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CONSTITUTIONAL LAW — FREEDOM OF SPEECH — ALL POSSIBLE GROUNDS FOR A VERDICT MUST BE CONSTITUTIONALLY VALID*

The greater the importance of safe-guarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.[1]

I. Introduction

The provisions of the first amendment to the United States Constitution including the guarantee of freedom of speech are frequently said to be paramount among constitutional rights.[2] The importance of freedom of speech and freedom of the press does not, however, stem only from the fact that these rights have historically been deemed inviolate by the people, but also, more basic to their importance, from the belief that these freedoms are vital and indispensable to the maintenance and development of a free and ordered society.[3] Safeguarding these rights so that men might voice their opinions on matters vital to them and expose falsehoods through the process of education and discussion is essential to free government.[4]

Freedom of speech and expression is not an absolute right, and some limitations are recognized as valid. The spoken word and other forms of expression are not sacrosanct and may be regu-

*Bachellar v. Maryland, 90 S. Ct. 1312 (1970).

1. De Jonge v. Oregon, 299 U.S. 353 (1937).
2. "The indispensable democratic freedoms secured by the First Amendment are given a preferred place, and have a sanctity and a sanction not permitting dubious intrusions." 16 Am. Jur. 2d *Constitutional Law* § 333, n. 15 (1964); *see also* Thomas v. Collins, 323 U.S. 516 (1945).
3. Mr. Justice Brandeis, in a concurring opinion to *Whitney v. California*, pointed out "that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." 274 U.S. 357, 375 (1927).
4. Thornhill v. Alabama, 310 U.S. 88 (1940).

lated as to time, place, and manner of presentation. Limitations may not be arbitrary, however, and require constitutional justification. Such regulation is justified if it furthers an important or substantial governmental interest unrelated to the suppression of free expression and if the incidental restriction on the exercise of the freedom is no greater than is necessary to the furtherance of that interest.[5] Difficulty often arises in resolving these considerations, especially where it is obvious that the government has a valid interest to protect, but it is not easily determined whether the restriction on freedom is or is not greater than is necessary. In such situations the trend has been to resolve the question in favor of a broad interpretation of the bounds of the freedom and to curb the governmental limitations.

One indication of this trend has been the willingness of the Supreme Court to reverse convictions that appear to have valid constitutional grounds, where the record fails to exclude the possibility that the verdict rested on invalid grounds as well. Where a statute is invalid in part or the instructions to the jury are indefinite as to what elements will support a conviction, the Court has ruled that, if the record does not reveal whether the conviction rested on valid or invalid grounds, or both, then the conviction cannot stand. *Bachellar v. Maryland*[6] is indicative of the fact that, in order for states to protect their interests effectively, the record of any conviction secured will have to reveal that a definite state interest was endangered and that the restriction on constitutional rights was only that which was necessary to protect the interest.

In *Bachellar* the petitioners were convicted in Baltimore City Criminal Court of violating a Maryland statute which prohibits "acting in a disorderly manner to the disturbance of the public peace, upon any public street . . . in any [Maryland] city . . . ."[7] In an appeal to the Maryland Court of Special Appeals, the petitioners contended that their right of free speech, expression, petition, and assembly as guaranteed by the first and fourteenth amendments to the United States Constitution was violated by the application of the statute and the refusal of the trial judge to instruct the jury that it could not convict on the basis of per-

5. United States v. O'Brien, 391 U.S. 367, 377 (1967). Chief Justice Warren provided a test to determine if conduct may be constitutionally regulated by resolving whether or not the governmental interest in doing so may be described by an adjective such as "compelling," "substantial," "subordinating," "paramount," "cogent," or "strong."

6. 90 S. Ct. 1312 (1970).

7. MARYLAND CODE ANN., art. 27, § 123 (1967).

sonal disagreement with the appellants' expressed views.[8] That court rejected their contentions, and the Court of Appeals of Maryland denied certiorari.

On appeal the United States Supreme Court first examined the factual situation that led to the contention by the petitioners that there had been a violation of their constitutional rights. The petitioners had been arrested on March 28, 1966, after participating in an anti-war demonstration that afternoon. The demonstration consisted of marching in front of a recruiting station, carrying placards with anti-war slogans, distributing leaflets, and engaging persons in the crowd of onlookers in debates. Some of the demonstrators staged a "sit-in" in the station and were bodily evicted at closing time by United States marshals and deputized police officers. (The conduct of the petitions in the station was not an issue, since the state did not prosecute them for their conduct in that place.[9]) At this point, according to the police lieutenant in charge, the petitioners lay on the sidewalks, blocking free passage and singing, while surrounded by placard bearers. The lieutenant testified that he decided to arrest the petitioners when it became evident that the crowd had become threatening and unruly and the demonstrators refused to leave after being ordered to do so three times.[10]

On this evidence, the trial judge instructed the jury that the petitioners might be found guilty of violating the statute in question on alternative grounds. He charged that a guilty verdict might be returned if the jury found either that the petitioners had engaged in "the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area" *or* for their "refusal to obey a policeman's command to move on when not to do so may endanger the public peace."[11]

The Supreme Court then examined whether the petitioners' protest was constitutionally protected and whether their constitutional rights to free speech and expression were violated by the statutory interpretation contained in the instructions to the jury.

8. Bachellar v. Maryland, 3 Md. App. 626, 628, 240 A.2d 623, 625 (1968).
9. 90 S. Ct. at 1314.
10. *Id.* at 1315.
11. Both elements of the instruction were based on the Maryland Court of Appeals' construction of § 123 in *Drews v. Maryland,* 224 Md. 186, 192, 167 A.2d 341, 343-44 (1961), *vacated and remanded on other grounds,* 378 U.S. 547 (1961). *reaffirmed on remand,* 236 Md. 349, 204 A.2d 64 (1964), *appeal dismissed* and *cert. denied,* 381 U.S. 421 (1965).

The Court concluded that the jury could have rested its verdict on any of several grounds:

> [P]etitioners' convictions could constitutionally have rested on a finding that they sat or lay across a public sidewalk with the intent of fully blocking passage along it, or that they refused to obey police commands to stop obstructing the sidewalk in this manner and move on . . . . It is impossible to say, however, that either of these grounds was the basis for the verdict. On the contrary, so far as we can tell, it is equally likely that "the verdict resulted merely because [petitioners' views about Viet Nam were] themselves offensive to some of their hearers." Thus, since petitioners' convictions may have rested on an unconstitutional ground they must be set aside.[12]

In considering cases in which an infringement of constitutionally protected conduct is alleged, a court must determine whether the conduct is protected and whether the limitation or regulation thereof is greater than necessary to further valid state interests. If part of the conduct is found to be subject to limitation, then the court must ascertain whether the punishment applied only to constitutionally prohibitable conduct and ensure that no punishment was adjudged for the exercise of protected rights. This comment will examine (1) necessary limitations and regulations of freedom of speech and expression and the limiting factors on the regulations themselves and (2) the development of the requirement that, for a verdict to be constitutionally valid, all the grounds on which it may have rested must be constitutionally permissible.

II. LIMITATIONS ON FREEDOM OF SPEECH

The necessity for safeguarding the right of free speech and expression has long been recognized, but in almost any exposition of the benefits and advantages of the freedom, there is a caveat that free speech is not absolute. At the same time, it is recognized that the restriction or limitation itself must be carefully scrutinized to ensure that it is imposed only to the degree necessary.

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest,

12. 90 S. Ct. at 1316, *quoting from* Street v. New York, 394 U.S. 576, 592 (1969).

> creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why 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 substantive evil that arises far above public inconvenience, annoyance or unrest . . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts or dominant political or community groups.[13]

The due process clause of the fourteenth amendment protects freedom of speech and press against abridgement by state legislative or judicial action.[14] When statutes touch a constitutionally protected area, they must be narrowly drawn so that, upon application, the degree of abridgement of the right is minimal. To ensure that a broad stifling of fundamental personal liberties does not result, the statute must clearly define and allow punishment only for specific conduct which constitutes a clear and present danger "to a substantial interest of the state."[15] If narrowly drawn and properly applied, any abridgement of freedom that results will be justified if the state interest outweighs the individual's interest in exercising that freedom in the manner prohibited. "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[16]

Statutes dealing directly with speech or expressive conduct have been upheld as constitutional. In *Chaplinski v. New Hampshire*,[17] a statute[18] dealing exclusively with spoken language was

13. Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949).
14. *See* Griswald v. Connecticut, 381 U.S. 479 (1965); Henry v. Collins, 380 U.S. 356 (1965); Garrison v. Louisiana, 379 U.S. 64 (1964).
15. Elfbrandt v. Russell, 384 U.S. 11, 18 (1966); *see also* Cantwell v. Connecticut, 310 U.S. 296 (1940).
16. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).
17. 315 U.S. 568 (1942).
18. PUBLIC LAWS OF NEW HAMPSHIRE, ch. 378, § 2 (1926).
> No person shall address any offensive, derisive or annoying words to any other person who is lawfully in any street or other public place, nor call him by an offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

held to be constitutional, because it was "narrowly drawn and limited to define and punish specific conduct lying within the domain of state power—the use in a public place of words likely to cause a breach of the peace."[19] The Court cited *Schenck v. United States*[20] as authority for the proposition that the right of free speech is not absolute at all times and under all circumstances. The Court stated further:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problems. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those by which their very utterance inflict injury or tend to incite an immediate breach of the peace.[21]

In *Feiner v. New York*,[22] the appellant contended that he was arrested merely because his views were unpopular and had excited his listeners. The Court, in rejecting this contention, stated that it was "well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker," but, "when the speaker passes the bounds of argument or persuasion and undertakes incitement to riot," it is within the authority of the police to prevent a breach of the peace.[23] In upholding the statute[24] under which Feiner was convicted, the Court quoted *Cantwell v. Connecticut*[25]: "When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears, the power of the state to punish is obvious."[26]

In *Cox v. Louisiana*[27] the Court noted that there was a governmental responsibility to ensure order and cited control of traffic on the streets as an example; the Court stated that in relation to that interest the state could restrict the "exercise of some civil

19. 315 U.S. at 573.
20. 249 U.S. 47 (1919).
21. 315 U.S. at 571-72.
22. 340 U.S. 315 (1951).
23. *Id.* at 320.
24. PENAL LAW OF NEW YORK, § 722 (1909) (as existed immediately prior to Sept. 1, 1961; *see* NEW YORK CODE ANN., Bk. 39, Appendix).
25. 310 U.S. 296 (1940).
26. Feiner v. New York, 340 U.S. 315, 320 (1951), *quoting from* Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).
27. 379 U.S. 536 (1965).

right which, in other circumstances, would be entitled to protection . . . ."[28]

Thus, the Court in *Bachellar* did not have to inquire extensively to ascertain that statutes similar to the one under which the petitioners were convicted have been held to be valid, that a defendant could be convicted for the reaction provoked in bystanders by his words or expressive conduct, and that one could be convicted for the obstruction of free passage of the public. Having examined these considerations, the court considered whether, if the petitioners had committed an offense under the statute, the verdict rested on that part of their conduct that was constitutionally punishable or upon conduct which was constitutionally protected.

III. The Constitutionally Valid Verdict

The Court in *Bachellar* found that the anti-war slogans and phrases on the placards carried by the demonstrators did not fall into the class of "fighting words" that would justify their punishment.[29] Nor could the petitioners be punished because of the uneasiness and excitement created in the crowd. The petitioners were not seeking to incite the crowd, and any agitation resulted from the fact that the petitioners' anti-war views were controversial. In support of this ruling, the Court quoted *Street v. New York:* "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[30]

The Court observed, however, that in light of the instructions given by the trial judge, the verdict could have rested on any of a number of grounds. It could have rested on the petitioners' refusal to move on when ordered to do so by a police officer, on the petitioners' deliberate obstruction of the sidewalk, or, equally as likely, on the ground that their protest amounted to "the doing or saying . . . of that which offends, disturbs, incites, or tends to incite a number of people gathered in the same area."[31] Thus, the Court found that the petitioners may have been found guilty of

28. *Id.* at 554-55. *See* Edwards v. South Carolina, 372 U.S. 227 (1963); Poulos v. New Hampshire, 345 U.S. 395, 405-08 (1953); Cox v. New Hampshire, 312 U.S. 569, 574 (1941); Cantwell v. Connecticut, 310 U.S. 296, 306-07 (1940); Schneider v. State, 308 U.S. 147, 160-61 (1939).

29. 90 S. Ct. at 1314.

30. *Id., quoting from* Street v. New York, 394 U.S. 576, 592 (1969). *See also* Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Terminiello v. Chicago, 337 U.S. 1 (1949).

31. 90 S. Ct. at 1315; *see* note 11 *supra.*

violating the statute simply because they advocated unpopular ideas.[32]

The *Bachellar* Court cited *Stromberg v. California*[33] as controlling authority. There the appellant had been convicted of displaying a red flag which was prohibited by a state statute if done for any of three purposes.[34] The Court held that that part of the statute which stated that it was an offense to display the flag as a symbol of opposition to organized government was unconstitutional. Even though the other two grounds were separable and constitutional, the Court reversed because the verdict did not specify the ground for conviction:

> If any of these clauses which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause . . . . [T]he necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.[35]

There are several cases which follow this pattern of the Court's investigating the record to determine if any grounds of a verdict were unconstitutional. The inquiry does not end if the verdict can be supported on alternative grounds that are constitutional. A clear example of this pattern is found in *Williams v. North Carolina*[36] where two alternative grounds were submitted to the jury on which to base its verdict, one of which was constitutionally invalid.[37] The Court, reversing, stated that to uphold a general verdict when it could not be determined whether the jury rested its verdict on valid or invalid grounds "would be to

32. 90 S. Ct. at 1315.
33. 283 U.S. 359 (1931).
34. CALIFORNIA PENAL CODE, § 403-A (repealed 1933) provided: "Any person who displays a red flag, banner, or badge or any flag, badge, banner or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony."
35. 283 U.S. at 368.
36. 317 U.S. 287 (1942).
37. *Id.* at 290-92. The jury was charged that it could find the defendants guilty of bigamy if they found that the prior divorce obtained by Williams was invalid because of the lack of jurisdiction of the Nevada court. The jury was charged that the Nevada decree should be denied recognition if it found either that Nevada was not the state of matrimonial domicil or that the North Carolina defendants were not personally served with process in Nevada and made no appearance. The Supreme Court ruled that the former alternative was invalid under the full faith and credit clause of the Constitution.

countenance a procedure which would cause a serious impairment of constitutional rights."[38]

This approach is further illustrated in *Terminiello v. Chicago*[39] where the defendant was convicted by a jury instructed to convict if it found that his speech either stirred the public to anger *or* constituted "fighting words." The Court noted that of the two grounds one could be constitutionally prohibited but the other was constitutionally protected. The Court reversed and held that Terminiello could have been "convicted under the parts of the ordinance [as construed] which, for example, make it an offense merely to invite dispute or to bring about a condition of unrest."[40]

In considering whether the trial court's instructions were sufficiently clear as to warrant a definite inference that the jury had based its verdict on constitutional grounds, the Court in *Yates v. United States*[41] ruled that the verdict should "be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected."[42] This rule is well-established in substance as evidenced by the cases in which the question has been a consideration. The *Bachellar* Court followed the rule in overturning the conviction of the petitioners.

The Supreme Court in its avidity to prevent any inroads into freedom of speech has carried the rule even further by examining not only alternative independent grounds for conviction, but also the possibility that a contributing factor of one of the grounds was constitutionally invalid. In *Street v. New York*[43] the appellant had been convicted of publicly burning a United States flag in violation of a New York statute which made it a crime to "publicly defy . . . or cast contempt upon [an American flag] either by words or act . . . ."[44] The Court held that the statute was unconstitutionally applied, because "it permitted him to be punished merely for speaking defiant or contemptuous words about the American flag."[45] The Court, citing *Thomas v. Collins*,[46] stated:

38. *Id.* at 292.
39. 337 U.S. 1 (1949).
40. *Id.* at 5.
41. 354 U.S. 298 (1957).
42. *Id.* at 311.
43. 394 U.S. 576 (1969).
44. N.Y. PENAL LAW, § 1425, Subd. 16, par. d (1909).
45. 394 U.S. at 581.
46. 323 U.S. 516 (1945).

> [E]ven assuming that the record precludes the inference that appellant's conviction might have been based *solely* on his words, we are still bound to reverse if the conviction could have been based upon *both* his words and his act.[47]

The *Street* Court noted further that the verdict was general and the sentence a single penalty and that, unless the record negated the possibility that the conviction was based on both violations—burning a flag *and* speaking contemptuous words about the flag—it was dictated by *Thomas* that "the judgment . . . must be affirmed as to both or as to neither."[48] The Court interpreted the rationale of *Thomas* to be:

> [W]hen a single count indictment or information charges the commission of a crime by virtue of the defendant's having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as "intertwined" and have rested the conviction on both together.[49]

The Court stated further that, since Street could not constitutionally be punished for his speech, his conviction could not stand because the record did not preclude that he was so punished.[50]

Evidencing a higher regard for the protection of pure speech, the *Street* Court was so concerned that an unconstitutional abridgement of the freedom of speech might occur that it centered its consideration of the case around the possible punishment of the appellant for his spoken words. The Court could have examined an alternative consideration—whether the state has power to prevent flag-burning as a form of symbolic conduct—and the issue would have remained a question of the extent of first amendment freedom of speech and expression. Chief Justice Warren, taking issue with the majority in his dissent, stated that he believed the question of the case to have been the constitutionality of flag-desecration statutes. He noted that the trial court and both parties stated the question to be "whether the deliberate act of burning an American flag in public as a 'protest'

47. 394 U.S. at 587 (Court's emphasis).
48. 394 U.S. at 588, *quoting from* Thomas v. Collins, 323 U.S. 516, 529 (1945).
49. 394 U.S. at 588. *See* Thomas v. Collins, 323 U.S. 516, 529 (1945).
50. 394 U.S. at 594.

may be punished as a crime."[51] He stated further that the trial proceedings demonstrated that the words of the appellant were brought into evidence only to show the appellant's purpose in burning the flag and that he had not burned it in a manner prescribed by law.

Street is a good example of the inclination of the Supreme Court to look into any possibility of a verdict resting on unconstitutional grounds and not to affirm a conviction merely because valid grounds were present on which the verdict could have been based. The Court was presented with one constitutional question, but it examined instead the question whether the appellant had been convicted for his words. The Court then warned that, if the spoken words of a defendant are introduced into evidence, the verdict must specifically rest on grounds other than what the defendant had said. Justice Black felt that this was a diversion from the rule established in *Giboney v. Empire Ice & Storage Co.*[52] where the Court rejected the contention that "the constitutional freedom of speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a criminal statute."[53] The willingness of the Court to divert from the rule in order to preclude the possibility of an unconstitutional abridgement of freedom of speech and expression exemplifies the trend set forth in this comment.

IV. CONCLUSION

An abridgement of freedom of speech and expression will be upheld as constitutional if (1) it is narrow and specific and protects a substantial interest of the state; and (2) the interest of the state when balanced against the individual's interest in exercising the freedom is found to be paramount. Once a defense attorney has determined by this test that one or more of the grounds upon which a possible conviction may rest would constitute an unjustifiable abridgement of his client's right of expression, he should request instructions that would require the jury to return a verdict of innocent unless it found that a conviction could be based on the valid grounds alone. It is the duty of the court not only to grant such instructions when requested, but also to make the determination and give the proper instructions on its own initiative. By so doing, the court will obviate any possibility that

51. *Id.* at 595 (Warren, Ch. J., dissenting opinion). *See* People v. Street, 20 N.Y.2d 231, 234, 229 N.E.2d 187, 189 (1967).
52. 336 U.S. 490 (1949).
53. 394 U.S. at 610, *quoting from* Giboney v. Empire Ice and Storage Co., 336 U.S. 490, 498 (1949).

the verdict is based on constitutionally invalid grounds. A court, in applying a statute, must be especially cautious in its instructions to the jury in order not to broaden the abridgement of a constitutional right and thereby render a conviction invalid.

In examining the validity of a conviction, the Supreme Court of the United States does not merely inquire whether there is any constitutional basis for the conviction, but examines the record to ascertain that the verdict does not rest on *any* unconstitutional grounds. *Bachellar* is illustrative of the trend of the Court to overturn a conviction which rested on alternative grounds if any were invalid under the Constitution. The trend is so firm that the Court will overturn a conviction for constitutionally prohibitable conduct if the record does not clearly preclude the possibility that constitutionally protected conduct was also a basis for the verdict.

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