proscribed three types of conduct and a general verdict of conviction followed. There it had been contended throughout the proceedings that one of the proscriptions was invalid under the Fourteenth Amendment. All the *Stromberg* case holds is that where the validity of a statute is successfully assailed as to one of three clauses of the statute, and all three clauses were submitted to the jury, the general verdict has an infirmity because it cannot be assumed that the jury convicted on the valid portion of the statute. The case offers no precedent for searching the record for error that at no time was urged before the state court and that was explicitly disclaimed on behalf of the defendant before the Supreme Court. See Mr. Justice Frankfurter, dissenting in Terminiello v. Chicago, 69 Sup. Ct. 894, 898 (1949).

[5] Terminiello v. Chicago, 69 Sup. Ct. 894, 900 (1949) (dissenting opinion).

[6] U.S. CONST. AMEND. I.

[7] Thornhill v. Alabama, 310 U.S. 88, 95 (1940); Gitlow v. New York, 268 U.S. 652, 666 (1925); *cf.* Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922).

[8] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Since such ut-

Speech of public interest, including words of idea-conveying nature, may be punished if "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 (the state) has a right to prevent."[9] This clear and present danger test was first enunciated in an "attempt" case to determine whether the verbal acts came close enough to the acts described in the statute to be punished.[10] It has since been employed to test the validity of a statute on its face[11] and to determine whether a conviction obtained under a statute not found to be invalid could be sustained.[12] It has been applied to test a conviction for common law breach of the peace.[13] However, if the statute itself declares that certain utterances are inimical to the public welfare, idea-conveying speech may be punished without the necessity of satisfying the clear and present danger test.[14]

The propriety of the court's searching the record for error and the question of whether the jury may have convicted Terminiello of merely

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terances do not form an essential part of any exposition of ideas and are of slight social value as a step toward truth, any benefit that may be derived from them is outweighed by the social interests in order and morality. CHAFEE, FREE SPEECH IN THE UNITED STATES 150 (1941). This was the rationale of the Illinois courts' holding that Terminiello's speech was not within the constitutional guarantees; he had referred to certain racial groups as "slimy scum," "bedbugs," and "snakes."

See State v. Warren, 113 N. C. 683, 18 S. E. 498 (1893) (an act of the Legislature making it unlawful to use profane language in certain localities is not an undue interference with freedom of speech).

[9] Shenk v. United States, 249 U.S. 47, 52 (1919).

[10] Shenk v. United States, *supra* note 9.

[11] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Thornhill v. Alabama, 310 U.S. 88 (1940).

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

[13] Cantwell v. Connecticut, 310 U.S. 296 (1940). The test was referred to and approved in both the majority opinion and Mr. Justice Jackson's dissenting opinion in the instant case. *See* Terminiello v. Chicago, 69 Sup. Ct. 894, 896, 905 (1949).

The quoted expression from the *Shenk* case has represented the traditional phrasing of the clear and present danger test. It has occasionally been paraphrased to the same general effect: ". . . suppression of expression of opinion is tolerated only when the expression *presents* a clear and present danger . . ." (italics mine). *See* West Virginia Board of Education v. Barnette, 319 U.S. 624, 633 (1943). Mr. Justice Douglas, in the majority opinion, uses the phrasing "*likely* to produce a clear and present danger" (italics mine). *See* Terminiello v. Chicago, 69 Sup. Ct. 894, 896 (1949). This should not represent a departure from the principle that "the degree of imminence of the substantive evil must be extremely high before utterances can be punished." *See* Bridges v. California, 314 U.S. 252, 263 (1941).

[14] Gitlow v. New York, 268 U.S. 652 (1925). Whether the "Gitlow distinction" is still the law is not clear. The Gitlow case was distinguished in Herndon v. Lowry, 301 U.S. 242, 256-258 (1937). The distinction was not applied in Taylor v. Mississippi, 319 U.S. 583, 589 (1943) or Thornhill v. Alabama, 310 U.S. 88, 105 (1940). But the Gitlow distinction was regarded as the law in Dunne v. United States, 138 F. 2d 137 (8th Cir. 1943), *cert. denied*, 320 U.S. 790 (1943), *rehearings denied*, 320 U.S. 814, 815 (1944). However the appeal of the conviction of the Communist leaders may provide a definitive statement as to whether the clear and present danger test must be satisfied for a conviction under an act such as the North Carolina Subversive Activities Statute, N. C. GEN. STAT. 14-11 (1943), discussed in 19 N. C. L. REV. 466 (1941).

"inviting public dispute" are not the fundamental problems posed by the *Terminiello* case. Rather the question is, "To what extent is control of the expression of ideas compatible with dynamic democratic processes?" And, conversely, "How may the order requisite to the functioning of a democratic society be maintained without restrictions upon the abuse of the freedoms of expression?"[15]

We have seen that the constitutional guarantees are not absolute, but that speech of public interest is subject to the clear and present danger restriction; and when the statute itself declares certain speech to be unlawful, even that test may not need to be satisfied. Our right to express ideas of public interest is not unqualified, but may be limited. That is the meaning of the First Amendment as interpreted by the Supreme Court.

This construction is inconsistent with the literal language of the Amendment and perhaps with our traditions.[16] It is incompatible with the interpretation that "no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information may be kept from (the voting citizen)."[17] There are those who believe that, so construed, the constitutional protection is essentially stripped of its vigor.[18]

But there are others who, with equal sincerity and conviction, feel that if the interchange of ideas contemplated by the First Amendment is to serve its aim, their presentation must be accompanied by order; and that the weapon of either the Facist or Communist who would overthrow democracy is disorder and mob action. Accordingly, they feel that the recent cases, culminating in the *Terminiello* case, in their effort to protect the freedoms of expression, are undermining the police power that is the community's only protection from lawlessness and anarchy.[19]

[15] "The problem which Lincoln cast in memorable dilemma: 'Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?'" *See* Minersville School District v. Gobitis, 310 U.S. 586, 596 (1940).

[16] "If there be any among us who wish to dissolve this union, or to change its republican form, let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." Jefferson, First Inaugural Address.

But cf. Mr. Justice Jackson's thesis that since the people, in adopting state constitutional provisions, have universally qualified them to make persons responsible for abuse of the liberty of free speech, that is what is meant by the cryptic phrase "freedom of speech" as used in the Federal Constitution. *See* Terminiello v. Chicago, 69 Sup. Ct. 894, 907 (1949) (dissenting opinion).

[17] MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 89 (1948).

[18] See MEIKLEJOHN, *op. cit. supra* note 17 and Rosenwein, *The Supreme Court and Freedom of Speech*, 9 LAW GUILD REV. 70 (1949).

[19] "Streets and parks maintained by the public cannot legally be denied to groups 'for the communication of ideas.' Hague v. C.I.O., 307 U.S. 496 (1939); Jamison v. Texas, 318 U.S. 413 (1943). Cities may not protect their streets from activities which the law has always regarded subject to control as nuisances (handbill distribution cases). Lovell v. Griffin, 303 U.S. 444 (1938); Schneider v. State, 308 U.S. 147 (1939). Cities may not protect the streets or even homes

How to maintain public order without impairing our freedoms of expression is one of the major dilemmas of our time. The public turns to the law and to the lawyer for its solution. The lawyer can help with the answer only when he is aware that every restriction placed upon the free exchange of ideas of public interest, however justified, is a restriction upon a basic right of a citizen in a free society and, further, realizes that those elements which would overthrow our democratic society employ disorder and mob violence as primary weapons.[20]

WILLIAM V. BURROW.

Corporations—Process—Service on Non-Resident Directors of Domestic Corporation

The corporation is a necessary party to a stockholders' derivative suit against the directors for mismanagement.[1] This suit has been held to be an action in personam,[2] service not being allowed by publication on the non-resident directors.[3] Thus a long recognized problem arises:[4] How can service of process be had on non-resident directors in the jurisdiction where the corporation is resident? "* * * * those (directors) who have looted and misappropriated corporate assets will be enabled to escape liability by reason of the fact that the corporation is not doing

of their inhabitants from the aggressions of organized bands operating in large numbers. Douglas v. Jeannette, 319 U.S. 157 (1943). . . . Neither a private party nor a public authority can invoke otherwise valid state laws against trespass to exclude from their property groups bent on disseminating propaganda. Marsh v. Alabama, 326 U.S. 501 (1946); Tucker v. Texas, 326 U.S. 517 (1946). Picketing is largely immunized from control on the ground that it is free speech, Thornhill v. Alabama, 310 U.S. 88 (1940), and police may not regulate sound trucks and loud-speakers, Saia v. New York, 334 U.S. 558 (1948)." *See* Terminiello v. Chicago, 69 Sup. Ct. 894, 907 (1949) (dissenting opinion).

[20] Mr. Norman Thomas, writing out of his rich experience, said very recently, "The heretic has always been the growing point in society. When he is repressed by force society stagnates . . . clearly our danger is not from the honest dissenter, but from the passions of the mob and those who manipulate it in the struggle for profit and power." Thomas, *The Dissenter's Role in a Totalitarian Age,* N. Y. Times Magazine, Nov. 20, 1949, p. 13.

[1] 13 FLETCHER CYC. CORP. (PERM. ED.) §5997.

[2] 3 FLETCHER CYC. CORP. (PERM. ED.) §1283.

[3] Fisher v. Parr, 92 Md. 245, 48 Atl. 621 (1901), Southern Mills Inc. v. Armstrong, 223 N. C. 495, 27 S. E. 2d 281 (1943), *cf.* McNaughton v. Broach, 236 App Div. 448, 260 N. Y. Supp. 100 (1932). *Semble* Bauer v. Parker, 82 App. Div. 289, 81 N.Y. Supp. 995 (1903). *But cf.* Holmes v. Camp, 219 N. Y. 359, 114 N. E. 841 (1916). Note, 148 A. L. R. 1251.

[4] Greer v. Mathieson Alkali Works, 190 U.S. 428 (1903); *see* Freeman v. Bean, 243 App. Div. 503, 276 N. Y. Supp. 310, 311 (1934) (dissenting opinion). *Report of Law Revision Commission for 1941,* N. Y. LEG. DOC. (1941) No. 65 (I). 27 CORN. L. Q. 74 (1941); 22 VA. L. REV. 153 (1935); 33 VA. L. REV. 187 (1947); 44 Y. L. J. 1041 (1934). Schuckman v. Rubenstein, 164 F. 2d 952 (6th Cir. 1947) discusses this problem in federal jurisdiction.