Supreme Court of the United States

OCTOBER TERM, ~~1969~~ 1970

In the Matter of:

JOHN S. BOYLE, CHIEF JUDGE OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, et al.

Appellants

vs.

LAWRENCE LANDRY, et al.

Appellees

Docket No. ~~6~~ 4

Place Washington, D. C.

Date April 29, 1970

ALDERSON REPORTING COMPANY, INC.

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TABLE OF CONTENTS

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Appellants;

vs.

No. 4

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Appellees.

Washington, D. C.
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The above-entitled matter came on for argument at 11:11 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear the argument from No. 6, Boyle against Landry.

Mr. Bilton, you may proceed whenever you are ready.

ARGUMENT OF DEAN H. BILTON, ESQ.

ON BEHALF OF APPELLANT

MR. BILTON: Mr. Chief Justice and may it please the Court:

This is an appeal from the entry of an interlocutory injunction by a three-judge court after that three-judge court found one subsection of the Illinois Intimidation Statute unconstitutional on its face. That Court said that the statute was over-broad.

The statute is part of the Illinois Criminal Code, Chapter 38, Section 12-6(a)(3). That is a rather short statute and may I just read it to you.

It says that "a person commits intimidation when, with the intent to cause another to perform or to omit the performance of any act, he communicates to another a threat to perform without lawful authority any of the following acts." And the part that we are involved with today is threat to commit any criminal offense.

I was quite shocked this morning when I opened up the Washington Post and found out that this was supposed to be a case that dealt with mob violation and some kind of mob action,

and for a year or so in the Law Week they ascribed this to some kind of a statute that prohibits threats. This statute does not prohibit threats. It is not a public order statute. This statute is a crime against a person and it is so codified in Illinois.

This is an extortion statute and extortion is a robbery. The only difference between extortion and robbery is "Give me your money or I will do something to you right now" and extortion is "Give me your money or I will do something to you in a short while or a little bit later."

And I see that this morning we are joined with the Younger case, with the Criminal Syndicalism case and the Fernandez case, all of them involving anarchy and public order. The case coming up tomorrow is a misconduct case, also an obscenity case.

This is really quite, quite different. This is a crime against a person and the object of protection here is the person and his right to keep his money in his pocket, and we think that to take that man's money away or threats being used as weapons to remove that money are never considered to be speech. And for that reason, of course, we feel that very initially this statute is just not unconstitutional as being a violation of the First Amendment.

We may have misled this Court in reaching this conclusion about this being a statute which prohibits threats and

we set out the question presented on page 4 of our brief.

Our question presented said that this statute is an extortion statute and that it deals with threats to commit crime. A more accurate statement would be that this is a statute that prohibits one from taking or attempting to take the property or the protective rights of another through the use of threats to commit crime, and we think it is in that light that this statute ought to be viewed.

The very first issue in this case is one of standing. The plaintiffs here were seven subclasses of black people in Chicago, all claiming to be black activists and all pending certain state charges, and the defendants here were all members of the officialdom of the City of Chicago, County of Cook, who were charged with the prosecution of the appellees. None of the appellees were charged with this intimidation statute at any time and there are no pending state charges against the appellees.

The appellees in their complaint stated that all the statutes involved, and there were five of them, including mob violence, resisting arrest, aggravated assault, aggravated battery, intimidation, were all being used by the defendants in furtherance of a bad faith conspiracy to keep these appellees from exercising their First Amendment rights. And they used the Dombrowski allegations of a killing effect and a bad faith conspiracy and they say these words.

There was an answer filed denying this conspiracy and a three-judge court sat and heard the threshold question of the constitutionality of this statute on its face.

By the way, there never has been a trial on the merits of this complaint. There has been no proof of any bad faith conspiracy existing among the appellants or defendants below to do the acts of which they were accused in the complaint.

Q Did the three-judge court issue an injunction or just a declaratory judgment?

A The three-judge court issued a declaratory judgment and then it issued pursuant to that a declaration that this subsection of the Intimidation Act was unconstitutional, and then issued a blanket injunction stopping state attorney's office of Cook County from prosecuting anybody under this particular subsection.

Q You did have a prosecution.

A There never was any prosecution of any plaintiff here under this statute at all.

Q It was a declaratory judgment in the broadest advisory sense, was it not?

A In the very pure broad abstract sense, that is correct.

By the way, the one subsection of the Intimidation statute that was set out in the complaint was a section that refers to intimidation by public officials. I wouldn't have

applied to the plaintiffs at all. It was an intimidation by a public official in withholding his own action or doing something that he shouldn't have done.

So truly when we went to hearing before the three-judge court, no one really understood what was the problem with the intimidation statute. It was not until after the three-judge court opinion that we find out and discover that the court thought that this one subsection was over-broad.

Looking at standing the court said that the plaintiffs had standing because they were not charged with any of the offenses here and that, therefore, they came under the right of the Dombrowski case and the Zwickler case to give such people declaratory judgments when they claim that their First Amendment rights are being infringed upon.

We submit to this Court that both Dombrowski and Zwickler are quite distinguishable and in both Dombrowski and Zwickler the plaintiffs there had a history in Louisiana and in New York of having the statutes that they complained about being used against them.

Mr. Dombrowski headed up his organization in Louisiana and he was arrested and he was charged with violating a Louisiana sedition statute, and then a motion to quash stopped that prosecution against Mr. Dombrowski. He then went into the Federal Court and sought to stop future prosecutions under that over-broad statute.

So we had a history of facts that he could point to and said, "Look, they are going to do it to me again." In fact, the State of Louisiana accommodated Mr. Dombrowski by raiding him again shortly after he filed his complaint in the District Court and indicted him under this sedition statute.

In the Zwickler case, a New York man who was distributing handbills anonymously, he was arrested and he was found guilty under a New York statute that said you can't distribute election campaign literature anonymously in quantity. His conviction was later overturned by the New York Supreme Court on the criminal element, but it didn't reach the constitutional point.

Zwickler then went to the U. S. District Court, filed his complaint for declaratory judgment and said, "I am going to do the same thing in the next election and they are going to apply the statute to me again in the next election." So he, too, had some facts he could point to to justify his conclusion that the state was going to apply this over-broad statute against him.

Now in our case none of the 15 or so named plaintiffs nor the organization act or any of the plaintiffs that joined in later on were ever charged with this intimidation statute. They didn't say anything about it in their complaint.

So we don't believe that a person has a right to come into a District Court and the magic words, "My First Amendment

rights are being chilled" and that gives him an automatic right to get a declaratory judgment of any statute he so chooses. And that is what happened in this case.

So for those reasons we do not believe that the plaintiffs here, in the first case, had any standing to challenge the act that they did. I will admit, however, that both Dombrowski and Zwickler do give the Federal Courts jurisdiction to sit in declaratory judgments when a person is not charged with a pending state case.

Now, looking at the statute itself on its merits, we do not believe that the statute is unconstitutional. And our brief from page 13 to page 20 we have a compilation of First Amendment cases, as best we could, and we drew two conclusions. And that is, one, that First Amendment cases are treated on a case-by-case basis. The rule of law seems that you balance the interest of the seeker against whatever state interest is involved.

Well, in this statute, the interest of the seeker is that of a thief. He is attempting to take something from another person by the use of threats, and the protected interest involved is the state's right to protect individuals in their person, in their safety and in their possessions.

We don't think there is any contest here. On that test along the statute should be considered a valid exercise of the state's power and and not over-broad statutes.

I believe that the three-judge court misunderstood this statute because it said that the statute was over-broad because it prohibited threats of insubstantial evil. Well, this in incorrect in two ways. First of all, the statute doesn't prohibit threats. It prohibits extortion by threats, it prohibits robbery by threats, but it doesn't prohibit threats in the abstract.

People can get up and speak about advocating crime. They can get up and threaten all they want. If there is no extortion element present, this statute doesn't prohibit that kind of conduct.

Q Would demand for ransom come under this statute?

A "Give me your money or I will commit a kidnapping," yes.

Q Or "Give me your money because I have your child."

A Well, "Give me your money because ---

Q This overlaps with the kidnapping statute?

A In that sense, it probably would overlap with kidnapping. It would certainly overlap with robbery because it the same kind of a statute, depending on how close the intimidating factor is.

If I hold a gun to your head and says "Give me your money or I will kill you in five minutes," I might be committing extortion or I might be committing robbery, depending on whether or not the incidence of violence is immediate or delayed.

Extortion is that statute which picks up where robbery leaves off. Yes, I believe that there is an overlapping with other state statutes.

Secondly, the court in that one statement about the statute prohibiting threats of insubstantial evil, the idea of "insubstantial evil" is a question that the victim really has to answer. What might be a very small weapon to a court might be a major weapon to the victim.

So when the court said that there are little crimes which might not be too serious to a person, the court did not place itself in the shoes of that victim. He might be just the kind of person that would be intimidated by a small offense.

Now to prove the point that the court, I believe,did lose sight of object of the protection of this statute and thought that this was a public order statute, I would just like to point to the opinion, as set out in page 94 of our appendix, and may I just read these few sentences here:

The court said, "Indeed the phrase 'commit any criminal offense' is so broad as to include threats to commit misdemeanors, possible by fine only. These evils are not so substantial that the state's interest in prohibiting the threat of them outweighs the public interest in giving legitimate political discussion of why it works. Since the language of subparagraph 8(3) isn an over-broad restriction on the freedom of speech, it is invalid. Obviously, however, if the threat is carried out, the

persons who violate the criminal law by their acts are subject to punishment."

Well, this notion that it is better to let a man threaten and speak to preserve the First Amendment and then arrest him when he commits action is a good notion for a statute that protects public order. But if I say to you, "Give me your money or I will break your windows later on" and you give me your money, I never carry out the threat.

So the action here, the threat, is a weapon.

Q So the insubstantial of the criminal act threatens is irrelevant?

A Of course, just as the caliber of the weapon used in robbery is irrelevant. I presume you could commit a robbery with a gun or a pea-shooter. The pea-shooter doesn't seem to be very dangerous, but when held up next to someone's eye it might just be enough to make the man part with his wallet.

And you can commit a robbery by not pulling the trigger of a gun. You can hold a gun and say, "Here, I have a gun, give me your money." You pay the man your money and he does not shoot you, so it is this notion in First Amendment cases. We can wait until the threatener acts. It doesn't apply to cases applying to protection of the individual, because ---

Q After all, the chilling effect on the victim.

A Oh, yes, it is a chilling effect on the victim. Yes.

So for that reason we believe the court was misconstruing this statute in such a way that they believe it was a public order statute.

When it talked about "legitimate political discussion," to this day I fail to see how intimidating a person to either take his vote, try to threaten crimes against him or intimidating a public official by taking away his freedom of speech, by threatening crimes against him can be considered "legitimate political discussion."

Telling a Congressman, "Mr. Congressman, vote for my program, advocate my program or I will commit an act of violence and I will kill you." This certainly is pretty powerful arguing and I don't believe that this ought to be protected free speech.

The court said, in holding this statute unconstitutional that the statute was not vague, but it was over-broad because it had little crimes included in the threats of the criminal conduct. A definition or what is or is not "over-broad" was set out by this Court in the Zwickler case. And this Court said that "over-breadth" is that which -- a constitutional principle that a governmental purpose to control or prevent activities which can be subject to certain regulation may not be achieved by means which sweep necessarily broadly and thereby invade the area of protect freedom.

Now there seem to be two factors in this concept of

over-breadth. One is this wide sweep and one is the invasion of the area of protected freedom.

Initially we do not think that the thief has any protected freedom to try to take property from another by threatening crimes. And as far as this "wide sweep" is concerned, we have set out in our brief a comparison of this statute with the Federal extortion statute and all the state extortion statutes.

Q Mr. Bilton, suppose a man walks in a store and says, "If you don't hire Negroes, I will see to it that you get no more profits." Doesn't that violate this statute?

A You get no more profits ---

Q Well, you walk -- if he walks in the store and says, "Either you give me some money or I am going to shoot you," that takes his profits.

A You didn't include that last. In committing a crime, Mr. Justice Marshall, you said that if you do not hire more Negroes, we will shoot you and that you will receive no more profits. They might boycott the store, people might not shop there.

That isn't a commission of a crime.

Q It's positive. They say that they will make sure that you don't make a nickel. Would that be covered by this statute?

A Well, I believe that you are trying to drive at those threatening words to commit a violence on the man. Do you

mean by subtly that they are saying, "Either you hire Negroes or we will hurt you," or saying that subtly?

Q He doesn't say that. He says, "Either you hire Negroes or you won,t make any money."

A It is not covered by this statute, because this statute only prohibits threats to commit crime, and since there to commit a crime, it would not be covered by this statute.

Q Well, I don't know what's the crime in Illinois anyhow.

A Well, I don't think it is a crime in Illinois to put another man out of business legally.

Q Well, it is plain that if you say, "If you don't hire Negroes, we will murder you," that would clearly be under this statute.

A That is correct.

Q It is a threat to commit a crime.

A That is correct.

Q "If you don't hire Negroes, we will burglarize your store" would also come under ---

A Correct.

Q "If you don't hire Negroes, we will see to it that you don't make a profit out of your store," that would not come under the statute.

A That would not come under the statute.

Q That would simply be a threat not a patronize the

store, I suppose, could be drawn from that. Would that be correct.

A That is correct, absolutely.

The threat here must be a threat to commit a crime. And that was a section that was held to be over-broad.

Q Could a threat be brought within the statute by the innuendo, the immplications, reasonable implications, to be drawn from the threat? I recall, for example, back some 20 years some cases in New York where the practices of extorting in Brooklyn, I think it was, was to go to a storekeeper and say, "You pay us $25 a week or you won't be able to get plate glass insurance any more."

The innuendo there was indirect that you won't be able to get the plate glass insurance because there will be so much breakage that no one will insure you. That would found to be something in a conviction to be sustained.

Would it be sustained under the Illinois statute?

A Yes, it would. The only problem there is the problem of the prosecutor proving up all the elements of the crime beyond a reasonable doubt, for he must convince the jury that the words "viewed beyond a reasonable doubt" carried that innuendo to have violence with his threats.

It is true it would cover our direct threats and threats by innuendo. We deal there,though, with problems of proof rather than the abstract case that we have here.

Q The statute would not be over-broad in your view because it permits proof of the innuendo?

A No, I don't say it. In that regard it sits with every other extortion statute in the country. You need not tell a man directly that you intend to do him violence if he gets the message by innuendo.

What we are trying to protect is people from being relieved of their possessions by force or by coercion.

We have set forth a comparison in our brief of relevant Federal statutes, including the Hobbs Act and other state statutes involving extortion, and we believe that our statute in Illinois is far narrower than those acts which committed extortion under the Hobbs Act.

I direct attention to Nick vs. The United States and Newark vs. Compagna, both cited in our brief, where a person committed extortion by threatening the movie industry to pull out the projectionist unless he received an illegal payoff. Here the act threatened was just to commit a tort or to commit an unfair labor practice, an illegal strike.

In Illinois, of course, we prohibit threats of crimes and to do a crime is something far more narrower in scope than to commit tort. We have set out the Communications Act in the Federal Government, which prohibits extortion by telephoning a person and injuring the reputation or threatening the reputation of the person or of another person, either living of deceased,

which is certainly far broader in scope than the statute here.

Q Of course, if you prevail on your Dombrowski point, we don't any of this that you have been arguing about.

A Well, if I prevail on my Dombrowski point, that is true. We are left in Illinois with a no constitutional declaration of a statute -- our statute as it sits right now has been declared by a three-judge court to be unconstitutional.

In all honesty, Mr. Zwickler was not under a pending state charge when he went into court and neither was Mr. Dombrowski. For that reason the District Court in Illinois, knowing full well that these people were not charged with the statute, but seeing in their complaint that they were threatened by the application of the statute by a bare face conspiracy, said that they extorted the same position as Mr. Zwickler did.

Q Well, the issuance of an injunction is what gives this Court appellate jurisdiction under Section 1253.

A Correct.

Q And now having jurisdiction of this case, there is nothing in the way of the court holding that it is improper for the District Court not only to grant an injunction, but also to issue a declaratory judgment under these circumstances. That is not here. The whole case is here.

Q Essentially the District Court's opinion on the declaratory feature might kill the state courts from going ahead.

A Well, the opinion on the declaratory feature, of

course, for all practical purposes takes away this particular statute for all use in Illinois. It is, however, an omnibus statute, we have seven other sections and we are not completely devoid of an extortion law in Illinois.

But this is a very important section, though, because it is the one that allows us to cope with new and innovative crooks. The other subsections are ones that are traditional extortion elements, the blackmail elements, threats to ruin the reputation. This section is the one that allows us not to sit back and let a person commit extortion that isn't covered by the other section. If he threatens a crime, then move in.

Q To go back to your response to Mr. Justice Stewart's question, if by whatever process it is determined that the injunction -- that there was no jurisdiction to issue an injunction here in the three-judge court, then there is nothing here on the declaratory judgment, because that would not be here, would it?

A Well, if this Court did rule that the appellees had no standing to bring their complaint to the District Court ---

Q No, you can't get a three-judge court for a declaratory judgment standing alone, can you?

A I peg your pardon. I didn't quite understand.

Q You can't get a three-judge court case for a declaratory judgment alone?

A No, sir, you have to seek an injunction.

Every declaratory injunction ---

Q So if the injunction falls, everything falls with it.

A Well, if the standing to bring the case to court fall, everything seems to fall with it, but there are other people who will do the same thing again and might be charged with intimidation and we are back again where we started, trying to support a statute that is alleged to be over-broad.

And we have a holding in Illinois that the statute is over-broad and the case is burst on the ground. It would not help the appellates in this case at all.

Getting back to our comparison, we did compare this statute with all the other states. We found all the other states having broader threats than ours do, and especially states such as Utah which prohibits coercion or threats of any nature. We think our statute is quite narrow when drawn in comparison with the statutes of the other states and of the Federal Government.

Whatever time I have left I would like to reserve for rebuttal. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Bilton.

Mr. Reid?

ARGUMENT OF ELLIS E. REID, ESQ.

ON BEHALF OF APPELLEES

MR. REID: Mr. Chief Justice, may it please the Court:

I would like to, first, address myself to the standing

issue and then to the issue of the merits of whether or not my analysis of the statute is over-broad and deterred First Amendment freedom.

First of all, I think Mr. Bilton got himself into the problem with the standing issue. You see, in this particular case, the history of the case is such that it is here only on one particle of a broad problem that was brought to the court below.

This case grew out of the situation in 1967 where were five mass arrest situations. A committee of 22 lawyers of the local bar and some from out of town got together in basically a Dombrowski complaint, taking from some of these mass arrest situations, sometimes there have been 55 people arrested and sometime as many as a hundred on other occasions and making them members or representatives of the class.

We have here seven subclasses of the total class. One subclass was arrested as a group on August 1, 1967, charged with many crimes, mob action and disorderly conduct being the main ones. Another group was arrested on May 21, 1967, also charged with mob action and disorderly conduct and resisting arrest and a few other charges.

On September 14th another group was arrested and charged with mob action, disorderly conduct and resisting arrest. Now then again on August 23, 1967, another group was arrested and charged with mob action, disorderly conduct and resisting arrest.

And then, to round out this particular class -- oh, excuse me, also on August 4, 1967, another group was arrested and charged with mob action, disorderly conduct, and, I believe, also resisting arrest.

Now, we added also a group know as ACT, which was an incorporated association which more or less advocated the confrontation of public issues in a forum of the streets. He also added as members of the class individuals who had not been arrested or charged with anything, but merely were Negroes who wanted to speak out against what was happening in the City of Chicago at that time in 1967, and we put them in a class and alleged their First Amendment rights were being chilled by this particular plan of action that was being perpetrated by the City of Chicago on people of arresting them with no hope of convictions, with high bonds and keeping them in jail sometimes two weeks before we could go in on motions to reduce the bail and get them out by raising the bail.

Now this Court in the Golden v. Litlis case said the following language with regard to his standing, although very probably you were addressing yourself to to the issue of mootness. But you said, "The difference between an abstract question and a controversy contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult if it would be possible to fraction a precise test for determining in every case whether there is such a controversy. Basically the

question in each case is whether there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to want the issuance of a declaratory judgment."

And you cited in support of that the Maryland Casualty Co. case.

Now in this particular case you have to know something about the City of Chicago in order to understand how the intimidation statute gets here. The City of Chicago has a large Corporation Counsel's office, which is charged in many instances, among other things, with enforcement of the city's ordinances.

And in 1967 a gentleman named Richard Elrod, who later became a state legislator, but was at that time in the Ordinance Enforcement Division of the Corporation Counsel's office, was present at every major demonstration in the City of Chicago, and he was the man on the scene charged with the duty of telling the Chicago police who they would arrest, when they would effect the arrest and what charges would be brought against the alleged offenders.

Now he was present at each and every one of these instances that I quoted to you in the complaint of the five groups of people that were arrested. Some 50 people, and sometimes as many as a hundred people in these mass arrest situations.

Now it was Richard Elrod who dreamed up the notion to later use the intimidation statute, which didn't carry just a

year in jail or a fine, but carried five years in jail. And when we as lawyers representing these people heard the threats, we beat him to the courthouse, because we did not want anybody charged with a felony that carried five years for merely protesting in a peaceful way and try to seek a redress for their grievances.

Now the reason that the standing issue was not raised in the jurisdiction statement and the reason it just came up in the brief of these particular appellants is that there were several groups of people below the State Attorney's office represented the defendants, who were county officials, and the Corporation Counsel's office represented the defendants who were city officials. And Richard Elrod, of course, was the Corporation Counsel's assistant in charge defending the city officials.

And it was Richard Elrod, I tell you, who dreamed up the intimidation statute so the issue never came up, because when the lawyers tried the case -- and I am one of 22 who stuck with the case -- were in court with Mr. Elrod and with the other lawyers who represented the county officials, obviously the issue never came up because we knew, and everybody else knew, that there was a substantial controversy about this intimidation statute, that Mr. Elrod wanted to use it and we beat him to court and the three-judge court agreed that as the statute was perverted or could be read, it was quite a chilling effect and had a chilling effect on First Amendment freedoms.

Now Mr. Bilton has stood up here and told you about taking money from somebody. I want to tell you how the statute was intended to be used and how you can read it in plain English and it would stick. When you make a victim or a so-called victim of that statute a public official, and then you read the statute that you will threaten him in order to get him to do something or in order to fail to do something by committing a crime.

Then I submit to you that you have to read the entire Criminal Code of the State of Illinois and also the ordinances of the City of Chicago and the other municipalities in the State of Illinois to determine whether or not you are threatening a crime.

For example, as the three-judge court said, "If you say to a public official either you will redress our grievances or we will picket the city hall." Now, if there is an ordinance in the City of Chicago which prohibits the picketing of the City Hall, you have just put yourself in a five-year noose to stand trial for the intimidation statute, and that is why we are here and that is why the three-judge court said clearly, this statute as yet -- and it can be read that way -- is quite a chilling statute as far as First Amendment freedoms are concerned.

And the court itself went through several examples. I can quote, if I can find the examples, of people blocking an intersection with baby carriages or people deciding to do things which in and of themselves would be misdemeanors if carried

through to fruition. And because you threatened to do a misdemeanor, to bring a public official into the public forum to do what he should do, then you are charged with a crime that carries with it a five-year penalty.

I say to you that this statute on its face is void because it is over-broad, and as Your Honors got into the questioning with Mr. Bilton, there are many other statutes in the State of Illinois and many other ordinances of the City of Chicago which deal with conduct that may be antisocial or may create harm to property or to persons.

I say to you that this is not such a statute, as it is presently drafted.

Another thing, back on the standing issue, Mr. Elrod himself, when he became a member of the Legislature, after the initial three-judge opinion in this case, entered into the State Legislature and had it passed a bill repealing this particular statute.

And I don't know today whether or not the Governor has signed that repeal bill, but I do know that a letter was sent to the Governor's office asking him to hold up on signing the repealer, because it would moot the issue before the Court today.

And I say to you what we are doing here ---

Q Counsel, how do we know these facts to be whether as they appear in this record?

A They don't appear in the record, because the last time I was here to argue the case I didn't know that. I found out after the first argument of this case.

Q What is it you want us to do with respect to these facts ---

A I think we can stipulate to the Court that a bill was introduced and passed by the Illinois Legislature, because it is a fact, repealing this section of the Intimidation Act of the State of Illinois. Now I don't know today whether or not the Governor has signed that bill, but I am saying that the gentleman who dreamed up this idea, Richard Elrod, introduced it and saw that the bill was passed.

Q Why is the evidence in the record that Mr. Elrod "dreamed it up"? Where is the evidence that ---

A Well, there is basically -- I may be ---

Q Mr. Elrod's presence at all these meetings.

A Mr. Elrod was the Assistant Corporation Counsel.

Q I know, but is that in the record?

A That is not in the record. The thing is that is you read the record, you may see that Mr. Elrod was a party to this lawsuit, so far as representing some of the defendants who are not here, and they would be the city officials.

Q But how do you know that Mr. Elrod from anything that we have before us was ever planning to use this statute against anybody?

A Only by our complaint, and our complaint is that the threat was made and it is a question of whether or not the word "threat" is a conclusion, argued by counsel, or that it is a fact. And I am saying to you that the threat, as used in the complaint in paragraph 8 and again, I believe, in paragraph 24 of the complaint, paragraph 25 of the complaint, paragraph 34 of the complaint, and paragraph 37 of the complaint where we all say in all of these paragraphs that we have been threatened by use of these statutes and the threatened use of other statutes that have not yet been used.

Q But there was an answer filed which denied all of those. Is there any proof?

A The only thing that I am saying to you is ---

Q Was there any proof taken?

A I am saying that ---

Q Were any proofs taken?

A No, and the reason is this question didn't even come up in the jurisdictional statement in this Court, in violation your rule 15.1(c), and I make that a point in my brief. In my brief I say that the question was not set forth in the jurisdictional statement and fairly complies therein as required by rule 15.1(c) of this Court.

Then I go on to say the question was one decided by a single judge, from whose decision an appeal must be taken to the Court of Appeals.

Now they filed a motion to dismiss and that is in the record. That motion to dismiss was denied by Judge Wills, sitting as one judge before he convened the three-judge court. I am saying that they had at that point a right to appeal that decision to the Court of Appeals for the Seventh Circuit. They chose not to appeal.

And then when the three-judge court was convened, they went ahead and the three-judge court decided that on the face of this particular statute it was over-broad and therefore unconstitutional.

Now I am saying when you have a situation like this, where standing was never raised, and I must apologize, I must go outside the record to give you the background of the reason, the explanation for this. It was never raised in the District Court before Judge Wills. An appeal was taken on the issue to the Seventh Circuit, and then when the statute was knocked out on its face, then for the first time in their brief, even after filing the jurisdictional statement, as an afterthought -- and this was before the Golden case even -- they decided that perhaps they would have a shot at us before this Court because of standing, because no one was ever charged actually with the violation of the intimidation statute.

I am saying to you, as you said in the Golden case, you must look at the totality of all the circumstances before the Court. You cannot just pull out one element of this case.

Q What totality do we have. As I see it, we have several allegations that people had been threatened, and I could read those in the text of the whole complaint, that they are threatened merely by the presence of the statute.

A Well, that may be the softest way to read it. The only way I am ---

Q Well, what other way should I read it?

A The only thing that I ---

Q There is no specificity here at all. There are no facts in this record at all that anybody has been told that if you exercise your right of free speech you will be charged with this crime. There is not one word in the record.

A Let me answer it this way, Your Honor.

Q Sure.

A Whether or not you read the word "threat" as being an allegation of facts or you read it as being a conclusion by the pleaders.

Now I say to Your Honor that you have a perfect right to read that as a pleading of facts, because it is a fact that we are threatened by the use of this statute, and it is a pleading of a fact. We were threatened by the use of this statute and it is probably a problem in semantics as to whether or not you will understand the word as hear it, "threat," to be a conclusion.

Q Well, I mean suppose a man in the Sanitation

Department picking up garbage says that if you don't give me cleaner garbage, I am going to have you convicted under this statute. Would you consider that a threat?

A Well, there must be a clear and present apparent ability to carry out the threat, and I went to the record only to explain that the person who made the threat was present in court -- but the person who made the threat had the apparent ability to carry it out.

Q And my personal trouble, Mr. Reid, is that I have great difficulty in going outside of the record.

A I understand, Your Honor. But may I say this: Your Honor does not have to go outside the record to deal with this case and I will show Your Honors that you don't have to do that. In this particular case the issue of whether or not there is standing is a factual issue and although it may result in a conclusion that may have jurisdictional effect, I am still saying that initially it was a factual determination to be made initially by the district judge.

And I am saying, Your Honors, that it was, in fact, made and that it was conceded and that either it was weighed -- and I am saying that Your Honors have a perfect right to say ---

Q I don't agree that this is just a question of standing. I think this is a question of whether you have got a question of controversy.

A That is correct, Your Honor, but that is ---

Q That is my problem.

A We are using the case of whether there is a sufficient case of controversy ---

Q And that is declaratory judgment.

A I am only using standing as a shorthand method of saying.

Q Well, what about your fifth class, the class of all these people that haven't participated in anything yet?

A They were chilled and their First Amendment rights were -- well, when you do this, Your Honor -- let's back up and say there is a distinct difference that this Court has recognized in this particular area between cases that deal with First Amendment freedoms and all other classes of cases. And the reason for that is quite important.

If we don't have an effective and quick method to effectively deal with and protect First Amendment freedoms ---

Q Well, then, anybody in Chicago could have filed this suit.

A No, Your Honor.

Q Well, what difference has this group you mentioned?

A Well, they might be put in -- you might even say they came in under pending jurisdiction. We had a substantial controversy between the first five groups, the people who were arrested. There is no question that there was a substantial controversy going on at the time between the mass arrest situation

and the City of Chicago.

Now out of that controversy as a result of what was happening to the people that were arrested, in our humble opinion, there were people who were standing on the sidelines who might have wanted to picket, who were not picketing, because they thought, "Look at what is happening to these people who are in that picket line. They are getting their heads beat in and they are being arrested, and they are being kept in jail. Now why should I go out there and picket peacefully and go to jail for two weeks before I can even post bond?"

Now it is these people I think this Court should address itself to because it is these people who then, after seeing the effects of the other people who are the activists, stand silent and stand moot, and that is the danger to order and liberty. And that is the same reason that this Court has made a distinction between First Amendment cases and all other cases.

Q What is there in this record that tells us that people should get beat over the head? In this record now.

A Well, Your Honor, I was speaking fast and it came out fast. I apologize. Of course there is nothing in this record.

People were arrested, they were held on bond, as the record shown, and they were later discharged and we are saying that because these people in the first five subclasses were dealt with in this manner, with no ---

Q It will be more helpful to the Court, Mr. Reid, if you keep your factual development within the record, so that we know that you are talking about this case and not some other hypothetical case.

A In this particular case there were four or five groups arrested and we picked some of the people out of these groups as representative of the class. Now we added a group and in answer to Justice Marshall's question, people who were never arrested but who wanted to speak up and use speech in a lawful manner.

Now I am saying to the Court ---

Q But did this record tell us somewhere that the people in this class had been arrested at some time?

A Yes, and in the appendix, starting at page 4, paragraph 8 ---

Q Well, is that an allegation of complaint or is it evidence?

A That is in the complaint.

Q Was it denied?

A It was -- no -- paragraph 8 was denied.

No, paragraph 8 was admitted, that's right. Let me explain the answer.

Q Well, I don't want to hold you up now.

A But in any event there was no question about it, about who the subclasses were.

Q There is one thing in your off-the-record discussion that doesn't seem to me to be pertinent. You said that this statute had been repealed by the Legislature and you didn't know whether it had been signed. And if it had been signed, this would moot the case.

A The bill has been vetoed.

Q And the Court is entitled to know it.

A The bill has been vetoed. I just got a note from Mr. Bilton two minutes ago.

Now, so it is not moot. The only thing that I am saying is that when you look at whether or not there is a case in controversy, I think you have to relax your standard as far as First Amendment cases are concerned, because this Court has said -- and I think we can't gloss over this -- that we are not really deal so much with the people that want to break the law.

There are statutes on the books that are available to give these people their just desserts and put them in jail commensurate with the crime that they have perpetrated in their actions. But when you back up a step and say that when you use language and you verbalize your grievances openly in a public forum and you address them to a public official, and you say, "Do something for us, please, or we will do X" and it turns out that an analysis of all the statutes codified by the X is applying, that you are then subject to five years' imprisonment.

I say that this runs smack dab into what we tried to

start out with in this country of having truly conflicting interests balanced. And I am saying that they are always on a collision course at any time that you take to the public forum and say do something for us.

MR. CHIEF JUSTICE BURGER: At this time we will suspend and you will have seven minutes left after lunch, Mr. Reid.

(Whereupon, at 12:00 Noon the argument in the above-entitled matter recessed, to reconvene at 1 p.m. of the same day.)

(The argument in the above-entitled matter resumed at 1 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Reid, you may continue whenever you are ready.

ARGUMENT OF ELLIS E. REID, ESQ. (resumed)

ON BEHALF OF APPELLEES

MR. REID: Thank you, Your Honor.

Mr. Chief Justice and may it please the Court:

I would like to at this point just address and point out that the problem that I think was bothering this particular Court is that I have a feeling that you have a fear of being intimidated by this type of a case if you relax the standing required in a declaratory judgment action to the degree that we feel is necessary in order to protect First Amendment freedoms.

But I would like to say two things and try to make this clear to the Court so that you understand it really from a practicing lawyer's point of view, one who is concerned with First Amendment freedoms.

First of all, I would like to say to you what I feel would have happened had the state in this particular proceeding won the race to the courthouse. Now it has been called in many circles that this is a so-called race to the courthouse, whether or not the state will file the charge or whether we will get to the court and ask for a declaratory judgment on these over-broad statutes in Federal forum.

I would like to say, first of all, that just from the lawyer's point of view had the state in this particular proceeding won the race to the courthouse, in addition to the conflicts legal and factual issues that I have had to address myself to here over the last three years, I would have then had to deal with another form, also the issue of bail, the issue of defense in a criminal case, the issue of being prepared to try a case if it was not enjoined, and also the anti-injunction statute in the Federal system.

Q Well, isn't that the normal course of litigation in the general scheme of things?

A What I am saying is that it doesn't have to be for the future. We have a problem here and I think that the Court is trying to address itself to that problem, because in Dumbrowski and in Zwickler this Court said that it would be enough to have a threat arrest under the proper factual circumstances and I detect from not only the questions today, but the previous time that I argued this case, that this Court is also dealing in its own mind with the floodgate problem, and that is whether or not you would be inundated with this type of litigation if we are able to sit back in our office and go to the criminal court and say, that is a good statute, that is a bad statute, we will file suit on the bad statute and come to court.

I don't think it is going to happen that way, because these cases are expensive, these cases are very tedious and they

take, as you cn see in this case, three to four years of a lawyer's time. And that is one issue.

But, on the other hand, if the state wins the race to the courthouse and is a threat and we have to wait, even though they are threatening us like today to file suit tomorrow and we have to wait until tomorrow until suit is actually filed, then in addition to the complex problems in this type of case, in this Federal forum, I am also put to the task of dealing with the complex legal and factual issues in the state court.

So I am saying, Your Honors, that the floodgate argument that might be thrust upon you today will be found to be wanting in this particular type of case, because it is a very burdensome type of litigation and, No. 1, you must get one judge of a district court to hear your case, look at your complaint and to decide whether or not in his discretion he will convene a three-judge court, as was done in this case, and motions for dismissal of your complaint may be filed, as they were filed in this case.

I would like to point out that these issues were met head-on on a motion to dismiss filed in this particular case and I would like to, in the time that I have remaining, address myself to four portions of the appendix which I think are importan to four specific portion of three-judge court's opinion.

Now, at page 57 of the appendix the court said as follows: "Plaintiffs filed their complaint on October 27, 1967,

Simultaneously they moved that a three-judge court be convened to hear and determine the issues presented therein. Shortly thereafter both the state and the city defendants moved to dismiss, contending inter alia, that the complaint failed to disclose a basis for an equitable relief and the doctrine of Federal abstention should be utilized to allow the state court an opportunity to adjudicate the state's issues presented in its complaint."

An opinion dealing with these motions was issued on December 28, 1967. The defendants' motions to dismiss were denied.

Now, at page 62 of the same opinion -- of the appendix, the court there said as follows: "The principles announced by the Supreme Court in Dombrowski and Zwickler appear clearly applicable in the instant case. Plaintiffs' claim that statutes are invalid because of vagueness, indefiniteness and over-breadth have been used by defendants in furtherance of a scheme to discourage plaintiffs' legitimate exercise of First Amendment rights. In Dombrowski the court indicated that the defense in a state tribunal prosecution is not sufficient to correct either of these evils. Arrest and threats of prosecution may have an interim effect on free expression where prosecutions are executed in bad faith and in furtherance of a scheme to discourage protected activities. The ultimate success of the defendant does not alter the impropriety of the unconstitutional scheme. The

adjudication simply resolves the guilt or innocence of the defendant. It does not purge the scheme of its impact upon federally protected rights."

And then at page 94 the same court, the three judges, continue, and they say there: "The provision is not vague. It is, however, over-broad, speaking now of the particular statute. Since it prohibits threats of insubstantial evil, the commission of criminal offenses against persons or property is a substantial evil, and the state may legitimately proscribe the making of threats to commit such offenses. The commission of offenses agains public order only, however, is not such a substantial evil that the state may prohibit the threat of it."

And then they go on to deal with the statute to show in examples as to how you can commit disorderly conduct, and because of this statute end up with five years in prison.

Now I would like to go back now to page 84 of the appendix -- page 88, excuse me, where the court points out this. This is important. They say: "However, at the outset of this analysis it should be recognized that Illinois has no legitimate interest in proscribing as intimidation statements that have no reasonable tendency to coerce or statements which, although alarming, are not expressions of an intent to act. Legitimate political expression is not intended to secure changes in a society of legal, social or economic structure which frequently take the form of expression about future events or conditions.

Such expressions may be in the form of policies, predictions or warnings or threats of lawful action."

I know my time is up. I would like to say here is the thrust of this particular statute, that we contend is unconstitutional and because of that, we feel that this Court has a duty to affirm the court below.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Reid.

You have four minutes left, Mr. Bilton.

REBUTTAL ARGUMENT OF DEAN H. BILTON, ESQ.

ON BEHALF OF APPELLANTS

MT. BILTON: I only wish to rebut one statement.

Mr. Reid just said that in Illinois you can threaten to commit a disorderly conduct and wind up in prison for five years. You can only do that in Illinois if you threaten to commit this disorderly conduct while you are tending to steal from a person or while you tending to rob from a person or while you are tending to extort from a person. Threats of disorderly conduct in the abstract are not prohibited by this statute whatsoever, because this is not a public order statute. This is a statute which protects the person.

Other than that, I think my argument-in-chief covered all the points that Mr. Reid talked about and I would have no further rebuttal, just to respectfully request this Court to reverse the three-judge court below and restore to Illinois a statute that we feel is very important in our scheme of our

Criminal Code.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Bilton. Thank you, Mr. Reid. The case is submitted.

(Whereupon, at 1:11 p.m. the argument in the above-entitled matter was concluded.)