

In 1949, in a 5 to 4 decision, the U.S. Supreme Court reversed the “breach of the peace” conviction of Arthur Terminiello, a right-wing agitator, for a speech he gave in Chicago on February 7, 1946. Justice William O. Douglas delivered the Opinion of the Court, recounting how the “auditorium was filled to capacity with over eight hundred persons present... Outside of the auditorium a crowd of about one thousand persons gathered to protest against the meeting. A cordon of policemen was assigned to the meeting to maintain order, but they were not able to prevent several disturbances.” In his speech, Terminiello had “condemned the conduct of the crowd outside and vigorously, if not viciously, criticized various political and racial groups whose activities he denounced as inimical to the nation’s welfare.”

The Supreme Court might have accepted Terminiello’s conviction if it agreed, as argued in the lower courts, that the speech had been “composed of derisive, fighting words, which carried it outside the scope of the constitutional guarantees [of the First Amendment].” But before exploring that possibility the Court had discovered a different problem, namely that the trial judge had included an overly broad jury instruction that “permitted conviction...if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest.” The Court then concluded that a “conviction resting on any of those grounds may not stand” and reversed the conviction as incompatible with freedom of speech.

Robert H. Jackson was one of the four justices who disagreed with this reversal; he also wrote a strongly worded dissent, which is provided below. Jackson had served as Solicitor General and Attorney General under Franklin Roosevelt before being appointed by him to the Supreme Court in 1941, where he remained until his death in 1954. In 1945 and 1946, Jackson took a leave of absence from the Court because Truman had selected him to serve as chief prosecutor for the International Military Tribunal at Nuremberg.

Robert H. Jackson on Free Speech and Public Order

(*Terminiello v. Chicago*, decided May 16, 1949; below is an abridged version of the dissent in this case by Associate Justice Robert H. Jackson.)

The Court reverses this conviction by reiterating generalized approbations of freedom of speech with which, in the abstract, no one will disagree. Doubts as to their applicability are lulled by avoidance of more than passing reference to the circumstances of Terminiello’s speech and judging it as if he had spoken to persons as dispassionate as empty benches, or like a modern Demosthenes practicing his Philippics on a lonely seashore.

But the local court that tried Terminiello was not indulging in theory. It was dealing with a riot and with a speech that provoked a hostile mob and incited a friendly one and threatened violence between the two. When the trial judge instructed the jury that it might find Terminiello guilty of inducing a breach of the peace if his behavior stirred the public to anger, invited dispute, brought about unrest, created a disturbance or molested peace and quiet by arousing alarm, he was not speaking of these as harmless or abstract conditions. He was addressing his words to the concrete behavior and specific consequences disclosed by the evidence. He was saying to the jury, in effect, that if this particular speech added fuel to the situation already so inflamed as to threaten to get beyond police control, it could be

punished as inducing a breach of peace. When the light of the evidence not recited by the Court is thrown upon the Court's opinion, it discloses that 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. This Court seems to regard these as enemies of each other and to be of the view that we must forego order to achieve liberty. So it fixes its eyes on a conception of freedom of speech so rigid as to tolerate no concession to society's need for public order.

An old proverb warns us to take heed lest we "walk into a well from looking at the stars." To show why I think the Court is in some danger of doing just that, I must bring these deliberations down to earth by a long recital of facts.

Terminiello, advertised as a Catholic Priest, but revealed at the trial to be under suspension by his Bishop, was brought to Chicago from Birmingham, Alabama, to address a gathering that assembled in response to a call signed by Gerald L. K. Smith [a Protestant right-wing agitator], which, among other things, said:

The same people who hate Father Coughlin hate Father Terminiello. They have persecuted him, hounded him, threatened him, but he has remained unaffected by their anti-Christian campaign against him. You will hear all sorts of reports concerning Father Terminiello. But remember that he is a Priest in good standing and a fearless lover of Christ and America.

The jury may have considered that this call attempted to capitalize the hatreds this man had stirred and foreshadowed, if it did not intend to invite, the kind of demonstration that followed.

Terminiello's own testimony shows the conditions under which he spoke. So far as material it follows:

We got there [the meeting place] approximately fifteen or twenty minutes past eight. The car stopped at the front entrance. There was a crowd of three or four hundred congregated there shouting and cursing and picketing...

When we got there the pickets were not marching; they were body to body and covered the sidewalk completely, some on the steps so that we had to form a flying wedge to get through. Police escorted us to the building, and I noticed four or five others there.

They called us "God damned Fascists, Nazis, ought to hang the so and so's." When I entered the building, I heard the howls of the people outside... There were four or five plain clothes officers standing at the entrance to the stage and three or four at the entrance to the back door.

The officers threatened that if they broke the door again, they would arrest them and every time they opened the door a little to look out something was thrown at the officers, including icepicks and rocks.

A number of times the door was broken, was partly broken through. There were doors open this way, and they partly opened, and the officers looked out two or three times and each time icepicks, stones and bottles were thrown at the police at the door. I took my place on the stage; before this I was about ten or fifteen minutes in the body of the hall.

I saw a number of windows broken by stones or missiles. I saw the back door being forced open, pushed open.

The front door was broken partly open after the doors were closed. There were about seven people seated on the stage. Smith opened the meeting with prayer, the Pledge of Allegiance to the Flag and singing of "America." There were other speakers who spoke before me and before I spoke, I heard things happening in the hall and coming from the outside.

I saw rocks being thrown through windows and that continued throughout at least the first half of the meeting, probably longer, and again attempts were made to force the front door, rather the front door was forced partly. The howling continued on the outside; cursing could be heard audibly in the hall at times. Police were rushing in and out of the front door protecting the front door, and there was a general commotion, all kinds of noises and violence—all from the outside.

Between the time the first speaker spoke and I spoke, stones and bricks were thrown in all the time. I started to speak about 35 or 40 minutes after the meeting started, a little later than nine o'clock...

The court below, in addition to this recital, heard other evidence, that the crowd reached an estimated number of 1,500. Picket lines obstructed and interfered with access to the building. The crowd constituted "a surging, howling mob hurling epithets" at those who would enter and "tried to tear their clothes off." One young woman's coat was torn off, and she had to be assisted into the meeting by policemen. Those inside the hall could hear the loud noises and hear those on the outside yell, "Fascists," "Hitlers" and curse words like "damn Fascists." Bricks were thrown through the windowpanes before and during the speaking. About 28 windows were broken. The street was black with people on both sides for at least a block either way; bottles, stink bombs and brickbats were thrown. Police were unable to control the mob, which kept breaking the windows at the meeting hall, drowning out the speaker's voice at times and breaking in through the back door of the auditorium. About 17 of the group outside were arrested by the police.

Knowing of this environment, Terminiello made a long speech, from the stenographic record of which I omit relatively innocuous passages and add emphasis to what seems especially provocative:

Father Terminiello: 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 I have for the *slimy scum* that got in by mistake.

...The subject I want to talk to you tonight about is the attempt *that is going on right outside this hall tonight*, the attempt that is going on to *destroy America by revolution*...

My friends, it is no longer true that it can't happen here. It is happening here, and it only depends upon you, good people, who are here tonight, depends upon all of us together, as Mr. Smith said. The tide is changing, and if you and I turn and run from that tide, we will all be drowned in this tidal wave of Communism which is going over the world.

...I am not going to talk to you about the menace of Communism, which is already accomplished, in Russia, where from eight to fifteen million people were murdered in cold blood by their own countrymen, and millions more through Eastern Europe at the close of the war are being murdered by these murderous Russians, hurt, being raped and sent into slavery. *That is what they want for you, that howling mob outside.*

I know I was told one time that my winter quarters were ready for me in Siberia. I was told that. Now, I am talking about the fifty-seven varieties that we have in America, and we have fifty-seven varieties of pinks and reds and pastel shades in this country; and all of it can be traced back to the twelve years we spent under the New Deal, because that was the build-up for what is going on in the world today.

Now, Russia promised us we would go back to the official newspaper of Russia. Primarily, it was back about 1929. They quoted the words of George E. Dimitroff, who at that time was the Executive Secretary of the Communist International. I only quote you this one passage. I could quote thousands of paragraphs for you. Let me quote you: "The worldwide nature of our program is not mere talk, but an all-embracing *blood-soaked reality*." *That is what they want for us, a blood-soaked reality but it was promised to us by the crystal gazers in Washington*; and you know what I mean by the "crystal [ball] gazers," I presume.

First of all, we had Queen Eleanor [Roosevelt]. Mr. Smith said, "Queen Eleanor is now one of the world's communists." She is one who said this—imagine, coming from the spouse of the former President of the United States for twelve long years—this is what she said: "The war is but a step in the revolution. The war is but one step in the revolution, and we know who started the war."

Then we have Henry Adolph Wallace [Vice President during Franklin Roosevelt's third term], the sixty million job magician. You know we only need fifty-four million jobs in

America, and everybody would be working. He wants sixty million jobs, because some of the bureaucrats want two jobs apiece. Here he is, what he says about revolution: "We are in for a profound revolution. Those of us who realize the inevitableness of the revolution and are anxious that it be *gradual and bloodless* instead of *somewhat bloody*. *Of course, if necessary, we will have it more bloody.*"

...Now, let me say, I am going to talk about—I almost said, about the Jews. Of course, I would not want to say that. However, I am going to talk about some Jews. I hope that—I am a Christian minister. We must take a Christian attitude. I don't want you to go from this hall with hatred in your heart for any person, for no person...

Now, this danger which we face—let us call them Zionist Jews if you will, let's call them atheistic, communistic Jewish or Zionist Jews, then let us not fear to condemn them. You remember the Apostles when they went into the upper room after the death of the Master, they went in there, after locking the doors; they closed the windows. (At this time there was a very loud noise as if something was being thrown into the building.)

Don't be disturbed. That happened, by the way, while Mr. Gerald Smith was saying "Our Father who art in heaven." (Just then a rock went through the window.) *Do you wonder they were persecuted in other countries in the world?...*

You know I have always made a study of the psychology, sociology of mob reaction. It is exemplified out there. Remember there has to be a leader to that mob. He is not out there. He is probably across the street, looking out the window. There must be certain things, money, other things, in order to have successful mob action; there must be rhythm. There must be some to beat a cadence. Those mobs are chanting; that is the caveman's chant. They were trained to do it. They were trained this afternoon. They are being led; *there will be violence.*

That is why I say to you, men, don't you do it. Walk out of here dignified. The police will protect you. Put the women on the inside, where there will be no hurt to them. Just walk; don't stop and argue... They want to picket our meetings. They don't want us to picket their meetings. It is the same kind of tolerance, if we said there was a bedbug in bed, "We don't care for you," or if we looked under the bed and found a snake and said, "I am going to be tolerant and leave the snake there." We will not be tolerant of that mob out there. We are not going to be tolerant any longer.

We are strong enough. We are not going to be tolerant of their smears any longer. We are going to *stand up and dare them to smear us...*

So, my friends, since we spent much time tonight trying to quiet the howling mob, I am going to bring my thoughts to a conclusion, and the conclusion is this. We must all be like the Apostles before the coming of the Holy Ghost. We must not lock ourselves in an upper room for fear of the Jews. I speak of the Communistic Zionist Jew, and those are not American Jews. We don't want them here; we want them to go back where they came from.

...Such was the speech. Evidence showed that it stirred the audience not only to cheer and applaud but to expressions of immediate anger, unrest and alarm. One called the speaker a "God damned liar" and was taken out by the police. Another said that "Jews, niggers and Catholics would have to be gotten rid of." One response was, "Yes, the Jews are all killers, murderers. If we don't kill them first, they will kill us." The anti-Jewish stories elicited exclamations of "Oh!" and "Isn't that terrible!" and shouts of "Yes, send the Jews back to Russia," "Kill the Jews," "Dirty kikes," and much more of ugly tenor. This is the specific and concrete kind of anger, unrest and alarm, coupled with that of the mob outside, that the trial court charged the jury might find to be a breach of peace induced by Terminiello. It is difficult to believe that this Court is speaking of the same occasion, but it is the only one involved in this litigation.

Terminiello, of course, disclaims being a fascist. Doubtless many of the indoor audience were not consciously such. His speech, however, followed, with fidelity that is more than coincidental, the pattern of European fascist leaders.

The street mob, on the other hand, included some who deny being communists, but Terminiello testified and offered to prove that the demonstration was communist-organized and communist-led. He offered literature of left-wing organizations calling members to meet and "mobilize" for instruction as pickets and exhorting followers: "All out to fight Fascist Smith."

As this case declares a nation-wide rule that disables local and state authorities from punishing conduct which produces conflicts of this kind, it is unrealistic not to take account of the nature, methods and objectives of the forces involved. This was not an isolated, spontaneous and unintended collision of political, racial or ideological adversaries. It was a local manifestation of a world-wide and standing conflict between two organized groups of revolutionary fanatics, each of which has imported to this country the strong-arm technique developed in the struggle by which their kind has devastated Europe. Increasingly, American cities have to cope with it. One faction organizes a mass meeting, the other organizes pickets to harass it; each organizes squads to counteract the other's pickets; parade is met with counter parade. Each of these mass demonstrations has the potentiality, and more than a few the purpose, of disorder and violence. This technique appeals not to reason but to fears and mob spirit; each is a show of force designed to bully adversaries and to overawe the indifferent. We need not resort to speculation as to the purposes for which these tactics are calculated nor as to their consequences. Recent European history demonstrates both.

...The present obstacle to mastery of the streets by either radical or reactionary mob movements is not the opposing minority. It is the authority of local governments which represent the free choice of democratic and law-abiding elements of all shades of opinion, but who, whatever their differences, submit them to free elections which register the results of their free discussion. The fascist and communist groups, on the contrary, resort to these terror tactics to confuse, bully and discredit those freely chosen governments. Violent and noisy shows of strength discourage participation of moderates in discussions

so fraught with violence, and real discussion dries up and disappears. And people lose faith in the democratic process when they see public authority flouted and impotent and begin to think the time has come when they must choose sides in a false and terrible dilemma such as was posed as being at hand by the call for the Terminiello meeting: "Christian Nationalism or World Communism—Which?"

...No one will disagree that the fundamental, permanent and overriding policy of police and courts should be to permit and encourage utmost freedom of utterance. It is the legal right of any American citizen to advocate peaceful adoption of fascism or communism, socialism or capitalism. He may go far in expressing sentiments whether pro-Semitic or anti-Semitic, pro-Negro or anti-Negro, pro-Catholic or anti-Catholic. He is legally free to argue for some anti-American system of government to supersede by constitutional methods the one we have. It is our philosophy that the course of government should be controlled by a consensus of the governed. This process of reaching intelligent popular decisions requires free discussion. Hence, we should tolerate no law or custom of censorship or suppression.

But we must bear in mind also that no serious outbreak of mob violence, race rioting, lynching or public disorder is likely to get going without help of some speech-making to some mass of people. A street may be filled with men and women and the crowd still not be a mob. Unity of purpose, passion and hatred, which merges the many minds of a crowd into the mindlessness of a mob, almost invariably is supplied by speeches. It is naive, or worse, to teach that oratory with this object or effect is a service to liberty. No mob has ever protected any liberty, even its own, but if not put down it always winds up in an orgy of lawlessness which respects no liberties.

...I do not think that the Constitution of the United States denies to the states and the municipalities power to solve that problem in the light of local conditions, at least so long as danger to public order is not invoked in bad faith, as a cover for censorship or suppression. The preamble declares domestic tranquility as well as liberty to be an object in founding a Federal Government and I do not think the Forefathers were naïve in believing both can be fostered by the law.

...This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. 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.