Supreme Court of the United States

October Term, 1968

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. 244

Place Washington, D. C.

Date March 24, 1969

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

John S. Boyle, Chief Judge of the Circuit Court of Cook County, Illinois, et al., Appellants,	:	
v.	:	No. 244
Lawrence Landry, et al. Appellees.	:	

Washington, D. C.
Monday, March 24, 1969.

The above-entitled matter came on for argument at 12:55 p.m.

BEFORE:

EARL WARREN, 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
ABE FORTAS, 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 WARREN: No. 244, John S. Boyle, Chief Judge of the Circuit Court of Cook County, Illinois, et al, versus Lawrence Landry, et al.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Butler.

ORAL ARGUMENT OF RONALD BUTLER, ESQ.

ON BEHALF OF APPELLANTS

MR. BUTLER: Mr. Chief Justice, your Honors.

This is an appeal from a permanent injunctive order issued by a three-judge court in the Northern District of Illinois, which order for purposes of this appeal held unconstitutional one subsection of the Illinois Intimidation Statute, Illinois Revised Statute, Chapter 38, Section 12-6(a)(3).

Jurisdiction is conferred upon this court by a title 28, Section 1253 and 2281. Probable jurisdiction was noted on the 9th of December 1968.

The posture of this case in the lower court is as follows: A complaint was filed by the plaintiffs purportedly alleging a conspiracy to violate the plaintiff's constitutional rights and setting forth that by the use of unconstitutional statutes on their face or the misuse of statutes which would be otherwise constitutional, that the plaintiff's constitutional rights were violated.

The defendants filed a motion to dismiss initially

alleging four basic grounds. First, lack of jurisdiction; second, no relief upon which a claim can be granted; third, as to those subclassifications of plaintiffs who had been arrested prior to the filing of the complaint for Federal equitable jurisdiction, the bar of of 28 USC 283; and lastly, as to those class of plaintiffs who had not been arrested but who were plaintiffs in the case, the claim that the lack of specificity in the complaint takes jurisdiction away from the District Court.

The single trial judge dismissed the motion to dismiss filed by the defendants. In doing so he stated that the plaintiffs did have proper standing, that the question of 2283 was a premature question because that statute was not jurisdictional, that a three-judge court would be convened and the first order of business upon convening the three-judge court would be to determine the threshold questions of constitutionality with respect to the five enumerated statutes which the plaintiffs have challenged.

The appellants thereby filed an answer denying the material allegations of the complaint and specifically in an affirmative series of affirmative defenses setting forth those statements which we made in the motion to dismiss.

Now the statute in question reads as follows: A person commits intimidation when within intent to cause another to perform or to omit the performance of an act he communicates

to another a threat to perform without lawful authority any one of the following acts and subsection 3 commit a criminal offense.

The lower court held that the statute in question was overbroad because it prohibited insubstantial evil. They said that the Commission of offenses against public order only is not such a substantial evil that the State may prohibit the threat.

And they further stated that the prohibition of insubstantial evil is outweighed by legitimate political discussion on the wide berth.

There are two issues presented for review in this case. One, whether the plaintiffs have sufficient requisite standing to entitle them to a determination of the constitutionality of the intimidation statute, and two, if they do have such standing whether the First Amendment prohibition against abridgement of speech is violated by a State statute which prohibits threats to commit a criminal offense where the intention is to force another to surrender his freedom of choice.

Now as to the standing point the complaint shows the constitutional validity of five Illinois statutes. The mob violence statute, resisting arrest, aggrevated assault, aggrevated battery and intimidation.

There are seven subclasses of plaintiffs. Six of

subclasses had been arrested in incidents prior to the filing of the Federal declaratory complaint and whose cases were presently pending at the time that the Federal declaratory suit was filed.

Q Were any of those suits under the intimidation statute?

A None were under the intimidation statute, your Honor.

Now as far as the complainants who were not arrested but who were party's plaintiff the complaint as the appellant's view it show no specificity with respect to any factual allegation which can be shown to depict a deprivation of constitutional rights.

In my view, reading the 37 paragraph complaint there are six paragraphs which have anything at all to do with the intimidation statute and with the subclassification of the plaintiff's who have challenged the statute under it. That was paragraphs 8, 24 and 25, paragraphs 34, 37(b) and 37(f).

But in each of those six paragraphs the complaint is devoid of any specificity of effect. All we see are conclusionary allegations. I am intimidated because of the intimidation statute.

Now the purported foundation for this case lies in two cases, Dombrowski versus Pfister and Zwickler versus Koota. Both of those cases, your Honors, there were specificity effects

at least in Dombrowski there were affidavits filed. There were offers of proof made. In both Dombrowski and Zwickler we had situations where there were prior arrests even though the arrests were not pending at the time of the Federal declaratory relief and lastly there was in the complaint the specific intention shown by the defendant to futur harassment, future violation of the plaintiff's constitutional rights.

I submit that this case does not fall within the precept of Dombrowski and Zwickler but rather falls within the concept of DuBois versus Clark and the recent case of Golden versus Zwickler.

In DuBois, this Court declined to hear a situation where they said, this Court said that no specificity at all is shown. In Golden versus Zwickler we had a situation where the Court stated that the complaint failed to present probably because of the lack of specificity of the complaint failed to present an actual case or controversy.

It is our opinion that the present complaint fails both the show specificity or to show an actual case or controversy.

Q Now is the situation different at the time of the judgment do you recall in Golden we felt that the three judge court had erred in making this determination of case controversy on the allegations alone rather than on the situation as it existed at the time of the remand.

A Yes.

Q Well, what is your position?

A We don't have any facts, your Honor. We have no facts.

Q So that we do have to go back then to the complaint itself?

A We have to go back to the complaint itself for purpose of the jurisdictional argument, yes. We would be in the same situation as Zwickler versus Golden before this court the second time.

Q Well, I know, but this argument based on Golden this is what I am trying to get clear.

A Yes.

Q Is this an argument that even on the face of the complaint there is no case or controversy in the sense of a live fight alleged within the four corners of the complaint?

A That is our allegation, yes. Unless this Court is prepared to allow that much more wide of a latitude than it seemed that the intendment of Dombrowski was designed to protect.

Q Yes.

A Secondly, as to the issue on the merits, the appellants contend that a statute which prohibits threats to commit a criminal offense where the threats are intended to force another to surrender their freedom of choice is not

within the purview of the First Amendment. We contend this upon two factors. First, an analysis of the thrust of the statute and secondly the scope of the First Amendment with respect to threatened conduct where the intention is to force another to surrender their freedom of choice.

The lower court in this case in a very fine opinion found that the intimidation statute as a whole was designed to protect communications intended to compel another to act against his will.

The court defined a threat then and they said a threat was an expression of an intention to inflict harm or evil against another. They said that it was more than a mere intention, however, that it was a menace, that it must unsettle the mind of the person on whom it operates and that it must take away from his acts that free and voluntary choice which would alone constitute consent.

They said further that the expression of that threat, it must have a reasonable tendency to be carried out by the threatenor according to its tenant. This is the definition of threat. This is the definition we abide by.

Now yet when the lower court approached the subsection involved, it shifted its emphasis from the substantiality of the threat to the substantiality of the crime. This we feel is what precipiated the error in the lower court's decision.

The lower court itself stated earlier that the substantiality of the crime was not really the important thing because they said that a mere expression of intent to commit a criminal act was not itself sufficient under this statute.

We need the final element of extortion which completes the prohibitive act which is the taking away of that free and voluntary action which alone constitutes consent, so the substantiality of the evil must go to the threat and to the fear committed by that threat as far as the object of the threat is concerned, the victim, and not to the substantiality or the insubstantiality of the crime threat.

The court made three illustrations to justify their proposed opinion. In the three illustrations were the following:

A group of dissidents who asked for certain things or will commit disorderly conduct.

People in a high crime neighborhood who ask for more police protection or failing to get it threaten to carry concealed weapons.

And finally, a group of mothers who threaten to block a highway should they not get a traffic regulatory signal.

And the lower court was of the opinion that since those crimes that they threatened were so insubstantial when measured against legitimate political discussion on a wide berth, that the First Amendment should then protect those

statements.

In those examples the Court in looking to the crime threat failed to observe the main purpose and spirit of the statute toward the person threatened. The substantiality of the threat could be great and the substantiality of the crime need not be great, need be insignificant, can be insignificant.

One example of this would be a threat by an individual to burn two pieces of lumber placed together in the form of a cross in an open field next to a school which is to be integrated the next day. A situation involving a substantial threat but yet an insubstantial crime.

A further example, individuals on a campus who approach the chancellor and tell the chancellor that unless their demands are met within five days that they are going to disrupt classes, that they are going to take over his office, they are not going to threaten him personally or physically, they are not going to destroy a building, but they are just going to make it impossible for the school to function.

This would be a situation where the threat would be very substantial but yet the crime might be nothing more than disorderly conduct.

It is appellant's contention that these type of examples along with the examples cited by the lower court would fall within the purview and concept of this statute and that this statute is valid.

In essence then, what the lower court seems to be saying is that the threat of an insignificant crime when they say that the threat of an insignificant crime should not be punished they are really saying that a little bit of illegality is not so bad and can be protected by the First Amendment so long as speech is involved.

Yet examining this issue in the light of First Amendment protections it doesn't seem to meet the category of the First Amendment precepts.

An extortion by threat is not the edificacy of ideas, it is not the teaching of ideas, it is not the exposition of ideas, it is not legitimate political discussion on a wide berth. The entire history of the cases of this Court from Baldwin versus Robinson in 1896 to the statement made in Carroll versus President and Board of Commissioners of Princess Anne County late last year seemed to indicate that speech uttered in a context of violence or speech uttered to follow an illegal course of conduct are not prohibited, are prohibited rather by the First Amendment. The First Amendment should not protect that type of conduct.

In our brief on page 18 and 19 we have set forth a myriad of cases respecting this point. I should just like to mention a few.

In Bridges versus California, where this Court -- a contempt case where this Court reversed a contempt

conviction, this Court was very clear to point out that under no construction therefor -- and I am quoting -- that under no construction therefor can we take the telegram of Bridges to be a threat to follow an illegal course of conduct.

In Chaplinsky versus New Hampshire where this Court said fighting words are no essential part of any exposition of ideas. In American Communication versus Douds where the majority said the Government may cut off a speaker only when his views are no longer views but threaten clearly and imminently to ripen into conduct into which the public has a right to protect.

Even Roth and Smith in the concurring and dissenting opinions, the dissenters, or the individuals who concur stated that freedom of expression can be suppressed if and to the extent it is so closely brigaded with illegal action as to be an inseparable part of it.

Your Honors, the approval of a little bit of illegality constitutes the doctrine of permissive lawlessness which this Court has never sanctioned and which I hope it never will.

How can we allow individuals or pressure groups to exact gain from others based upon the threat to commit a criminal offense and at the same time maintain that we live under a system of order, under a system where First Amendment rights are protected under a system where individual rights are first and foremost.

I don't think we could live with the opinion of the lower court and so state.

In conclusion the effect of the decision of the lower court is to insulate via the First Amendment threatened acts which force other individuals to surrender their freedom of choice.

The statute under consideration when measured by the scope of the decisions of this court failed to transgress the sanctity of free expression of ideas. Since the protection of the right of another as freedom of choice stands upon as equal a footing as the right of the speaker to say it.

Q May I ask you a question, going back to your standing point, is it your statement that the complaint on its face fails to show any charge formal or informal under the particular statute that the District Court held was unconstitutional, a particular section, is that challenged by your opponents?

A Yes, he challenges it, yes.

Did you ask if my opponent challenges it?

Q Yes.

A Yes, he says that there is sufficient standing.

Q I understand that but I understood your statement was that as to the group of defendants who were charged, formally charged, of something this particular statute the District Court relied on the intimidation statute was not

involved in any of those charges?

A That is correct.

Q And then I understood you to say that as to the defendants who were not formally charged that there is no allegation in the complaint that they were threatened in any way.

A Yes, there is an allegation that they were threatened but it is our contention that the allegation in the complaint is conclusory and there are no facts to support this. They said that they were threatened, yes.

Q My recollection of the complaint is and perhaps I am wrong, is that in one general allegation at the beginning they list this intimidation statute among the others, they come down to saying what the specific defendants are complaining about this intimidation statute is not referred to.

A That is correct.

Q Am I right?

A That is correct. Although they later on restate in conclusory fashion that they are intimidated and harassed by the intimidation statute.

Q Yes.

Q But they don't allege that any State officer actually threatened them with prosecution under the statute?

A No, they don't.

Q Of anything?

A That is correct.

Q They allege that they feel threatened and intimidated?

A Yes, that is my reading of the complaint.

Q And as a matter of fact they say they are deterred from exercising their free speech?

A Yes, that is correct.

Q Now is that conclusory?

A I think it is conclusory, yes. I think we need something along the lines of Dombrowski in the sense of when and how and where, how did this happen? Can you just say I have been intimidated?

Q Can you say there are some demonstrations that I would engage in except for these statutes? Is that too general for you?

A I think there are many demonstrations that one could engage in and still with the statute.

Q No, how about my question?

A Maybe I didn't understand it.

Q Well, they say there are some demonstrations that we would engage in except for these statutes. Is that too general an allegation to satisfy you?

A I think it is, yes.

Q You want to say on there that there was a demonstration on such and such a date?

A No, I think it would be more valid to say that we were going to involve ourselves in a demonstration that we have been specifically harassed by police officers.

Q You mean it has to be specific action by the State under these statutes?

A I would think that there should be, yes.

Q Some allegation of it?

A Some allegation of it, yes.

Q Is this the only statute in the State of Illinois that covers intimidation commercial intimidation, for example, expose, a ganster goes to a store, the owner of a store says unless you pay me $100 a week we will burn your store?

A Yes. This is the only statute with its seven subpoints, one of which is that.

Q How do you construe the effect of the Court's judgment here? The Court says that, as I understand it, that this statute is hereby declared unconstitutional, null and void in that it violates the due process clause of the Fourteenth Amendment of the Constitution. Isn't that right?

A Well, yes -- no, no, well they said -- maybe that is true but the basis of it is it violates the Fourteenth Amendment because it is overbroad. Because it sweeps unnecessarily broadly.

Q As you understand it would that mean, the

Court's judgment here mean that the statutes unavailable to the State in the situation that I have described?

A Yes, absolutely with respect to subsection (a)(3), yes, sir.

Q Subsection (a)(3)?

A Which is the only subsection on appeal before this Court, yes.

Q And that this is not equivalent to a holding confined to the First Amendment area?

A I couldn't believe that that is true, your Honor.

Q Because it has nothing to do with the application of the statute?

A That would be correct.

Q Thank you.

A Yes.

Q In your opinion if the decision below is sustained, even a substantial threat, a serious threat or a serious crime would not be punishable under the section?

A That is correct, it would have to come under one of the other sections and may I state to the Court that there are other specifically enumerated crimes such as bribery, perjury, theft, anything as far as concealed weapons are concerned, which would be within the confines of subsection (a)(3) but not within the confines of subsections (1), (2), (4), (5), (6) and (7) which would fall as well along with this

legitimate political discretion.

Q Do you think that these crimes that once bothered American cities so much like the garage extortion racket and the cleaners and dyers racket and all those others, do you think so far as this subsection is concerned those prosecutions would be wiped out?

A I believe so, your Honor. I think the legislature tried to make specific wherever they can in each of the subsections and then they put in the final section which was narrowly limited to the prevention of threats to commit a crime and still take in the areas which were not covered by the other subsections.

Q But you do have some independent criminal statutes against extortion?

A No, not against extortion, your Honor. We have the specific criminal sections when the act is completed. As far as extortion is concerned ---

Q This is only threat.

A Except for Section 33(3) which has to do with extortion by public officials which is the old common law extortion, the only other extortion intimidation statute we have. Yes.

Thank you, your Honor.

MR. CHIEF JUSTICE WARREN: Mr. Reid.

ORAL ARGUMENT OF ELLIS E. REID, ESQ.

ON BEHALF OF APPELLEES

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

Basically to begin with, I would like to point out and quote from page 8 of my brief:

> "Legitimate political expression intended to secure changes in society's legal, political, social, or economic structure frequently takes the form of expressions about future events or conditions. Such expression may be in the form of promises, predictions or warnings, or threats of lawful action."

Now apparently the basis of this quote is that the court below deemed it inappropriate to circumscribe a threat of miniscule illegal activity.

But what we have here is really a collision between the right of certain individuals in this society to exercise what has been historical and classical First Amendment freedoms and the right of the State to protects itself and to protect the ordered liberty, without which we would not have any freedom of speech.

So we always will have a conflict in this area and this court has on many occasions tried to resolve that conflict. But now we have a statute before this Court which the State contends is an extortion statute in the classic sense. It is

not. This statute does not require the defendant to take or to attempt to take anything of value from the purported victim.

I say it is not an extortion statute. It is over-broad. An extortion statute could have been drawn to protect the State against that evil and in fact you have Section (a)(1) of that statute which is not here on appeal and which will remain valid which says, of course, the threat of inflicting physical harm on the person threatened or any other person or on property.

Now if they want to protect people from extortion I say well and good the State has an interest in that which is substantial but when you deal with what they term as the right of a public official to have freedom of choice, I say you have made the statute so bread as to really put a five-year noose or a $5,000 fine around anyone's neck who have the temerity to publicly utter that we will march around Mayor Daly's house and violate let us say an ordinance which maybe would cause us to pay $100 fine at the most. Now we must face five years in the penitentiary or forfeit $5,000.

This is the real guts of this particular case. The statute also makes criminal the threat to commit a criminal offense without regard to the degree of the threat. This is the point I am making.

In other words, if you carry out the threat in its final analysis and its going to violate a misdemeanor and it

would be punishable only by fine, why then will you take it one step back and say I am going to do this tomorrow. Now you face five years in the penitentiary.

I suggest to you that this is the reason that the Court below struck this particular portion of this statute.

Q Don't you have to have another element under this statute which is, take your example, Mayor Daly, unless you fire the Superintendent of School we are going to commit this misdemeanor around your house?

A Yes. That is correct

Q And that element of the threat is not part, a necessary part of the supposed misdemeanor?

A That is correct. In other words, in every form of let us say direct action protest, there is always an evil that you are trying to get rid of or there is always some change in the society that you are trying to bring about so I am saying that this statute when you take just historical direct action protest it elevates what has been the exposure of using misdemeanors and punishment by fine or short detention to the area of a felony.

And I think that it puts a chill on legitimate free expression of ideas, and a chill on the right of individuals to determine that they will do something in a way to bring about legitimate change.

Q To get around to the first question which I

assume you are going to meet has there been any threat of invoking this statute against any of the plaintiffs here? Against any of the appellees here?

A Yes. In the complaint we allege a scheme and we alleged a conspiracy and we allege the chronology of events most of which, in fact all of which took place in 1967. There were a series of mass arrests in Chicago involving about three or four incidents, separate and distinct incidents.

There are seven subclasses in the total class action presented to the Court below.

Q But nobody, but they didn't use the intimidation statute?

A They did not arrest anybody for the intimidation statute but we allege they threatened to do so and it would be a question of whether or not we could prove that they in fact threatened to use this particular statute but we were going to prove that there were meetings of officials and they had set about a scheme of high bonds and to use everything at their disposal, including the statute.

Q Did you specifically allege a threat to prosecute under this statute?

A I believe we did.

Now whether or not it is a conclusion as my opposing counsel said, I would say that we alleged it as a fact.

Q I missed that if you did and I haven't seen that.

I would like to be directed to it if there is such an allegation.

A Pursuant to, this is page 17 of the appendix and this is paragraph 34 of the complaint.

Pursuant to the aforesaid plan or scheme defendants have threatened to continue -- no strike that -- have threatened and continue to threaten to enforce the said unconstitutional void and illegal statutes and ordinances against the plaintiffs herein for the sole purpose of harassing, intimidating, subjecting and causing to be subjected, plaintiffs and their members.

Now I suggest to you that this statement met all of the statutes including intimidation statute, and I would like to point out I think at page 18 also which is paragraph 37(a) where we alleged as a result of those threats -- now we never really got down to the factual issues because we felt that we could prove that there were meetings of the chief judge, meetings of the States Attorney's Office and that they had gone over all of these statutes and we didn't just pull these statutes out of a hat. These were the statutes that we had on information and belief that they were going to use in the scheme of dealing with so-called mass arrest situations.

Now we allege that. Now we didn't name names or dates and meeting places ---

Q Your books would have gone only so far as to

show that there had been as I understand you, meetings of these various law enforcement authorities where there had been discussions of each of these statutes.

A That is correct.

Q That they in the event certain things happened they would bring to bear these statutes?

A That is correct.

Q But was there ever anything in the way of coming to any one of these appellees and saying this is what we are going to do if you do that?

A Well, I would suggest no -- no one ever pointed a finger and said they were going to do it directly to us.

Q And you don't have any allegation in here do you that a threat out of the kind that I have just suggested was ever made?

A No, not a direct threat but I suggest to the Court that a threat can be just as obvious if it is indirect and it gets back to you by a third party as if the finger was pointing in your face and said we are going to do this to you.

Q Well, I would suppose that law enforcement authorities would be doing this sort of thing every day in the week, aren't they? They have got to anticipate if certain arise they may have to bring to bear the circumstances in the particular statutes, don't they?

A But the question here is one of standing and one of chill and one of ---

Q Well, frankly, what I am thinking, I am not thinking to those so much as I am of the issue which of course we dealt with here only in Golden.

A Yes.

Q And the issue we are on I don't see how you frankly, how this alleges within the principle of Golden, a case of controversy.

A Well, in Golden the language that I have picked out of Golden states that 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 fashion a precise test for determining in every case whether there is such a controversey.

Basically the question in each case is whether the facts alleged under all of these circumstances show that there is a substantial controversy between the parties having adversely interest of sufficient immediacy and reality toward the issuance of a declaratory judgment.

Now I am asking this Court to take into account the fact that you have to look at all of the facts and circumstances as to what is alleged in the complaint. Here we have had experience with the circumstances that we contended with

in the mass arrest circumstances.

We had undergone the mass arrests of 60 people, some of which were on their front porches.

Q Mr. Reid, what experience did any of these people have with these statutes that was held unconstitutional in this case?

A What is it your Honor? I didn't understand.

Q What experience did any of your people have with the enforcement of this statute which was declared unconstitutional in this case?

A With the intimidation statute only. Actually no one was ever charged so we had no experience other than let us say an indirect threat that the next time around we will not only use mob action but we are going to use the intimidation statute as well.

Q An indirect threat?

A Yes.

Q That is sufficient to declare a statute unconstitutional?

A I would say whether or not the threat is indirect or direct it is still a threat and either I am going to be chilled in my feeling that I can go out and exert my First Amendment freedoms or not.

Q Could you be chilled by rumor?

A Well, I would suggest this was more than a rumor.

Q Well, weren't you chilled when this statute was passed?

A Yes, we were but it is a question of degree, your Honor, and I am saying ---

Q You just found it didn't you?

A What did you say?

Q You just found the statute?

A I didn't hear you.

Q You just found the statute before this was filed?

A Did we just find the statute?

Q Yes.

A Well, you mean so far as our drafting the complaint?

Q Yes, sir.

A Well, I would suggest it didn't start from our end as to which statutes we were going to sit down and try to get the Court to define to be unconstitutional. I suggest that in light of what was happening and in light of what we felt was going to happen to our plaintiffs below and appellees here that we said in light of these statutes where they have already taken action and we have this history behind us now and in light of the fact that we are being threatened in the future by intimidation statute, let us file a complaint taking care of what has gone before the mob action, disorderly conduct

as well as intimidation because we want perspective relief as well as, you know, dealing with history.

Q But every one of these cases so far, Mr. Reid, I think this is right, isn't it -- in Golden, Zwickler had been arrested and convicted, on one occasion for violation of the statute involved.

A That is correct.

Q In Cameron and Johnson after the statute was enacted the police came down and they arrested all the picketers.

In Dombrowski we had raids on the plaintiff's offices and you recall and taking all their papers and all the rest of it. And I guess actual indictments of them under some of those Louisiana statutes.

Now you are carrying this pretty far aren't you to suggest that merely because officers get together and decide that they are going to cope with this developing situation by applying this and that and the other statute but no threat of any kind to any particular individual, none of your clients was in fact threatened with a prosecution under this or in fact threatened that this statute would be brought to bear if he carried on this conduct.

We don't have anything like that here.

A I am suggesting to the Court that your Honors and from your question I take the attitude or the idea from

that, that you feel that a police officer must first come down or a State's attorney and say I am going to charge you, Ellis Reid.

Q No, what I am suggesting, Mr. Reid, is that the cases where this issue has arisen have all been cases where on the fact the statute was actually applied against the plaintiff who sought the relief, declaratory relief.

A That is correct.

Q And here at least we don't have that factual situation.

A That is a difference.

Q Yes.

A But I am suggesting that even though that is a difference and I recognize that to be a difference, I am not trying to minimize that -- I am saying you can't try this case in a vacuum. Surely if you said nothing else had happened before you might be right it would be pretty remote but when you have the chronology and the dealing with the plaintiffs below with the other statutes that were in fact applied I think that the threat became so eminent and immediate and there was an actual controversy between live litigants at that point although the indictment had not followed them and no one had come down to make an arrest I still think although we were in Court perhaps early I don't think we were in Court too early as to make the issue one that would be not an actual case or

controversy and I am asking you to really look at the facts and circumstances involving the mass arrest situation where they used other statutes and we cannot divorce this statute from the total scheme of things. And it is the total scheme of things.

Q Well, did this case come up on a motion to dismiss?

A It did.

Q Was it after an answer?

A No, they came up on a motion to dismiss before Judge Will alone and it was denied.

Q And he denied the motion to dismiss?

A That is correct.

He felt that there was sufficient allegations to state a claim and, of course, now at that point we were not s plit off between intimidation, mob action, disorderly conduct, resisting arrest.

Q But there has never been any facts in this case?

A Other than in some other circumstances what Judge Will termed ad hoc hearings involving whether or not he would enjoin particular prosecutions which came at a subsequent point in time. But there has never been an evidentiary hearing dealing with the threat or the nature of the threat involved in ---

Q Now I take it that the State is saying that

your allegation in paragraph 34 which is an express allegation that the defendants have threatened the plaintiffs was not a sufficient allegation to survive a motion to dismiss?

A That is what they are saying, and, of course, the court below sought our way that it was substantial and it is a question of semantics whether or not this ---

Q I know, but whatever the actual facts were is another matters. The question is sufficiency of these allegations.

A That is correct.

Q The question is whether you must not only say you have been threatened but then go on and allege specifically how you have been threatened on a certain day or by a certain letter or by words or telephone call or what.

A That is the issue, and, of course, we contend that in the totality of the complaint that we have made out a case on the pleadings. When you read the complaint as a whole not picking out certain portions and forgetting others but when you take it on a whole that we have stated a cause of action upon which relief could be granted, that is the way the case was presented below and I would urge the court to deal with it in that fashion here.

Q What do we do with the State's specific denial of 34?

A Well, I would say ---

Q What do we do with that?

A At that point we did not really get to an evidentiary hearing because basically the court ---

Q You say you were threatened and the State says you were not threatened.

A That is correct.

Q On the basis of that, that is all the court had to go on?

A That is what the court had before it, yes.

But specifically, though, I have raised the point in my brief, and I like just to point out to the Court now that I see that the Court has a great deal of interest in this point probably in light of Golden, but perhaps I was in error when I pointed out that this matter comes here really on a direct appeal and in their jurisdiction statement it is our contention that this issue was not fairly comprised within that jurisdictional statement and, therefore, this particular issue is not before the Court.

Now I understand that if the Court wants to deal with this as a jurisdictional recquisite then the doctrine of waiver may not apply but it is our contention that this particular standing argument has been waived because it was one wherein an appeal should have been taken directly to the Court of Appeals because it was based on a decision of a single judge.

Q Well, you don't waive. That is a jurisdictional matter, isn't it?

A Well, that is why I am saying that if that is a matter of jurisdiction then I would say that it would not be one that could be waived but I don't feel that under the circumstances here that it would be a matter of jurisdiction.

Q Did the State ever move to dismiss for want of jurisdiction or did they just move for failure to state a claim?

A They moved for failure to state a claim.

Q And they thereby admitted your allegations in 34, didn't they?

A They did what?

Q They must have admitted the allegations in 34?

A Well, I don't have a copy of the answer before me now and, of course, unfortunately Mr. Tucker below argued the matter ---

Q I know but the motion to dismiss before Judge Wills as a single judge that was just a motion to dismiss for failure to state a cause of action?

A Correct.

Q And for those purposes they admitted your allegations?

A That is correct, but for those purposes.

Q And they never moved to dismiss for want of jurisdiction?

A That is correct.

I would say that if you read their motion to dismiss it does not really articulate want of jurisdiction. I think it is found again at page 30 of the appendix.

Q But then after the three judge court was convened they did file their answer denying 34?

A That is correct, and then the three judge court ruled.

Q You challenged quite a lot of statutes, didn't you, in your initial complaint? Did you challenge all of those statutes that were listed beginning on page 25 of the transcript, record, in the appendix? Page 25.

A Twenty-five of the appendix?

Q Yes. Did you challenge all of those?

A Basically, no. We challenged the disorderly conduct ordinance 193-1. We challenged the mob action statute. We challenged the intimidation statute and I believe the resisting arrest ordinance. And there were some few others which we -- I don't have a copy -- where we withdrew more or less a challenge for the court below. Basically it was two ordinances and two statutes that were challenged.

Q Which two?

A The two statutes were mob action and the intimidation statute which is before this particular Court. The other ordinances were dealt with by the single judge,

Judge Will below. He separated them saying that he felt that he was not for a three judge court being that they were only ordinances of local application.

Q How did this list on page 25 get into this appendix?

A I don't know. I did not make a point of it. I read it but I really, I guess what this is on page 25 is really a listing of the grab-bag of the city council of ordinances that fall under Chapter 193 of the Municipal Code of Chicago.

Q Yes.

Q That was attached to your complaint, wasn't it?

A I don't think this was attached to my complaint. I have not looked ---

Q It is part of Exhibit A as I see it, to your complaint, statutes and ordinances.

A Well, I would say this: Although it might have been it was just an index maybe of all the available ordinances under Chapter 193 but we only challenged 192-1.

Q You don't contend that you are really in danger of being arrested for advertising psychic or magical powers or for promotion of marriage or spiritualism and fortune telling, do you?

A Well, basically, I guess when we realize that many of these ordinances that were passed for specific reasons

all of which and some of which have long since ceased to have any meaning, maybe, I did not -- I would say -- deal with this particular portion of the complaint and I don't know why it was put in there. Maybe it was to show that they have many, many ways to control us and that we were specifically dealing with disorderly conduct.

Q It amuses me but it sort of highlights what is a real problem in the case to me which is whether you can go through a statute book and without any specific or explicit basis in threats of enforcement you see against you whether you can just go through the statute book and pick out statutes which might conceivably be used by the police in a civil rights demonstration, and then bring an action based on Dombrowski seeking relief or whether you have got to have a specific basis and specific threats and specific harassment, specific action taken under a specific statute before you can utilize Dombrowski.

That is the issue here and this long list is merely a humorous illustration of the kind of intellectual problem and legal problem that I suspect is very real in this case.

A I would ask the Court to reach a middle ground from what you said. I think there is a point inbetween those two poles. In other words, I would agree this Court should not sit to hear contrived, not substantial litigation where one would go through a statute book and dig them out.

But I think also we should not in the area of First Amendment freedoms and this is where I think this is unique and this I think is the reason for Dombrowski. Wait until someone has been tried and convicted before they would have standing before this Court.

I think that this particular case presents a factual circumstance of that middle ground. There was a scheme that was entered into and upon where we were harassed, where we were intimidated, where we were thrown into jail with high bonds and where there were meetings and where the police prosecutors starting going through the statute book and we heard about it and we got to court before they did.

Now I don't think we lose our standing by beating them to court. And that is the issue I am trying to impress upon this court. I think when I say look at the totality of the chronology of events.

Q Yes, but the question perhaps is whether you have just by general allegation, listing some general statutes and then inserting a general allegation that you are threatened with harassment under those statutes -- that is your paragraph 34 -- whether you made out a basis, whether you made out or whether you have got a complaint that really comes under Dombrowski. Now Dombrowski is quite a different kind of case and it is at least arguable that Dombrowski is quite a different kind of case than you have been presenting to us with respect

to the intimidation statute because all you have alleged here is very general statement embracing a number of statutes without any particularization and embracing and alleging a general danger of prosecution again so far as this statute is concerned without any particularization.

A Yes, I can see your concern but again I am saying that had nothing occurred, had no one been arrested, rather than the many, many people who were arrested, perhaps you would be right. But here we had a series of arrests, mass arrests and here we had albeit other statutes and ordinances used that showed a scheme to deal with this type of protest activity in a certain way.

I think then we are in a different position and we then perhaps, and I urge upon the court, I think we would have the right to then allege they are not only going to use the ones they already arrested us on, but you might call it pendant jurisdiction or whatever you want to deal with, but I am saying to get away from circuitous litigation let us deal with the total problem now because they now are threatening not only to use mob action and disorderly conduct, they are threatening to use intimidation, too, so we, therefore, put it in as part and parcel of this complaint.

Therefore, I feel that the court below had jurisdiction and I feel as I stand here now I have standing to sue and the right to attack the intimidation statute also, as well as the

ones that we attacked below with proper standing and I would say with no allegation below that we did not have proper standing.

Basically for those reasons I would like to urge that the Court affirm the law because unless we have a basis for dealing with these matters within the framework of the Courts, all of those things that we urge about taking to the streets in a riotous way may come to pass and I would suggest that when we tighten the noose around people's necks and they become frustrated, they have no way to go but mostly the illegal way.

Thank you for listening.

MR. CHIEF JUSTICE WARREN: Mr. Butler

REBUTTAL ORAL ARGUMENT OF RONALD BUTLER, ESQ.

ON BEHALF OF APPELLANTS

MR. BUTLER: Several short points on rebuttal, your Honor.

MR. CHIEF JUSTICE WARREN: Very well.

MR. BUTLER: First of all in answer to Mr. Justice White's question with respect to the pleadings on page 30 of the appendix, first point under the motion to dismiss is that this court has no jurisdiction and it has been realleged.

Q Was that argued in the context of case and controversy?

A It was argued in the context of case and controversy in the memorandum that was filed, yes, which is

not a part of this.

Q It doesn't appear on this, Judge Wills' opinion of a motion to dismiss that he ever dealt with this in the context of declaratory judgment rather than an injunctive relief?

A He dealt with it in the context of Dombrowski generally, your Honor, where there is a statement, I believe, on page 487 of Dombrowski which said that the minimum requirements of standing have been lessened and the court, the three judge court, on page 64 of the appendix, footnotes 25 and 26 repeated that statement in a manner in which it seemed to indicate that the standing requirement was lessened.

Q But at least he never did address himself specifically to the elements of either injunction or declaratory judgment with respect to this threat statute?

A Yes, I believe in all fairness to him, I believe he tried to attribute it toward the declaratory judgment phase, not the injunctive phase.

Q I don't see it even mentioned the declaratory phase.

A Well, no, well, maybe not in the opinion. Probably not in the record, but I was cognizant at least ---

Q But either declaratory or injunctive was not -- in either aspect he didn't talk about that particular ---

A No, that is correct. But we must remember that

Zwickler versus Koota had been decided at the time of this and he was cognizant of it although it doesn't appear.

Also, as far as paragraph 34 is concerned, your Honor, I see no difference between the allegations which I contend are conclusory in that respect or in a civil case where I state that someone else was negligent and someone else committed a tort against me. I think that is conclusory. I don't think that has any kind of even quasi-specificity.

I think I could take paragraph 34, as it had been pointed out by one of the Justices earlier, and include every single State of Illinois Criminal Statute in paragraph 34 because all I have to say is I am in fear.

Q Thirty-four says more than that; 34 says defendants have threatened.

A Well, I think the same allegation could be made. Defendants have threatened to use every single statute.

Q Do you think that on a motion to dismiss for failure to state an equitable claim that you could say that you hadn't threatened these people?

A I think so, yes. Because a motion to dismiss admits all pleaded allegations but the question is whether that is well pleaded.

Q So you wouldn't admit it by that motion to have threatened anybody?

A No, I would admit only well pleaded allegations

and if something says I have been threatened it is the same as saying I have a tort committed against me. Someone has been negligent.

Q This says defendants have threatened and continue to threaten.

A When someone says a defendant is threatened, that is a conclusion. How did the threat come about. That is a conclusion based upon something else with something else not involved here.

Q That is just a general description of the facts.

A I respectfully disagree with you as far as that is concerned. I think it is not.

Q What do you think a conclusion is?

A I think a conclusion is something that is based upon a series of other statements. I can't say that I committed a negligent act against you and have a complaint withstand a motion to dismiss. I can say that you injured me as far as a certain time and a place in an automobile when you went into the back of my automobile.

I could make a conclusion from the basis of those statements but I can't just make the statement and expect it to withstand the motion.

Q Do you have any cases indicating that this kind of an allegation is insufficient?

A No, I have no cases, your Honor.

Q Anywhere?

A No, Dombrowski and Zwickler and the rest of the cases have been quite difficult and up until Golden versus Zwickler was taken I didn't know myself whether a standing argument would be sufficient in this case.

Q How about a civil tort action in which the allegation is made that the six defendants threatened me with bodily harm. Do you think that would stand up?

A I think there would have to be something more, your Honor.

Q Like what?

A Like time, like place.

Q Which is evident, which you don't usually plead.

A It can, yes, it can be evidence at times.

Q Why do you run off the point that you filed an answer and you keep running away from it?

A No, I am not running away from it, your Honor. I am not running away from it at all. The answer was filed, there was a denial.

I have nothing more.

MR. CHIEF JUSTICE WARREN: Very well, Mr. Butler.

(Whereupon, at 1:55 p.m. the oral argument in the above-entitled matter was concluded.)