BRANDEIS, J., Concurring Opinion

SUPREME COURT OF THE UNITED STATES

---

274 U.S. 357

Whitney v. California

ERROR TO THE DISTRICT COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE, OF THE STATE OF CALIFORNIA

No. 3 Argued: October 6, 1925 --- Decided: May 16, 1927

MR. JUSTICE BRANDEIS, concurring.

Miss Whitney was convicted of the felony of assisting in organizing, in the year 1919, the Communist Labor Party of California, of being a member of it, and of assembling with it. These acts are held to constitute a crime because the party was formed to teach criminal syndicalism. The statute which made these acts a crime restricted the right of free speech and of assembly theretofore existing. The claim is that the statute, as applied, denied to Miss Whitney the liberty guaranteed by theFourteenth Amendment.

The felony which the statute created is a crime very unlike the old felony of conspiracy or the old misdemeanor [p373] of unlawful assembly. The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or of assembling with others for that purpose, is given the dynamic quality of crime. There is guilt although the society may not contemplate immediate promulgation of the doctrine. Thus, the accused is to be punished not for contempt, incitement, or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely. The novelty in the

prohibition introduced is that the statute aims not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.

Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus, all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The right of free speech, the right to teach, and the right of assembly are, of course, fundamental rights. *See Meyer v. Nebraska,* 262 U.S. 390; *Pierce v. Society of Sisters,* 268 U.S. 510; *Gitlow v. New York,* 268 U.S. 652, 666; *Farrington v. Tokushige,* 273 U.S. 284. These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not, in their nature, absolute. Their exercise is subject to restriction if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic, or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled. *See Schenck v. United States,* 249 U.S. 47, 52. [p374]

It is said to be the function of the legislature to determine whether, at a particular time and under the particular circumstances, the formation of, or assembly with, a society organized to advocate criminal syndicalism constitutes a clear and present danger of substantive evil, and that, by enacting the law here in question, the legislature of California determined that question in the affirmative. *Compare Gitlow v. New York,* 268 U.S. 652, 668-671. The legislature must obviously decide, in the first instance, whether a danger exists which calls for a particular protective measure. But where a statute is valid only in case certain conditions exist, the enactment of the

statute cannot alone establish the facts which are essential to its validity. Prohibitory legislation has repeatedly been held invalid, because unnecessary, where the denial of liberty involved was that of engaging in a particular business.[n1] The power of the courts to strike down an offending law is no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly.

This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present, and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgement of free speech and assembly as the means of protection. To reach sound conclusions on these matters, we must bear in mind why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.[p375]

Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary. They valued liberty both as an end, and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government.[n2] They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds

repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence [p376] coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it.[n3] Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger, it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.[p377]

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.[n4] Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. Thus, a State might, in the exercise of its police power, make any trespass upon the [p378] land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this Court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, wastelands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in

destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.

The California Syndicalism Act recites in § 4:

> Inasmuch as this act concerns and is necessary to the immediate preservation of the public peace and safety, for the reason that, at the present time, large numbers of persons are going from place to place in this state advocating, teaching and practicing criminal syndicalism, this act shall take effect upon approval by the Governor.

This legislative declaration satisfies the requirement of the constitution of the State concerning emergency legislation. *In re McDermott,* 180 Cal. 783. But it does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. As a statute, even if not void on its face, may be challenged because invalid as applied, *Dahnke-Walker Milling Co. v. Bondrant,* 257 U.S. 282, the result of such an enquiry may depend upon the specific facts of the particular case. Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, [p379] it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent, and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the State, creates merely a rebuttable presumption that these conditions have been satisfied.

Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of

serious evil might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed below that the statute, as applied to her, violated the Federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury. On the other hand, there was evidence on which the court or jury might have found that such danger existed. I am unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes, and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances, the judgment of the state court cannot be disturbed. [p380]

Our power of review in this case is limited not only to the question whether a right guaranteed by the Federal Constitution was denied, *Murdock v. City of Memphis,* 20 Wall. 590; *Haire v. Rice,*204 U.S. 291, 301; but to the particular claims duly made below, and denied. *Seaboard Air Line Ry. v. Duvall,* 225 U.S. 477, 485-488. We lack here the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases vital errors, although the objection was not taken in the trial court. *Wiborg v. United States,* 163 U.S. 632, 658-660; *Clyatt v. United States,* 197 U.S. 207, 221-222. This is a writ of error to a state court. Because we may not enquire into the errors now alleged, I concur in affirming the judgment of the state court.

MR. JUSTICE HOLMES joins in this opinion.

[1.] Compare Frost v. R.R. Comm. of California, 271 U.S. 583; Weaver v. Palmer Bros. Co., 270 U.S. 402; Jay Burns Baking Co. v. Bryan, 264 U.S. 504; Pennsylvania Coal Co. v. Mahon, 260 U.S. 393; Adams v. Tanner, 244 U.S. 590.

[2.] Compare Thomas Jefferson:

> We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge.

Quoted by Charles A. Beard, The Nation, July 7, 1926, vol. 123, p. 8. Also in first Inaugural Address:

> If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.

[3.] Compare Judge Learned Hand in Masses Publishing Co. v. Patten, 244 Fed. 535, 540; Judge Amidon in United States v. Fontana, Bull. Dept. of Justice No. 148, pp. 4-5; Chafee, "Freedom of Speech," pp. 456, 174.

[4.] Compare Z. Chafee, Jr., "Freedom of Speech", pp. 24-39, 207-221, 228, 262-265; H. J. Laski, "Grammar of Politics", pp. 120, 121; Lord Justice Scrutton in Rex v. Secretary of Home Affairs, Ex parte O'Brien, [1923] 2 K.B. 361, 382:

> You really believe in freedom of speech if you are willing to allow it to men whose opinions seem to you wrong and even dangerous; . . .