MEMORANDUM OF LAW

Subject: American Law Concepts of "Endangering the Maintenance of Law and Order"

I. Historical Perspective

The concept of "a breach of the peace" is the American common law equivalent of "endangering the maintenance of law and order". The roots of this concept extend back to the very birth of the Republic, and, over the years, both state and federal courts in the United States have had occasion to give extensive analysis to the application and meaning of that common law crime.

It has become fully recognized over the course of time that the common law crime of "breaching the peace" has been substantially watered down by the three freedoms embodied in the First Amendment of the United States Constitution[1/] (i.e., Freedom of Speech, Press, and Assembly). Those freedoms are obligatory upon both the State and Federal Governments. Consequently, the United States Supreme Court has had to lay down uniform standards

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1/ The First Amendment of the United States Constitution provides in pertinent part that:

> Congress shall make no law . . . abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

by which to determine whether a breach of the peace has occurred.

Earlier Supreme Court decisions, which tended to more frequently uphold the convictions of individuals charged with breaching the peace, have today been substantially discredited or distinguished by later opinions of that Court. Typical of such cases are: Gitlow v. New York, 268 U.S. 652 (1925) (conviction under state Criminal Anarchy statute for utterances which threatened the overthrow of the Government by unlawful means, upheld), and Whitney v. California, 274 U.S. 357 (1927) (conviction upheld under analogous statute for organizing and participating in a convention of the Socialist Party, which advocated and taught the forbidden doctrine of criminal syndicalism). These two cases and other early cases, are readily distinguishable from the more recent line of cases in that the convictions upheld in the earlier cases were not measured against the test of "clear and present danger". That test has subsequently become the dominant criterion by which to determine whether an actual or threatened "breach of the peace" has occurred.

II. Case Discussion

U.S. Supreme Court Cases

The three seminal cases out of which the "clear and present danger" test emerged are: Cantwell v. Connecticut,

310 U.S. 296 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940); and Terminiello v. Chicago, 337 U.S. 1 (1949).

In Cantwell, the defendants were convicted of the common law offense of inciting a breach of the peace. They were proponents of the Jehovah Witness faith who were endeavoring to interest members of the public in a heavily Roman Catholic town to adhere to the Jehovah Witness faith. Defendants' conduct had involved the playing of a phonograph record which strongly attacked the Catholic religion and church. Two passersby who were themselves Catholics became incensed by the contents of the record and were tempted to strike one of the defendants unless the defendants removed themselves from that scene. On being warned to leave, the defendants did so, and there was no evidence that they engaged in any arguments or personally offensive conduct. The Supreme Court held that the conduct of the defendants did not amount to a breach of the peace and reversed the lower court convictions. The Court expressed concern about the vague and indefinite nature of the term "breach of the peace" and termed it a "common law concept of the most general and undefined nature". (at 308)

The Court ruled that,

> Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish

> specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioners' communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render [them] liable to conviction of the common law offense in question. (at 311)

The Court went on to say that,

> When a clear and present danger of riot, disorder, interference with the traffic upon the public streets, or other immediate threat to public safety, peace or order appears, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application. (at 308)

Thornhill, supra, was the second major case to apply the "clear and present danger" standard for breaches of the peace. That case arose in the context of a labor dispute, and involved an anti-picketing statute whose alleged purpose, according to the State's Attorney General, was the protection of the community from violence and breaches of the peace which assertedly were the "concomitants of picketing". (at 105) Overturning the conviction in this case, the Supreme Court ruled that,

> Every expression of opinion on matters that are important has the potentiality of inducing action

> in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgement of the liberty of such discussion can be justified only where the clear danger of substantive evils arises . . . . (at 104-105) [Emphasis added]

The third case in the seminal trilogy is Terminiello v. Chicago, 337 U.S. 1 (1949), in which the Supreme Court reversed the conviction of a man who had been found guilty of violation of a breach of the peace statute which provided that:

> All persons who shall make, aid, countenance, or assist in making any . . . breach of the peace, or diversion tending to a breach of the peace . . . shall be deemed guilty of disorderly conduct . . . .

Petitioner in this case had delivered an address at a meeting of a political organization. That meeting had commanded considerable public attention and a crowd of about 1,000 persons had gathered outside the auditorium in which the petitioner spoke to protest the meeting. Although policemen were on hand, order was not maintained and a number of disturbances broke out.

The Court held that the petitioner's conviction for breach of the peace could not stand on the facts of this case. In support of its decision, the Court reasoned that,

As we have noted, the statutory words "breach of the peace" were defined in instructions to the jury to include speech which "disturbs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance . . ." . . .

The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in De Jonge v. Oregon, 299 U.S. 353, 365, it is only through free debate and free exchange of ideas that Government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Accordingly, 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, 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, although 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 the public inconvenience, annoyance, or unrest . . . For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups. (at 4-5) [Emphasis added]

Thus, the Cantwell-Thornhill-Terminiello trilogy squarely established the test of "clear and present danger" as the operative yardstick by which to determine whether an actual or threatened breach of the peace has occurred.

Subsequent Supreme Court cases have reaffirmed this test and have applied it in situations which are quite analogous to the instant trial. One such case, Garner v. Louisiana, 368 U.S. 157 (1961), involved the conviction of a group of black students who had been charged with the statutory crime of disturbing the peace. That statute defined disturbing the peace as the commission of any act in such a manner as to "foreseeably disturb or alarm the public". (at 165) At the trial, the only evidence in support of that charge was that the defendants participated in peaceful sit-in demonstrations at "white" lunch counters for the purpose of protesting against racial segregation. One of the arrested students stated that she wished to get a glass of iced tea, but she and her friend were told by the police that they were disturbing the peace by sitting at a counter reserved for whites and that they would have to leave.

The Supreme Court overturned petitioners' conviction on the grounds that the evidence was not substantial enough to support a conviction of disturbing the peace and that, consequently, their rights to due process of law under the 14th Amendment of the United States Constitution had been violated. As the Court remarked,

> The undisputed evidence shows that the police who arrested the petitioners were left with nothing to support their actions except their own opinions that it was a breach of the peace for the petitioners to sit peacefully in a place where

> custom decreed they should not sit. Such activity . . . is not evidence of any crime and cannot be so considered either by the police or by the courts. (at 174)

A strikingly analogous case to the one sub judice is Cox v. Louisiana, 379 U.S. 536 (1965). In that case, the appellant had been convicted of breach of the peace and other criminal offenses as a result of having led a demonstration of 2,000 black college students who protested racial discrimination and the arrest of 23 fellow students. During the course of the picketing, the group assembled peaceably at the state capitol building, marched to the courthouse where the 23 fellow students were locked in jail cells and, in an orderly manner, sang, prayed, and listened to the appellant's speech but failed to disperse following notice by the police that they had exceeded their time for demonstrating. Upon the failure of the crowd to disperse, tear gas shells were exploded by the police causing the immediate dispersal of the demonstrators. None of the black students participating in the demonstration were arrested on that day, although on the following day appellant was arrested and charged with disturbing the peace and other offenses. The trial record showed that under the leadership of appellant, the students, in response to the singing of their fellows who were in custody, had cheered and applauded, sometimes

loudly. The Court also noted that the record did not show any "boisterous or violent conduct or indecent language on the part of the . . . students". (at 548)

On appeal, the conviction of the appellant was set aside. The Court held that,

> Our conclusion that the record does not support the contention that the students' cheering, clapping and singing constituted a breach of the peace is confirmed by the fact that these were not relied on as a basis for conviction by the trial judge, who, rather, stated as his reason for convicting Cox of disturbing the peace that
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> > "[i]t must be recognized to be inherently dangerous and a breach of the peace to bring 1,500 people, colored people, down in the predominantly white business district in the City of Baton Rouge and congregate across the street from the courthouse and sing songs as described to me by the defendant as the CORE [Congress of Racial Equality] national anthem carrying lines such as 'black and white together' and to urge those 1,500 people to descend upon our lunch counters and sit there until they are served. That has to be an inherent breach of the peace, and our statute . . . has made it so." (at 550) [emphasis added]

In Ashton v. Kentucky, 384 U.S. 195 (1966), a man was indicted and convicted for printing and disseminating a pamphlet claimed to be in violation of the common law crime of "criminal libel", which was defined by the State trial court as "any writing calculated to create disturbances of the peace, corrupt the public

morals, or lead to an act, which, when done, is indictable".

The Supreme Court reversed the conviction and held that,

> To make an offense of conduct which is "calculated to create disturbances of the peace" leaves wide open the standard of responsibility. It involves calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments per se. This kind of criminal libel "makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence". Chafee, Free Speech in the United States 151 (1954) (at 200)

In Ashton the Supreme Court once again criticized the term "breach of the peace" as being vague and ambiguous:

> Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffers. (id.)

In Gregory v. Chicago, 394 U.S. 111 (1969), a group of blacks numbering in excess of 35 petitioned the United States Supreme Court for a reversal of their convictions under a disorderly conduct statute. Petitioners had marched in a peaceful and orderly procession from City Hall to the Mayor's residence to press their claims for desegregation of the public schools. Having promised to cease singing their freedom and rally songs at a particular time, the marchers did so. Although petitioners continued to nm rch in a

completely lawful fashion, the white onlookers became unruly as the number of bystanders increased. The police, to prevent what they regarded as an impending civil disorder, demanded that the demonstrators disperse. When this command was not obeyed, petitioners were arrested for disorderly conduct. The Supreme Court, in a unanimous decision, reversed the petitioners' convictions, holding that "there was no evidence in this record that the petitioners' conduct was disorderly". (at 112) By implication, the Court found that no situation involving a clear and present danger was presented.

Thus, as to statutory and common law "breaches of the peace", the United States Supreme Court has followed the practice of applying the standard of "imminent danger" or "clear and present danger". Although there is no uniform measure of how "imminent" or how "clear and present" a danger must be in order to qualify as a punishable evil, one commentator has made the following ~~considerations~~ observations which still have current applicability:

> The likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be substantial and serious and the degree of imminence extremely high. It is still true that beyond these general standards the Supreme Court has not yet fixed a standard by which to determine when a danger

shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgement of free speech and assembly as a means of protection.

Whether an act is likely to bring about danger of substantive evils sufficient to justify impairment of the constitutional right of freedom of speech and press is a question of proximity and degree that cannot be completely captured in a formula, Annot., "The Supreme Court and the Right of Free Speech and Press", United States Supreme Court Reports, 93 Law. Ed. 1151, 1157 (1949)

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