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The First Amendment's Freedom of Harassment - People v. Pierre-Louis

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Cover Page Footnote
28-3

THE FIRST AMENDMENT'S FREEDOM OF HARASSMENT

DISTRICT COURT OF NEW YORK
NASSAU COUNTY

People v. Pierre-Louis[1]
(decided July 25, 2011)

Defendant Nicolas Pierre-Louis was charged with aggravated harassment, under New York Penal Law section 240.30(1),[2] for a series of profane telephone calls made to two Nassau County Assistant District Attorneys (ADA).[3] Pierre-Louis filed a motion to dismiss, pursuant to New York Criminal Procedure Law sections 170.30,[4] 170.35,[5] 100.15[6] and 100.40,[7] arguing that even though his statements

[1] 927 N.Y.S.2d 592 (Dist. Ct. 2011).

[2] N.Y. Penal Law § 240.30(1) (McKinney 2012):

> A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she: 1. Either (a) communicates with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm; or (b) causes a communication to be initiated by mechanical or electronic means or otherwise with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm . . . .

Id.

[3] *Pierre-Louis*, 927 N.Y.S.2d at 593.

[4] N.Y. Crim. Proc. Law § 170.30 (McKinney 2012) ("After arraignment upon an information, a simplified information, a prosecutor's information or a misdemeanor complaint, the local criminal court may, upon motion of the defendant, dismiss such instrument or any count thereof upon the ground that: (a) It is defective, within the meaning of section 170.35.").

[5] New York Criminal Procedure Law section 170.35, titled "Motion to Dismiss Information, Simplified Information, Prosecutor's Information or Misdemeanor Complaint; as Defective," reads, in pertinent part:

> An information, a simplified information, a prosecutor's information or a misdemeanor complaint, or a count thereof, is defective within the meaning of paragraph (a) of subdivision one of section 170.30 when: (a) It is

may have been vulgar and derisive, his speech was constitutionally protected under the First Amendment of the United States Constitution,[8] as well as under article I, section eight of the New York Constitution.[9] The Nassau County District Court found that while Pierre-Louis's statements were "vituperative in nature, the statements [did] not rise to level of 'fighting words' . . . nor [did] they rise to the level of a true threat"; and therefore, constituted constitutionally protected speech.[10] The court further held that the New York aggravated harassment statute was unconstitutional as applied to this case and did not allow for the statute's unconstitutional vagueness and overbreadth to be cured.[11]

Between February 22, 2010, and April 11, 2010, defendant Pierre-Louis left several telephone voice mail messages at the office of a Nassau County Assistant District Attorney.[12] In these voice

> not sufficient on its face pursuant to the requirements of section 100.40; provided that such an instrument or count may not be dismissed as defective, but must instead be amended, where the defect or irregularity is of a kind that may be cured by amendment and where the people move to so amend . . . .

N.Y. CRIM. PROC. LAW § 170.35 (McKinney 2012).

[6] N.Y. CRIM. PROC. Law § 100.15 (McKinney 2012) (stating the requirements for the form and content of a misdemeanor complaint and a felony complaint).

[7] N.Y. CRIM. PROC. LAW § 100.40(1) (McKinney 2012) (listing what is needed for a criminal charge to be sufficient on its face).

[8] The First Amendment to the United States Constitution reads, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

[9] Article I, section 8 of the New York Constitution reads, in pertinent part, "Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." N.Y. CONST. art I, § 8.

[10] *Pierre-Louis*, 927 N.Y.S.2d at 595.

[11] *Id.* at 597. The People contested Pierre-Louis' motion, but also moved to amend the information, under section 170.35 of the New York Criminal Procedure Law, if the court should so hold it defective. *Id.* at 593. The court quoted the opinion in *Dietze*, stating:

> While it is argued that the statute's unconstitutional overbreadth might be cured by restricting its reach to "fighting words" or other words which, by themselves, inflict substantial personal injury, such a "cure" would, indeed, be fraught with significant problems of its own. First, although to be sure, a statute ought normally to be saved by construing it in accord with constitutional requirements, it is basic that the very language of the statute must be fairly susceptible of such an interpretation; put otherwise, the saving construction must be one which the court "may reasonably find implicit" in the words used by the Legislature.

Id. at 597 (citation omitted from original).

[12] *Id.* at 593.

messages Pierre-Louis yelled and screamed profanities at the ADA in response to the ADA's failure to arrest a certain Jessy Pierre-Louis.[13] In the recordings, Pierre-Louis stated that he was "coming at [the ADA] with fury" and that he would continue calling until the arrest was finally made.[14]

The ADA stated in the People's supporting disposition that Pierre-Louis left other profane messages which were both "alarming and annoying."[15] The ADA further stated that the repeated calls, coupled with Pierre-Louis's "screaming outbursts of rage and anger," led her to fear for her "safety and [for] the safety of [another] Assistant District Attorney."[16] Defendant Pierre-Louis argued that even though his statements were profane and offensive, the statements were protected by the First Amendment and could not subject him to criminal liability for aggravated harassment under section 240.30(1) of the New York Penal Law.[17]

The Nassau County District Court granted Pierre-Louis's motion to dismiss on the ground that Pierre-Louis's speech was constitutionally protected under the First Amendment.[18] After reviewing relevant Supreme Court case law, the court in *Pierre-Louis* found that the statements made by Pierre-Louis did not contain "fighting words" and did not present a "true threat," because the statements were too vague.[19] The court stated that, even though Pierre-Louis's voice mail recordings were offensive to the ADA, the threats were limited to having the ADA fired.[20] Furthermore, the court in *Pierre-Louis* found that the aggravated harassment statute was unconstitutional as applied in *Pierre-Louis*.[21]

In holding that Pierre-Louis's statements were constitutionally protected speech, the court in *Pierre-Louis* first recognized that free speech is a fundamental right granted by the First Amendment of the

[13] *Pierre-Louis*, 927 N.Y.S.2d at 593.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 594.

[18] *Pierre-Louis*, 927 N.Y.S.2d at 595.

[19] *Id.* According to the court "[e]ven the worst of the alleged statements, 'I'm coming at you with fury,' is too vague to be considered a true threat, but is more properly understood in context with the defendant's other statements." *Id.*

[20] *Id.*

[21] *Id.* at 597.

United States Constitution as well as by article I, section eight of the New York State Constitution.[22] However, the court also noted that the right to free speech is not an absolute right and that, in certain circumstances, it may be proscribed by the state.[23] In order for there to be a proscription on the First Amendment's right of free speech, there must be a clear definition of the restriction "so as not to have a chilling effect upon speech that is permissible."[24] "Through the years, the court has sought to define the areas in which the proscription of free speech is justified."[25]

The United States federal courts, in determining whether "the proscription of free speech is justified,"[26] first refer to the seminal case of *Chaplinsky v. New Hampshire*.[27] In *Chaplinsky*, the United States Supreme Court proscribed the use of "fighting words."[28] Defendant Walter Chaplinsky was convicted for violating Chapter 378, section 2 of the Public Laws of New Hampshire, which made it a crime for an individual to "address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, . . . [or] call him by any offensive or derisive name . . . ."[29] Chaplinsky argued that the statute violated the First Amendment of the United States Constitution because it unreasonably restrained his freedom of speech, press and religion.[30] The Court ac-

[22] *Pierre-Louis*, 927 N.Y.S.2d at 594.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] 315 U.S. 568 (1942).

[28] *Id.* at 571-72.

[29] *Id.* at 569. Chaplinsky, a Jehovah Witness, was distributing literature of his sect on the street while allegedly denouncing all religion, causing the rise of a disturbance. *Id.* at 569-70. As a result of the riot, Chaplinsky was led to a police station by an on duty traffic officer, when they encountered City Marshall, Bowering. *Id*. at 570. Chaplinksy allegedly stated to City Marshall Bowering, "You are a God damned racketeer and a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." *Chaplinsky*, 315 U.S. at 569. Chaplinsky's version of the event differed from that of Bowering. *Id.* at 570. Chaplinsky alleged that when he encountered Bowering, he requested for Bowering to arrest those responsible for causing the disturbance. *Id.* Bowering responded by cursing at him. *Id.* Chaplinsky contests using the name of the Deity, but admits to stating everything else set-forth in the complaint. *Id.*

[30] *Chaplinsky*, 315 U.S. at 569. The Court only warranted Chaplinsky's attack of the statute on the basis of free speech. *Id*. at 571. The court noted that the written word was not involved, and that it cannot be said that cursing an officer is at all related to freedom of worship. *Id.*

knowledged that both the freedom of speech and the freedom of the press are fundamental rights protected by the First Amendment made available to the states by the Fourteenth Amendment.[31] The Supreme Court began its decision by first exploring the statute itself.[32] The Supreme Court recognized that the right of free speech is not an absolute right and proscribed the use of "fighting words."[33] The Court concluded that the First Amendment does not protect words of lewdness, obscenity, profanity, or fighting words—words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace."[34]

Since *Chaplinsky*, the United States Supreme Court has consistently held that the First Amendment to the United States Constitution permits certain restrictions on speech.[35] In *Brandenburg v. Ohio*,[36] the Court used a two-prong test to determine when the State can proscribe speech.[37] According to the Court, speech can be pro-

[31] *Id.* at 570.

[32] *Id.* at 571. The Court noted that the statute could be divided into two separate provisions, the first relating "to words or names addressed to another in a public place[,]" and the second, relating to "noises and exclamations." *Chaplinsky*, 315 U.S at 572. The Court assumed, but did not so hold, that the second provision of the statute was unconstitutional, and therefore limited their exploration of the statute to the first provision. *Id.* In making its determination that the statute was valid, the Supreme Court referred back to prior case-law in which the state court found that the statute sought to protect public peace, and that the only words prohibited were those which ignited violence. *Id.* at 573. The proper test was found to be "what men of common intelligence would understand would be words likely to cause an average addressee to fight." *Id.* The Court concluded:

> The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the address, words whose speaking constitute a breach of the peace by the speaker—including "classical fighting words," words in current less "classical" but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.

Id. The statute punished "verbal acts" and was drafted carefully so as to not "impair liberty of expression." *Chaplinsky*, 315 U.S. at 574.

[33] *Id.* at 571-72.

[34] *Id.* at 572. Fighting words are not protected by the First Amendment because they are not an "essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 572. *See* Virginia v. Black, 538 U.S. 343, 359 (2003) (recognizing that speech which "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" is not warranted under the First Amendment).

[35] *See Black*, 538 U.S. at 359 (listing all the examples of when the Supreme Court has proscribed free speech).

[36] 395 U.S. 444 (1969).

[37] *Id.* at 447.

scribed if it is "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action."[38] The Court reasoned that unless those two elements are found, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation."[39]

Twenty-nine years after *Chaplinsky*, the Supreme Court was presented with *Cohen v. California*,[40] and once again reiterated that the states have the authority to prohibit the use of fighting words.[41] The Court described them as being "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[42] However, the Court concluded that the defendant's wearing of a jacket, bearing the words "Fuck the Draft," did not constitute fighting words, as proscribed by *Chaplinsky*, for it was not directed as a personal insult, and did not incite violence.[43]

Several years after the *Chaplinsky*, *Brandenburg*, and *Cohen* decisions, the United States once again recognized that the protections afforded to speech by the First Amendment are not absolute protections.[44] *In Virginia v. Black*,[45] the Court found that the states

[38] *Id.*

[39] *Id.*

[40] 403 U.S. 15 (1971).

[41] *Id.* at 20.

[42] *Id.* (citing *Chaplinsky*, 315 U.S. at 572).

[43] *Id.* at 16, 18. The defendant in this action, Paul Robert Cohen, was convicted for violating section 415 of California's Penal Code which calls for the imprisonment of persons "maliciously and willfully disturbing the peace or quiet of any neighborhood or person . . . by . . . offensive conduct." *Id.* at 16. Cohen was said to have violated the statute by wearing a jacket to the Los Angeles County Courthouse, which bore the words "Fuck the Draft." *Cohen*, 403 U.S. at 16. Cohen testified that his wearing the jacket represented his deep resentment against the Vietnam War and the draft. *Id.* The Court recognized that Cohen neither participated in violence, or threatened to, nor did he cause others to engage in violence. *Id.* at 16-17. Thus, the Supreme Court reversed Cohen's conviction and stated:

> [T]he State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected.

Id. at 18.

[44] *See Black*, 538 U.S. at 358 (finding that the First Amendment does not grant absolute protection and may be regulated by the government).

[45] 538 U.S. 343 (2003).

may also proscribe "true threats"—"those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[46] In *Black*, respondents Barry Black, Richard Elliot, and Jonathan O'Mara were all Ku Klux Klan members and were each convicted separately for burning crosses in violation of Virginia's cross-burning statute.[47] In addressing the constitutionality of the cross-burning statute, the Supreme Court noted that those persons who burn crosses directed at a particular individual often intend for it to be received with fear.[48] While the First Amendment protects freedom of expression, the Court acknowledged that case law showed that this right was not absolute and that free speech may be proscribed.[49] The Court recognized that "the government may regulate certain categories of expression consistent with the Constitution."[50] The Supreme Court thus concluded that true threats may be proscribed.[51] The Court defined true threats:

> True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individu-

[46] *Id.* at 359. *See also* Watts v. United States, 394 U.S. 705, 707 (1969) (recognizing that "threats must be distinguished from what is constitutionally protected speech" and proscribing the use of "true threats"). In *Watts*, the defendant was convicted for violating a statute which prohibited "any person from 'knowingly and willfully . . . making any threat to take the life of or inflict bodily harm upon the President of the United States . . . .' " *Id.* at 705. The defendant was arrested for stating the following during a public rally:

> "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a riffle the first man I want to get in my sights is L.B.J." "They are not going to make me kill my black brothers."

Id. at 706. The Supreme Court upheld the constitutionality of the statute, but held that it was inapplicable in the *Watts* case. *Id.* at 707.

[47] *Black*, 538 U.S. at 348.

[48] *Id.* at 357. "[O]ften the cross burned intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful." *Id.*

[49] *Id.* at 358.

[50] *Id.*

[51] *Black*, 538 U.S. at 359-60.

> als from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.[52]

While the Supreme Court has made clear that some speech may be proscribed, it has invalidated laws that proscribe speech, which it deemed to be entitled to the protections of the First Amendment.[53] For instance, in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*,[54] the Court held that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."[55] Thus, the Son of Sam Law at issue in *Simon & Schuster* was held to be inconsistent with the First Amendment for New York because it "singled out speech on a particular subject for a financial burden that it places on no other speech and no other income."[56]

Similarly, New York courts have also invalidated statutes as violative of the First Amendment's right to free speech.[57] The leading case in New York State to have invalidated a statute found to unconstitutionally proscribe free speech is *People v. Dietze*.[58] In *Dietze*, the court convicted the defendant for harassment under subdivisions one and two of the New York Penal Law section 240.25.[59] The court

[52] *Id.* (internal quotations omitted).

[53] *Pierre-Louis*, 927 N.Y.S.2d at 594. *See* Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984) (stating that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment"); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (recognizing the invalidity of content-based regulations because "[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed").

[54] 502 U.S. 105 (1991).

[55] *Id.* at 116 (quotation omitted).

[56] *Id.* at 123.

[57] *See* People v. Dietze, 549 N.E.2d 1166 (N.Y. 1989) (holding New York Penal Law section 240.25(2) unconstitutional for proscribing speech entitled to constitutional protection).

[58] 549 N.E.2d 1166 (N.Y. 1989).

[59] *Id.* at 1167. The defendant allegedly approached the complainant and her son, and referred to the complainant "as a 'bitch' and to her son as a 'dog,' and said that she would beat

sentenced the defendant to pay a fine of fifty dollars, and imposed a surcharge of fifteen days imprisonment in the event that the defendant is unable to pay said amount.[60] The defendant argued that subdivision two of section 240.25 was "unconstitutionally overbroad because its prohibitions extend to a great deal of protected speech as well as to unprotected obscenities and 'fighting words.' "[61]

The court in *Dietze* found that it had enough evidence to support a finding that the defendant had the "requisite intent" under section 240.25(2) to "harass" or "annoy"; however, the defendant's words did not fall within any of the proscribed categories established by precedent.[62] Thus, the New York Court of Appeals held section 240.25(2), Harassment in the First Degree, of the New York Penal Law to be unconstitutional.[63] The Court of Appeals reasoned that section 240.25(2) was unconstitutional "[b]ecause the statute, on its face, prohibits a substantial amount of constitutionally protected expression, and because its continued existence presents a significant risk of prosecution for the mere exercise of free speech."[64]

Similarly, in *People v. Mangano*,[65] the New York Court of Appeals recognized that speech, even if found to be offensive, which does not fall within one of the defined areas of proscribed speech is constitutionally protected free speech.[66] The defendant in *Mangano* was charged with five counts of harassment in the second degree for violating section 240.30(1) of the New York Penal Law.[67] The defendant was said to have left five messages on the answering machine of the Village of Ossining's Parking Violations Bureau ("the Bu-

the crap out of [her] some day or night on the street." *Id*. The defendant knew of the woman's mental state. *Id.* Additionally, the defendant had previously been warned by a police officer to not argue with the complainant again. *Id.*

[60] *Dietze*, 549 N.E.2d at 1167-68.

[61] *Id.* at 1168.

[62] *Id.* "[T]he evidence that defendant was aware of the complainants disability, that she had previously been admonished by a police officer, and that her name-calling was unprovoked was sufficient to support a finding that defendant had the requisite intent to 'harass' or 'annoy' the complainant." *Id.*

[63] *Id.* at 1167. Section 2 of 240.25 Harassment in the First Degree read as follows: "A person is guilty of harassment when, with intent to harass, annoy or alarm another person: (2) In a public place, he uses abusive or obscene language, or makes an obscene gesture." *Pierre-Louis*, 927 N.Y.S.2d at 595.

[64] *Dietze*, 549 N.E.2d at 1167.

[65] 796 N.E.2d 470 (N.Y. 2003).

[66] *Id.* at 471.

[67] *Id. See* N.Y. Penal Law § 240.30(1), *supra* note 2.

reau").[68] The Village of Ossining restricted overnight parking between the hours of three in the morning to six in the morning.[69] Ossining residents were to leave messages, after five in the evening, on the Bureau's telephone answering machine in order to prevent their overnight guests from receiving tickets.[70] Callers were to give the license plate number of the automobile, as well as provide a description of both the vehicle and the parking designation.[71] Callers were also allowed to leave complaints on the Bureau's answering machine.[72]

On August 22, 1998, and August 26, 1998, the defendant left about five messages on the Bureau's machine after hours.[73] The defendant mentioned vehicles and license plate numbers, and then wished two employees and their families poor health, gave complaints of their poor job performance, and also complained of the tickets she had been given.[74] At trial, the jury convicted the defendant of four out of the five counts, which was then affirmed by the Appellate Division.[75] The New York Court of Appeals reversed the defendant's conviction, holding that while the defendant's messages were offensive, they were "made in the context of complaining about government actions, on a telephone answering machine set up for the purpose . . . of receiving complaints from the public."[76] The Court disagreed with the People's contentions that "appellant's messages [fell] within any of the proscribable classes of speech or conduct."[77]

A similar challenge was presented in *People v. Yablov*.[78] In *Yablov*, the court found the harassment statute in question to be facially insufficient for proscribing speech entitled to First Amendment protection and therefore granted the defendant's motion to dismiss.[79] The defendant in this action, Shiela Yablov, was charged with violat-

[68] *Mangano*, 796 N.E.2d at 470-71.
[69] *Id.* at 470.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Mangano*, 796 N.E.2d at 470-71.
[74] *Id.* at 471.
[75] *Id.*
[76] *Id.*
[77] *Id.* (alteration in original).
[78] 706 N.Y.S.2d 591 (Crim. Ct. N.Y. 2000).
[79] *Id.* at 592.

ing sections 240.30 and 240.26 of the New York Penal Law.[80] The defendant allegedly left a series of messages during a period of seventeen months on the complainant's answering machine, after the complainant ended their romantic relationship.[81] Defendant filed a motion to dismiss, arguing that the statute was facially insufficient under sections 170.35(1)(a) and 100.40 of the New York Criminal Procedure Law.[82] Defendant Yablov further argued that her voice messages did not establish the elements of aggravated harassment and therefore her speech could not be proscribed.[83] The court found that while the defendant's actions were "offensive and obnoxious," they were not criminal and could therefore not be proscribed.[84] Thus, the court held the accusatory instrument to be facially insufficient.[85]

While the First Amendment of the United States Constitution and article I, section 8 of the New York State Constitution provide for the protection of free speech, both the Supreme Court as well as the New York Court of Appeals have recognized that the First Amendment does not afford absolute protection, and that speech can therefore be proscribed.[86] Federal courts as well as New York State courts require clear definitions of what is being proscribed before setting such restrictions on the freedom of speech.[87] The court in *Pierre-Louis* followed Supreme Court precedent as well as prior New York case law in holding that Defendant Pierre-Louis's statements were constitutionally protected.[88] The court held that although "vulgar and vituperative in nature, [Pierre-Louis's] statements [did] not rise to the level of 'fighting words' as described by *Chaplinsky* and *Cohen* nor do they rise to the level of a true threat," as proscribed by *Watts* and *Black*.[89]

The court in *Pierre-Louis* accurately relied on *Dietze* in de-

[80] *Id.* at 591.

[81] *Id.* "On one occasion, from approximately six [in the evening] until six [in the morning], the complainant received at least twenty-two [phone] calls from the defendant." *Id.* at 591-92.

[82] *Yablov*, 706 N.Y.S.2d at 592. *See* CRIM. PROC. § 170.35, *supra* note 5; CRIM. PROC. § 100.40, *supra* note 7.

[83] *Yablov*, 706 N.Y.S.2d at 592.

[84] *Id.*

[85] *Id.*

[86] *Pierre-Louis*, 927 N.Y.S.2d at 594.

[87] *Id.*

[88] *Id.* at 594-97.

[89] *Id.* at 595.

termining that the statute was unconstitutional as applied to *Pierre-Louis*.[90] The court noted that it has commonly been argued that New York's Aggravated Harassment statute should be upheld, both as a means of justification as well as a mechanism in which to distinguish it from the *Dietze* statute, on the basis that it protects an individual's privacy rights by prohibiting a "trespass by telephone."[91] The court in *Pierre-Louis* correctly found that this argument failed for a number of reasons.[92] First, the statute had been used in cases where there were not any privacy rights at issue.[93] Second, legislative intent shows that the statute is meant to include circumstances in which communication occurs—it matters not who initiated the communication.[94] Third, even if the communication was initiated by the defendant, this alone would be an insufficient basis for a "trespass by telephone" assertion.[95] Labeling such conduct a "trespass by telephone" solely because of "the content of the communication would be violative of basic and fundamental principles of the First and Fourteenth Amendments."[96] Finally, contemporary society requires that more than just an annoying telephone call be made in order to show that a substantial privacy interest was violated.[97] Today, many people travel with mobile phones, both making and receiving many phone calls while on the go, which requires that privacy interests be carefully scrutinized.[98]

The argument for justifying the constitutionality of the statute—Pierre-Louis's statements were unconstitutional under the statute for it represented a "trespass by telephone," appropriately failed in *Pierre-Louis*. Pierre-Louis left messages on a machine which was

[90] *Id.* at 594-97.

[91] *Pierre-Louis*, 927 N.Y.S.2d at 596.

[92] *Id.*

[93] *Id. See* People v. Dupont, 486 N.Y.S.2d 169 (App. Div. 1st Dept 1985) (holding that distribution of profane and obscene magazines was protected by the First Amendment). The Appellate Court reasoned that "[e]ven if the material in the magazine was provocative, that would not render its distribution the equivalent of 'fighting words' so as to except such activity from the protection of the First Amendment." *Id.* at 176 Defendant's act of distributing the magazine was "neither a violent nor a potentially violent act." *Id.*

[94] *Pierre-Louis*, 927 N.Y.S.2d at 596.

[95] *Id.* at 597.

[96] *Id.*

[97] *Id.*

[98] *Id.*

set up for that exact purpose for which it was used.[99] The court in *Pierre-Louis* acknowledged that Defendant Pierre-Louis allegedly called a Nassau County Assistant District Attorney and left messages using profane and derogatory language.[100]

However, derogatory statements alone did not constitute a trespass by telephone because the calls were made on a telephone line which had been set up for the purpose of both receiving and sending telephone calls from the public.[101]

While many of Pierre-Louis's messages may have contained profanity and were highly offensive, they were constitutionally protected speech under the First Amendment.[102] Although it may be argued that many would find Pierre-Louis's repeated phone calls and profane statements to be severe harassment, the decision in *Pierre-Louis* is warranted for freedom of speech is a right which should not be restricted unless it clearly falls within one of the categories proscribed by prior case law. Otherwise, courts would unreasonably and arbitrarily limit the freedom of speech in some cases.

On the other hand, the *Pierre-Louis* decision might also present problems. For instance, individuals may continue to argue that they engaged in free speech in cases in which they intentionally harass another with the use of profanity and obscenity. The *Pierre-Louis* decision may lead to the start of violence if individuals cannot seek protection from harassment through the judiciary. For example, in the *Pierre-Louis* decision Defendant Pierre-Louis left several voice mail messages on the answering machine of two Nassau County ADA's which not only contained profanity, but contained threats to the lives of these ADA's.[103] As previously stated, Pierre-Louis stated that he was coming at the ADA with fury if his demands were not met and then sought free speech as his defense.[104] Here, the ADA feared for her life and turned to seek protection from the court, which was not granted. If this issue were to arise in another situation, some may respond with violence rather than turning to the court at all out of desperate fear.

[99] *Pierre-Louis*, 927 N.Y.S.2d at 597.
[100] *Id.* at 595.
[101] *Id.* at 597.
[102] *Id.* at 595.
[103] *Id.* at 593.
[104] *Pierre-Louis*, 927 N.Y.S.2d at 593, 594.

This violence issue may be resolved if the Supreme Court creates a better definition of exactly which statements are to be labeled "fighting words," and draws a clear line between what is constitutionally protected speech and what is clear harassment. The two-prong test used by the Supreme Court in *Brandenburg* is overly broad and should be reworked. The Court stated that a state may only proscribe speech if it is first, "directed to inciting or producing imminent lawless action" and, second, "likely to incite or produce such action."[105]

Although a clearer test may help in differentiating what is a threat and what is protected speech, it is imperative that the Court continue to protect free speech. The First Amendment protections are a vital part of the United States Constitution, as well as the New York State Constitution, and free speech should be entitled to strong protection by the courts.

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[105] *Brandenburg*, 395 U.S. at 447.

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