



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 8 | Number 3

Article 28

1992

Freedom of Speech and the Press

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Criminal Procedure Commons](#), [First Amendment Commons](#), [Jurisprudence Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

(1992) "Freedom of Speech and the Press," *Touro Law Review*. Vol. 8: No. 3, Article 28.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol8/iss3/28>

This New York State Constitutional Decisions is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

CRIMINAL COURT

NEW YORK COUNTY

People v. Little⁵²⁹
(published July 9, 1991)

A criminal defendant moved to dismiss his indictment for disorderly conduct⁵³⁰ contending that his insulting comments and accompanying conduct directed at a police officer were constitutionally⁵³¹ protected speech.⁵³² The court held that because the defendant's gestures were nothing more than an accompaniment to the words spoken and did not rise to the level of violent and threatening behavior, the language uttered by the defendant remained protected speech.⁵³³

The defendant was charged with disorderly conduct for yelling abusive profanities while waving his arms and pointing his fingers toward a police officer on a public street.⁵³⁴ The defendant's conduct caused pedestrians to stop and take notice.⁵³⁵

The court noted that if the defendant had been charged solely

529. N.Y. L.J., July 9, 1991, at 23 (Crim. Ct. New York County 1991).

530. Defendant was indicted for disorderly conduct pursuant to section 240.20(1) of the New York Penal Law which provides, in pertinent part: "A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: 1. He engages in fighting or in violent, tumultuous or threatening behavior" N.Y. PENAL LAW § 240.20(1) (McKinney 1980).

531. The court did not state whether defendant's action was brought under the state or federal constitution. The court's decision, however, was based on *People v. Dietze*, 75 N.Y.2d 47, 549 N.E.2d 1166, 550 N.Y.S.2d 595 (1989), in which the court of appeals found that the New York State Constitution provided an independent basis for its holding. *Id.* at 50 n.1, 549 N.E.2d at 1167 n.1, 550 N.Y.S.2d at 596 n.1.

532. "Every citizen may freely speak, write and publish his 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.

533. *Little*, N.Y. L.J., July 9, 1991, at 23.

534. *Id.*

535. *Id.*

on the basis of the profanities he uttered, rather than on the basis of a statute regulating behavior, the court would clearly have found defendant's speech constitutionally protected by following the holding of *People v. Dietze*.⁵³⁶ In *Dietze*, the court of appeals held that Penal Law section 240.25(2), the harassment statute, was constitutionally invalid because it prohibited otherwise protected speech.⁵³⁷ The court in *Dietze* stated that "[s]peech is often 'abusive' -- even vulgar, derisive, and provocative -- and yet it is still protected under the State and Federal constitutional guarantees of free expression unless it is much more than that."⁵³⁸ To forbid or penalize speech, the court of appeals requires that the speech rise to the level of presenting "a clear and present danger of some serious substantive evil"⁵³⁹ In finding the statute invalid, the court in *Dietze* reasoned that "[a]t the least, any proscription of pure speech must be sharply limited to words which, by their utterance alone, inflict injury or tend naturally to evoke immediate violence or other breach of the peace."⁵⁴⁰ Because the court in *Dietze* recognized that Penal Law section 240.25(2) was held not constitutionally limited in scope, it determined the statute extended to any "abusive language intended to annoy."⁵⁴¹ The court voided the statute for overbreadth because it prohibited a substantial amount of constitutionally protected expression and its continued existence posed a significant threat of prosecution for the mere exercise of

536. 75 N.Y.2d 47, 549 N.E.2d 1166, 550 N.Y.S.2d 595 (1989).

537. *Id.* at 53, 549 N.E.2d at 1169, 550 N.Y.S.2d at 598.

538. *Id.* at 51, 549 N.E.2d at 1168, 550 N.Y.S.2d at 597.

539. *Id.*

540. *Id.* at 52, 549 N.E.2d at 1168, 550 N.Y.S.2d at 597 (citing *Lewis v. City of New Orleans*, 415 U.S. 130, 132 (1974); *Gooding v. Wilson*, 405 U.S. 518, 522 (1972); *People v. Feiner*, 300 N.Y. 391, 401, 91 N.E.2d 316, 320 (1950), *aff'd*, 340 U.S. 315 (1951); *People v. Tylkoff*, 212 N.Y. 197, 202, 105 N.E. 835, 837 (1914)).

541. *Id.* The court refused to judicially construct such limitations to render the statute constitutional. *Id.* at 52, 549 N.E.2d at 1169, 550 N.Y.S.2d at 598. The court reasoned that interpreting the statute as limited to specific proscribable speech would result in an impermissibly vague statute as opposed to an overly broad one, thereby causing a chilling effect. *Id.* at 53, 549 N.E.2d at 1169, 550 N.Y.S.2d at 598.

free speech.⁵⁴²

Subsequent case law that has scrutinized subsection three of the disorderly conduct statute⁵⁴³ extended the holding in *Dietze*, finding this statute unconstitutional in that it impinged upon constitutionally protected expression.⁵⁴⁴ In *People v. Perkins*,⁵⁴⁵ a defendant was charged with shouting profanities and making an obscene gesture directed at a police officer in the presence of a crowd of onlookers.⁵⁴⁶ The court favored the “jurisdictional approach” utilized by the concurring opinion in *Dietze*.⁵⁴⁷ This approach prescribes that when a statute is challenged on constitutional grounds there is a strong presumption of constitutionality.⁵⁴⁸ The court noted that statutes should be construed in a manner that saves them from constitutional imperfections and interpreted in a way that “trims them to their constitutional limits.”⁵⁴⁹

In determining whether to extend the holding in *Dietze*, the court in *Little* distinguished *Dietze* and its progeny by noting that the subdivision of the disorderly conduct statute, under which the defendant was charged, regulated behavior as opposed to language.⁵⁵⁰ Hence, on its face, subdivision one of the disorderly conduct statute does not raise the same constitutional

542. *Id.*

543. N.Y. PENAL LAW § 240.20(3) (McKinney 1980); see *Little*, N.Y. L.J., July 9, 1991, at 23; *People v. Perkins*, 147 Misc. 2d 325, 558 N.Y.S.2d 459 (Dist. Ct. Nassau County 1990).

544. See *Little*, N.Y. L.J., July 9, 1991, at 23.

545. 147 Misc. 2d 325, 558 N.Y.S.2d 459 (Dist. Ct. Nassau County 1990), *rev'd*, 150 Misc. 2d 543, 576 N.Y.S.2d 750 (Sup. Ct. New York County), *appeal denied*, 78 N.Y.2d 1129, 586 N.E.2d 70, 578 N.Y.S.2d 887 (1991).

546. *Id.* at 326, 558 N.Y.S.2d at 460.

547. *Id.* at 327-28, 558 N.Y.S.2d at 461 (citing *Dietze*, 75 N.Y.2d at 54, 549 N.E.2d at 1170, 550 N.Y.S.2d at 599 (Wachtler, C.J., concurring)).

548. *Id.*

549. *Id.* The court in *Little* utilized the same approach. See *Little*, N.Y. L.J., July 9, 1991, at 23.

550. *Little*, N.Y. L.J., July 9, 1991, at 23. The court stated that “while in certain circumstances the behavior regulated under subdivision one may be accompanied by language, the statute itself is not a proscription of pure speech.” *Id.*

concerns.⁵⁵¹ The defendant's constitutional claim undoubtedly would have failed if the court ended its analysis here.⁵⁵² However, the court "trim[ed] the statute to its constitutional limits"⁵⁵³ by applying the holding in *Dietze*.⁵⁵⁴ As a result, the court found the insulting comments made by defendant to be constitutionally protected.⁵⁵⁵

In determining whether the defendant's conduct, i.e., pointing his fingers and raising his arms, was also constitutionally protected speech, the court analyzed whether it rose to the level of tumultuous, violent or threatening behavior.⁵⁵⁶ The court concluded that the defendant's conduct was not threatening.⁵⁵⁷ The court also determined that the defendant's behavior was not tumultuous and violent by reasoning that this phrase connotes more than "mere noise or ordinary disturbance,"⁵⁵⁸ but rather, refers to frightening mob-like behavior.⁵⁵⁹ The court ruled that "defendant's gestures were nothing more than an accompaniment to words spoken which, in this context, [did] not remove the language uttered by defendant from the protection of the holding of *Dietze*."⁵⁶⁰

Alternatively, if the defendant behaved more violently, to the extent that his conduct could be segregated from his utterances, it appears that his conduct would have been proscribed by the statute and not constitutionally protected. Unlike *Dietze* and its

551. *Id.*

552. *Id.*

553. *Id.* (citing *People v. Dietze*, 75 N.Y.2d 47, 60, 549 N.E.2d 1166, 1174, 550 N.Y.S.2d 595, 603 (1989) (Wachtler, C.J., concurring)).

554. *Id.*

555. *Id.*

556. *Id.*

557. *Id.* (stating that "[w]hile genuine threats or physical harm fall within the scope of the statute, such an outburst, without more does not") (quoting *Dietze*, 75 N.Y.2d at 54, 549 N.E.2d at 1170, 550 N.Y.S.2d at 599).

558. *Id.*; see also *People v. Mighty*, 142 Misc. 2d 37, 40, 535 N.Y.S.2d 944, 946-47 (City Ct. Rochester 1988) (finding that the defendant's abusive language and name calling directed at police officers did not constitute violent and tumultuous conduct).

559. *Little*, N.Y. L.J., July 9, 1991, at 23.

560. *Id.*

progeny, the court in *Little* did not hold the subsection of the statute constitutionally invalid, but rather construed the statute as limited to certain constitutionally proscribed speech, a result the *Dietze* court refused to create.⁵⁶¹

561. See *Dietze*, 75 N.Y.2d at 52-53, 549 N.E.2d at 1169, 550 N.Y.S.2d at 598. The court refused “to incorporate limitations into the statute by judicial construction.” *Id.* at 52, 549 N.E.2d 1169, 550 N.Y.S.2d 598. “While it is argued that the statute’s unconstitutional overbreadth might be cured by restricting its reach to ‘fighting words’ or other words . . . such a ‘cure’ would, indeed, be fraught with significant problems of its own.” *Id.* “[C]onstruing the statute as limited to certain constitutionally proscribable speech would likely result in transforming an otherwise overbroad statute into an impermissibly vague one” *Id.* at 53, 549 N.E.2d at 1169, 550 N.Y.S.2d at 598.