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Freedom of Speech and Press

regarding the constitutionality of topless dancing.[111] As Justice Lowe stated, "although plaintiff has squarely raised the constitutional issue of whether the SLA's six foot rule violates the freedom of expression of dancers employed by plaintiff, it is unnecessary for this Court to reach the merits of this constitutional claim," since the SLA's rule was declared null and void for lack of authority to promulgate it.[112] As such, the court enjoined the SLA's enforcement of Rule 36.1(s).

People v. Tolia[113]
(decided September 14, 1995)

Defendant appealed from a judgment convicting him of inciting to riot[114] during a concert[115] being held in Thompkins Square

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111. *Jay-Jay Cabaret*, 164 Misc. 2d at 680, 629 N.Y.S.2d at 942. The court discussed in great detail that the instant case was very similar to Beer Garden v. State Liquor Authority, 79 N.Y.2d 266, 590 N.E.2d 1193, 582 N.Y.S.2d 65 (1992), where the court struck down SLA Rule 36.1(q). *Id.* at 276, 590 N.E.2d at 1197, 582 N.Y.S.2d at 69. In striking down that rule, the *Beer Garden* court found that "agencies are possessed of only those powers expressly delegated by the Legislature, together with those powers required by necessary implication." *Id.* Since the legislative history of subsections (q) and (s) were the same, a determination that there was no authority to promulgate subsection (q) should also apply to subsection (s). *Id.* Hence the "six-foot" rule should also be declared null and void. *Jay-Jay Cabaret,* 164 Misc. 2d at 680, 629 N.Y.S.2d at 942. The *Jay-Jay Cabaret* court took this approach in resolving this case but noted that its declaration was "without prejudice to re-promulgation of said rule upon a showing of the requisite grant of appropriate statutory authority and compliance with the relevant statutory provision." *Id.*

112. *Id.*

113. 631 N.Y.S.2d 632 (App. Div. 1st Dep't 1995).

114. *See* PENAL LAW § 240.08 (McKinney 1992). This section provides in pertinent part: "A person is guilty of inciting to riot when he urges ten or more persons to engage in tumultuous and violent conduct of a kind likely to create public alarm. Inciting to riot is a class A misdemeanor." *Id.* The grand jury charged defendant with riot in the first degree, which states:

> A person is guilty of riot in the first degree when (a) simultaneously with ten or more other persons he engages in tumultuous [sic] and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm, and (b) in the course of and as a

Park[116] (hereinafter the "Park") which erupted into a "violent and tumultuous confrontation" between a crowd of over two hundred persons and certain members of the New York City Police Department.[117] Defendant argued, inter alia,[118] that his conviction violated the First Amendment of the United States Constitution[119] and article I, section 8 of the New York State Constitution[120] because it abridged his freedom of speech.[121] Defendant further contended that while Penal Law section 240.08 includes no mens rea element, the First Amendment requires proof of intent to incite violence and, therefore, his freedom of speech may not be impinged upon unless the requisite intent was established;[122] thus, making his "conviction against the weight of

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result of such conduct, a person other than one of the participants suffers physical injury or substantial property damage occurs. Riot in the first degree is a class E felony.

N.Y. PENAL LAW § 240.06 (McKinney 1992). The defendant was acquitted of riot in the first degree after a jury trial. *Tolia*, 631 N.Y.S.2d at 635.

115. The concert was a four-day event entitled the "Resist to Exist Concert" and a "Squatters May Day" which began on April 28, 1990, and ran through and included Tuesday, May 1, 1990. *Id.* at 632. The facts and circumstances surrounding defendant's conviction centered around the events which occurred on the last day of the concert, May 1, 1990. *Id.* at 632-35.

116. Thompkins Square Park is located in the lower east side of Manhattan and extends from Seventh Street to Tenth Street between Avenues A and B. *Id.* at 632. The layout of the park consists of a "band shell which is located on the Seventh Street side of the Park facing north, in front of which is a concrete area 50-70 feet wide containing semi-circular benches." *Id.*

117. *Id.*

118. Defendant also appeals his conviction on the grounds that the evidence presented was legally insufficient and that the jury charge was improper "due to the court's use of the words 'provoked' or 'stimulated' as a synonym for the word 'urge', which improperly allowed the jury to find defendant guilty on a theory of pure causation." *Id.* at 637.

119. U.S. CONST. amend. I. The First Amendment states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." *Id.*

120. N.Y. CONST. art. I, § 8. This section provides in pertinent part: "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." *Id.*

121. *Tolia*, 631 N.Y.S.2d at 635-36.

122. *Id.*

the evidence" and the statute constitutionally defective.[123] After a jury trial, defendant was convicted of inciting to riot and was sentenced to one-year in prison.[124] On appeal, the Appellate Division, Third Department affirmed the conviction, finding that such a conviction did not violate the defendant's free speech rights.[125] In reaching this determination, the court found that the defendant's "intentional actions posed a 'clear and present danger' which led to violent, tumultuous behavior engaged in by more than ten people[,]" rendering defendant's speech "not of the variety protected by the United States and New York Constitutions because such actions were "calculated to incite and produce imminent lawless action."[126]

Although initially the "Resist to Exist" concert in the Park was being operated with all of the necessary and required permits being in place,[127] certain events transpired on the last day of the

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123. *Id.* at 635.

124. *Id.*

125. *Id.* at 636-37. In affirming defendant's conviction, the court also held that the evidence presented was sufficient to support the conviction. *Id.* at 635. In reaching this conclusion, the court viewed the evidence "in a light most favorable to the People." *See* People v. Malizia, 62 N.Y.2d 755, 465 N.E.2d 364, 476 N.Y.S.2d 825 (1984) (finding sufficiency of the evidence in both quantity and quality to support verdict), *cert. denied*, 469 U.S. 932 (1984); People v. Jemmott, 202 A.D.2d 366, 610 N.Y.S.2d 5 (1st Dep't 1994) (finding the evidence sufficient as a matter of law to support the verdict by giving the People the benefit of every reasonable inference from the evidence presented). Furthermore, the court declined to review defendant's argument concerning an improper jury charge in the interest of justice because it was unpreserved on appeal as a matter of law. *Tolia*, 631 N.Y.S.2d at 637. Nevertheless, the court in *Tolia* hypothetically addressed defendant's argument and found that the jury charge was proper because the trial "court's definition of the word 'urge' properly conveyed its correct meaning to the jury; that to find the defendant guilty of the crime charged, the People had to prove his intent to create violence; and that there was a clear and present danger his actions would do so." *Id.* at 637.

126. *Id.* at 636-37.

127. *Id.* at 632. The requisite permits were obtained by the concert organizers, Lori Sbordone and Mary Shero, from the New York City Parks and Police Departments. *Id.* Among other things, the permits specified that the use of amplifiers was to cease at 7:00 p.m. *Id.* However, on the final day of

concert which resulted in the arrest, charge and conviction of the defendant herein.[128] On May 1, 1990, the final day of the concert, there were several police officers[129] and Parks Department Enforcement Officers[130] patrolling and monitoring the concert.[131] Initially, the size of the crowd in the Park ranged between fifty to one hundred people, all of whom were generally "well-behaved, drinking and enjoying the music."[132] However, certain statements were made intermittently during the concert by various individuals, including defendant, to the effect that the Park belonged to the concert-goers and that the police officers and park enforcement personnel had no right to interfere with their festivities.[133]

By 6:00 p.m. the audience had increased to approximately two hundred people, some of whom were led on a march through Greenwich Village only to arrive back in the Park approximately one hour later.[134] At this time, after being informed that the permit for the concert concerning amplifier use could not be extended to 10:00 p.m., the defendant took to the stage and addressed the crowd with statements such as "'Be prepared to break the law tonight', 'Be prepared to resist tonight' and 'Be prepared to fight tonight.'"[135] These statements did not seem to have an immediate reaction on the crowd, however, the police

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the concert, an extension of time was granted for the use of amplifiers until 9:00 p.m. *Id.*

128. *Id.*

129. The New York City Police Officer in charge of the event was Inspector Michael Julian, Commander of the Ninth Precinct who, along with Sergeant Steven Marron and five other uniformed officers, monitored the Park form 3:00 p.m. until 7:30 p.m. when additional officers arrived on the scene. *Id.* at 632-33.

130. Only two uniformed Parks Department Officers were on hand at the Park, however, they were easily identifiable in their green khaki uniforms. *Id.* at 633.

131. *Id.* at 632-33.

132. *Id.* at 633.

133. *Id.*

134. *Id.* The marchers carried banners which read such things as "'May Day', 'Squat or Rot' and 'F**k the Police'" and were followed by Sergeant Marron and other Officers. *Id.*

135. *Id.*

officers were "sufficiently alarmed . . . to promptly call for additional officers."[136]

The additional seven to ten officers[137] who arrived at the Park at approximately 8:30 p.m., were instructed to "deploy[] themselves along the fringe of the crowd" which was estimated to be "between 200 and 300 people present in front of the bandshell and between 30 and 60 people on stage."[138] Among those individuals on stage was the defendant who, at some point between 8:30 and 9:00 p.m., interrupted the music with various speeches all of which asserted that the crowd should resist the police in turning off the electricity.[139]

At 9:00 p.m. the band on stage began a new song at which point certain officers approached the stage to inquire as to how long the music was going to last. The individuals on stage thought the officers intended to stop the concert.[140] Thus, as the officers approached the stairs leading to the stage, the defendant allegedly pointed at the officers and yelled into the microphone "The pigs are here to shut off the power and if you want the party to continue, you better let them know it" and "They are going to try to shut us down. What are we going to do? We are going to resist."[141] Thereafter, defendant further proclaimed, "'Resist' and began chanting 'Whose f***g park? Our f***g park."[142] It was unclear whether or not defendant proclaimed

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136. *Id.*

137. The additional officers were "plainclothes and anti-crime officers . . . including Captain Sullivan, Sergeants Bourken and Rittenhouse and other officers." *Id.*

138. *Id.*

139. *Id.* Defendant's speeches are alleged to consist of the following:

> "'This is the people's Park'; 'Resist, the police are coming. Resist'; 'Resist, the police are coming.'; 'The police are here to shut the power off at 9:00, we can't let them do that.' or 'The police are here to shut the power down and we have to resist the police.'"

Id.

140. *Id.* One individual announced to the crowd, "Here they come, here comes the park pigs, here comes the police." *Id.*

141. *Id.*

142. *Id.*

"[w]e are going to riot."[143] However, it was established that defendant "raised his arms over his head, waiving the crowd toward the stage and encouraging people to come forward."[144]

Subsequently, several officers[145] attempted to get on stage to stop the concert but were prevented from doing so by the crowd on stage blocking them.[146] One police officer, who was able to get on stage, informed defendant that the concert would come to an end after the band finished performing as the electricity was going to be turned off.[147] After hearing this, defendant again began waving and encouraging the crowd.[148] In response to defendant's urging, approximately one hundred people "surged forward from the audience while defendant and others already on stage rushed toward the officers, grabbing, pushing and swinging at them."[149] After ordering defendant's arrest, several bottles were thrown at the police officers and the defendant began to fight with certain police officers and resist arrest.[150] However, while the defendant was being handcuffed, the arresting officer was attacked by another member of the audience.[151] In addition, several of the other officers were involved in their own "struggles with various members of the concert-goers."[152] Several more officers arrived on the scene at approximately 9:15 p.m. in an attempt at securing and monitoring the crowd.[153] However, it was not until 10:30 p.m. that the crowd finally

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143. *Id.*

144. *Id.* at 634.

145. Among those officers attempting to get on stage were Parks Department Enforcement Officers Jordan and King as well as Sergeant Marron. *Id.*

146. *Id.* The "people massing at the top of the stairs" used body blocks to stop the officers from getting on stage. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* Several officers were hospitalized after receiving concussions and lacerations from being beaten by members of the audience and from being struck by bottles. *Id.*

153. *Id.*

dissipated, but not before "other officers and participants were injured and more arrests were made."[154]

In appealing his conviction, defendant raised a constitutional claim concerning violation of his freedom of speech rights along with an allegation that the statute under which he was being convicted was statutorily defective and therefore, constitutionally invalid.[155] Defendant asserted that "although the statute include[d] no mens rea element, the First Amendment requires proof that he intended to incite violence, and that his conviction thereby violated the First and Fourteenth amendments to the United States Constitution and Article 1 [section 8] of the New York Constitution."[156] Thus, defendant put into question the constitutional validity of the statute, arguing that it impinged upon his fundamental right of freedom of speech.

In affirming defendants conviction, the First Department found that "under the facts presented herein, defendant's speech [was] not of the variety protected by the United States and New York Constitutions but was calculated to incite and produce imminent lawless action."[157] In reaching this determination, the court relied predominately upon several United States Supreme Court cases[158] and only two New York cases,[159] all of which concerned the constitutionality of abridging speech in certain instances where such regulation is for the welfare of the public.[160]

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154. *Id.*

155. *Id.* at 635-36.

156. *Id.* at 636.

157. *Id.* at 636-37.

158. *Id. See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989); Hess v. Indiana, 414 U.S. 105 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969); Noto v. United States, 367 U.S. 290 (1961); Dennis v. United States, 341 U.S. 494 (1951); Herndon v. Lowry, 301 U.S. 242 (1937); Schenck v. United States, 249 U.S. 47 (1919).

159. *Tolia*, 631 N.Y.S.2d at 636-37. *See, e.g.*, Lewis v. AFTRA, 34 N.Y.2d 265, 313 N.E.2d 735, 357 N.Y.S.2d 419, *cert. denied*, 419 U.S. 1093 (1974); People v. Winston, 64 Misc. 2d 150, 314 N.Y.S.2d 489 (Sup. Ct. Monroe County 1970).

160. *See, e.g.*, *Brandenburg*, 395 U.S. 444 (1969).

For instance, in *Dennis v. United States*,[161] the Supreme Court upheld sections two and three of the Smith Act,[162] finding that such an Act which has the "obvious purpose . . . to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism"[163] must be constitutional.[164] Furthermore, the Court found that "[o]verthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech."[165] Thus, the Court held that the statute did not "inherently, or as construed or applied in the instant case, violate the First Amendment . . . ."[166] Therefore, petitioners conviction under the Act was "proper[] and constitutional[]," in light of the fact that their "conspiracy to organize the communist party and to teach and advocate the overthrow of the Government of the United States by force and violence created a 'clear and present danger' of an attempt to overthrow the Government by force and violence."[167]

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161. 341 U.S. 494 (1951).

162. *Id.* The Smith Act made it a crime to willfully and knowingly conspire to organize a group of persons (the Communist Party) to teach and advocate the overthrow and destruction of the government of the United States by force and violence and to advocate and teach the duty and necessity of overthrowing and destroying the government of the United States by force and violence. *Id.* at 497.

163. *Id.* at 501.

164. *Id.* at 499.

165. *Id.* at 509.

166. *Id.* at 516-17.

167. *Id.* Moreover, the Court recognized the role of the judiciary when deciding whether a statute violates an individual's freedom of speech rights and further held that:

> When facts are found that establish the violations of a statute, the protection against conviction afforded by the First Amendment is a matter of law. The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts. The guilt is established by proof of facts. Whether the First Amendment protects the activity which constitutes the violation of the statute must depend upon a judicial determination of the scope of the First Amendment applied to the circumstance of the case.

Id. at 513.

In contrast, the Supreme Court in *Noto v. United States*,[168] although faced with the same issue of whether a conviction under the Smith Act was constitutional, reversed defendant's conviction, holding that it was violative of his constitutional freedom of speech right in light of the vastly different circumstances surrounding such conviction.[169] Much of the evidence deduced at trial showed the Communist Party's teaching of certain abstract doctrines of "propriety or even moral necessity for a resort to force and violence," without any "substantial direct or circumstantial evidence" of advocating to actively resort to violence imminently.[170] Furthermore, the Court found that "[t]o permit an inference of present advocacy from evidence showing at best only a purpose or conspiracy to advocate in the future would be to allow the jury to blur the lines of distinction between the various offenses punishable under the Smith Act."[171] Therefore, the Court found that defendant's conviction was against the weight of the evidence and reversed the judgment because it violated defendant's rights under the First Amendment.[172]

In *Tolia*, the First Department, in upholding defendant's conviction, applied the 'clear and present danger' standard as set forth in *Schenck v. United States*[173] and its progeny.[174] In his

168. 367 U.S. 290 (1961).

169. *Id.* at 291. The Court held that "the record in this case . . . bears much infirmity and requires us to conclude that the evidence of illegal Party advocacy was insufficient to support this conviction." *Id.* Specifically, the Court found insufficient evidence "to prove that the Communist Party presently advocated forcible overthrow of the Government, not as an abstract doctrine but by the use of language reasonably and ordinarily calculated to incite persons to action, immediately or in the future." *Id.* at 290.

170. *Id.* at 298.

171. *Id.* at 298-99.

172. *Id.* at 300.

173. 249 U.S. 47 (1919). This case involved convictions under the Criminal Espionage Act, arising out of certain acts by the defendants which "caus[ed] and attempt[ed] to cause insubordination . . . in the military and naval forces of the United States, when the U.S. was at war with [Germany], to wit, that the defendants willfully conspired to have printed and circulated to men who had been called and accepted for military service," certain documentation which proscribed, among other things, abandonment of the war and draft. *Id.*

majority opinion in *Schenck*, Justice Holmes enunciated the 'clear and present danger' standard by stating that "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[175] The Court further stated that to find such a clear and present danger under certain circumstances "is a question of proximity and degree."[176]

Furthermore, the Supreme Court expanded upon the standard set forth in *Schenck* in its holding in *Herndon v. Lowry*,[177] wherein the Court held that:

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at 48-49. In upholding defendants' convictions, the Court found that the documents in question "would not have been sent unless [they] had been intended to have some effect," and further, the Court "did not see what effect [the documents] could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying out of it." *Id.* at 51. Therefore, in light of the circumstances under which the defendants uttered their speech, their convictions were not in violation of the First Amendment. *Id.* at 52.

174. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989); Hess v. Indiana, 414 U.S. 105 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969); Noto v. United States, 367 U.S. 290 (1961); Dennis v. United States, 341 U.S. 494 (1951); Herndon v. Lowry, 301 U.S. 242 (1937).

175. Schenck v. United States, 249 U.S. 49, 52 (1919).

176. *Id.* For example, "[w]hen a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any Constitutional right." *Id.*

177. 301 U.S. 242 (1937). The Supreme Court struck down defendant's conviction under section 56 of the Georgia Penal Code for attempting to incite insurrection by organizing the Communist Party, since the construction and application of the statute deprived defendant of the right of freedom of speech and of assembly. *Id.* at 258. The Court set forth the relevant provisions of section 56 which stated that "[a]ny attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection." *Id.* at 246 n.56. Furthermore, the Court stated:

> The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate

> The power of the State to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principles of the Constitution.[178]

This individual liberty of freedom of speech and of assembly is "[t]he right of a man to think what he pleases, to write what he thinks, and to have his thoughts made available for others to hear or read has an engaging ring of universality."[179] Therefore, "statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action . . . ."[180]

> are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment.

Id. at 263.

178. *Id.*

179. Dennis v. United States, 241 U.S. 494, 520-21 (Frankfurter, J., concurring). However, Justice Frankfurter was careful to point out that the liberty guaranteed under the First Amendment was not without limits. His concurrence goes on to state that "the soil in which the Bill of Rights grew was not a soil of arid pedantry. The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest." *Id.* at 521 (Frankfurter, J., concurring). *But compare* Lewis v. AFTRA, 34 N.Y.2d 265, 277, 313 N.E.2d 735, 743, 357 N.Y.S.2d 419, 431 (1974) (holding that "[f]reedom of speech and freedom of the press are fundamental rights" and the denial of such rights "violates basic principles of liberty and justice and is not to be tolerated in a free society").

180. Brandenburg v. Ohio, 395 U.S. 444, 449 n.4 (1969). *Compare* Texas v. Johnson, 491 U.S. 397, 420 (1989) (holding defendant's conviction for burning the American flag, under a Texas venerated object desecration statute, unconstitutional because defendant's conduct amounted to political expression and was speech of the sort protected by the First Amendment); Hess v. Indiana, 414 U.S. 105, 107-08 (1973) (finding defendant's conviction under an Indiana disorderly conduct statute unconstitutional because the statute, as applied to defendant, merely punished his spoken words which did not amount

Moreover, the Court in *Brandenburg v. Ohio*,[181] reiterated and expanded upon this 'clear and present danger' standard. The Court struck down defendant's conviction under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism" as unconstitutional.[182] The Court recognized that where a statute does not draw a distinction between the mere abstract teaching of resorting to violence and "'preparing a group for violent action and steeling [the group] to such action,' [such a statute] impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments."[183] Thus, only where such advocacy by an individual is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action" will the individual's freedom of speech or assembly be abridged.[184]

The *Tolia* court determined that Tolia engaged in conduct and speech which by its very nature posed a "'clear and present danger' which led to violent, tumultuous behavior engaged in by more then [sic] ten people."[185] Furthermore, the court found that defendant's actions were intentional in light of the circumstances which were "steadily deteriorating" and were "worsened by defendant's relentless calls for the crowd to use force to resist and stop the police from ending the concert, which police officers

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to fighting words nor were they "intended to incite further lawless action on the part of the crowd in [his] vicinity [or] likely to produce such action").

181. 395 U.S. 444 (1969).

182. *Id.* at 444-45 (citations omitted).

183. *Id.* at 448 (citations omitted).

184. *Id.* at 447. The *Brandenburg* Court, finding the Ohio Criminal Syndicalism statute unconstitutional, recognized that "[n]either the indictment nor the trial judge's instruction to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action." *Id.* at 448-49.

185. *Tolia*, 631 N.Y.S.2d at 636.

were greatly outnumbered."[186] The court noted that the defendant should have been able to ascertain the volatile mood of the crowd as evidenced by the numerous bottles being thrown and shattering in defendant's vicinity, the "grabbing, pushing and swinging at the police officers," and the surging forward of the crowd in response to defendant's urging.[187] Moreover, the riot began seconds after defendant's urging of the agitated crowd to come forward.[188] Indeed, the purpose behind Penal Law section 240.08[189] is "to prevent the outbreak of violence by discouraging such language and conduct as can be reasonably anticipated would cause civil disorder" thereby, "penalizing those who urge riotous conduct without the necessity of proving a consummated riot or an agreement to riot by persons assembled with [an] accused."[190] Thus, under the circumstances, Tolia's actions were not protected under either the Federal or New York State Constitutions, as such action was intended to produce imminent lawless action and there was a "clear and present danger [defendant's] actions would do so."[191]

Finally, defendant asserted that the statute under which he was convicted is constitutionally defective because it fails to enunciate the elements of "intent" and "clear and present danger."[192] However, the court held that "the fact that the statute makes no reference to 'intent' or to 'clear and present danger' does not deem it unconstitutional," since a "strong presumption of constitutionality attaches to state statutes and . . . whenever possible, the courts must construe a statute in a manner which avoids constitutional defects."[193] The court looked at *People v.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *See supra* note 114.

190. People v. Winston, 64 Misc. 2d 150, 152-54, 314 N.Y.S.2d 480, 493-94 (Sup. Ct. Monroe County 1970).

191. *Tolia*, 631 N.Y.S.2d at 636-37.

192. *Id.* at 636.

193. *Id. See Winston*, 64 Misc. 2d at 156, 314 N.Y.S.2d at 497 (upholding section 240.08 of the New York Penal Law as constitutional despite the absence of the elements of "intent" and "clear and present danger"). *See also* People v. Liberta, 64 N.Y.2d 152, 171-72, 474 N.E.2d 567, 578, 485

Winston,[194] where the Monroe County Supreme Court grappled with the constitutionality of this statute and held that "[w]hile mindful of the necessity of these two elements before one's freedom of speech may be abridged, it is sufficient that this Court interpret the statute as requiring those elements in accordance with sound constitutional principles so as to preserve its constitutionality."[195] Further, the court in *Tolia* recognized that "the societal value of speech must, on occasion, be subordinated to other values and considerations."[196]

Thus, the court upheld the constitutionality of Penal Law section 240.08 of the State of New York both in its construction and as it was applied to the defendant under both the Federal and New York State Constitutions thereby, finding that defendant's freedom of speech rights were not violated.[197] Therefore, according to the *Tolia* court, the New York State Constitution goes no further than the Federal Constitution in protecting speech that incites imminent lawless action.

N.Y.S.2d 207, 218 (1984) (holding that a rape statute which is underinclusive because it exempts women is not necessarily unconstitutional but rather "the legislature would prefer to eliminate the exemptions and thereby preserve the statute" and that to declare such a statute a "nullity would have a disastrous effect on the public interest and safety"); Epton v. New York, 19 N.Y.2d 496, 505, 227 N.E.2d 829, 834, 281 N.Y.S.2d 9, 16 (1967) (finding a criminal anarchy statute constitutional by "construing it in accordance with sound constitutional principles so as to preserve its constitutionality"), *cert. denied*, 390 U.S. 29 (1968); Simpson v. Wells, 181 N.Y. 252, 257, 73 N.E. 1025, 1026 (1905) (upholding a tax assessment statute which was open to two constructions as constitutional because "by any reasonable construction it can be given a meaning in harmony with fundamental law").

194. 64 Misc. 2d 150, 314 N.Y.S.2d 480 (Sup. Ct. Monroe County 1970).

195. *Id.* at 156, 314 N.Y.S.2d at 496-97.

196. *Dennis*, 341 U.S. at 503.

197. *Tolia*, 631 N.Y.S.2d at 636.