



WHITNEY v. CALIFORNIA
SUPREME COURT OF THE UNITED STATES
274 U.S. 357
May 16, 1927
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OPINION: Justice Sanford...[Whitney]...was charged...with violations of the **Criminal Syndicalism Act of [California]**. She was tried, **convicted** on the first count, and sentenced to imprisonment. The **judgment was affirmed**...The pertinent provisions of the Criminal Syndicalism Act are:

"Section 1. The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine...advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a **change in industrial ownership or control, or effecting any political change**.

"Sec. 2. Any person who:...4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism. . .

"Is guilty of a felony and punishable by imprisonment."

The first count...charged that...the defendant..."did then and there unlawfully...**organize and assist in organizing**, and was, is, and **knowingly became a member of** an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet **criminal syndicalism**."

The following facts...were established...: The defendant, a resident of Oakland, in Alameda County, California, had been a member of the Local Oakland branch of the Socialist Party. This Local sent

delegates to the national convention of the Socialist Party held in Chicago in 1919, which resulted in a split between the "radical" group and the old-wing Socialists. The "radicals" -- to whom the Oakland delegates adhered -- being ejected, went to another hall, and formed the Communist Labor Party of America. Its Constitution provided for the membership of persons subscribing to the principles of the Party and pledging themselves to be guided by its Platform, and for the formation of state organizations conforming to its Platform as the supreme declaration of the Party. In its "Platform and Program" the Party declared that it was in full harmony with "the revolutionary working class parties of all countries" and adhered to the principles of Communism laid down in the Manifesto of the Third International at Moscow, and that its purpose was "to create a unified revolutionary working class movement in America," organizing the workers as a class, in a revolutionary class struggle to conquer the capitalist state, for the overthrow of capitalist rule, the conquest of political power and the establishment of a working class government, the Dictatorship of the Proletariat, in place of the state machinery of the capitalists, which should make and enforce the laws, reorganize society on the basis of Communism and bring about the Communist Commonwealth -- advocated, as the most important means of capturing state power, the action of the masses, proceeding from the shops and factories, the use of the political machinery of the capitalist state being only secondary; the organization of the workers into "revolutionary industrial unions"; propaganda pointing out their revolutionary nature and possibilities; and great industrial battles showing the value of the strike as a political weapon -- commended the propaganda and example of the Industrial Workers of the World and their struggles and sacrifices in the class war -- pledged support and cooperation to "the revolutionary industrial proletariat of America" in their struggles against the capitalist class -- cited the Seattle and Winnipeg strikes and the numerous strikes all over the country "proceeding without the authority of the old reactionary Trade Union officials," as manifestations of the new tendency -- and **recommended that strikes of national importance be supported and given a political character, and that propagandists and organizers be mobilized "who can not only teach, but actually help to put in practice the principles of revolutionary industrial unionism and Communism."**

Shortly thereafter the Local Oakland withdrew from the Socialist Party, and sent accredited delegates, including the defendant, to a convention held in Oakland in November, 1919, for the purpose of organizing a California branch of the Communist Labor Party. The defendant, after taking out a temporary membership in the Communist Labor Party, attended this convention as a delegate and took an active part in its proceedings. She was elected a member of the Credentials Committee, and, as its chairman, made a report to the convention upon which the delegates were seated. She was also appointed a member of the Resolutions Committee, and as such signed the following resolution in reference to political action, among others proposed by the Committee: "The C.L.P. of California fully recognizes the value of political action as a means of spreading communist propaganda; it insists that in proportion to the development of the economic strength of the working class, it, the working class, must also develop its political power. The C.L.P. of California proclaims and insists that the capture of political power, locally or nationally by the revolutionary working class can be of tremendous assistance to the workers in their struggle of emancipation. Therefore, we again urge the workers who are possessed of the right of franchise to cast their votes for the party which represents their immediate and final interest -- the C.L.P. -- at all elections, being fully

convinced of the utter futility of obtaining any real measure of justice or freedom under officials elected by parties owned and controlled by the capitalist class." The minutes show that this resolution, with the others proposed by the committee, was read by its chairman to the convention before the Committee on the Constitution had submitted its report. According to the recollection of the defendant, however, she herself read this resolution. Thereafter, before the report of the Committee on the Constitution had been acted upon, the defendant was elected an alternate member of the State Executive Committee. The Constitution, as finally read, was then adopted. This provided that the organization should be named the Communist Labor Party of California; that it should be "affiliated with" the Communist Labor Party of America, and subscribe to its Program, Platform and Constitution, and "through this affiliation" be "joined with the Communist International of Moscow;" and that the qualifications for membership should be those prescribed in the National Constitution. The proposed resolutions were later taken up and all adopted, except that on political action, which caused a lengthy debate, resulting in its defeat and the acceptance of the National Program in its place. After this action, the defendant, without, so far as appears, making any protest, remained in the convention until it adjourned. She later attended as an alternate member one or two meetings of the State Executive Committee in San Jose and San Francisco, and stated, on the trial, that she was then a member of the Communist Labor Party. **She also testified that it was not her intention that the Communist Labor Party of California should be an instrument of terrorism or violence, and that it was not her purpose or that of the Convention to violate any known law.**

...[W]e now take up...the various grounds upon which it is here contended that the Syndicalism Act and its application in this case is repugnant to the due process and equal protection clauses of the Fourteenth Amendment...

That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question. *Gitlow v. New York*¹.

By enacting the provisions of the Syndicalism Act the State has declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute; and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest.

¹Case 1A-S-3 on this website.

The essence of the offense denounced by the Act is the combining with others in an **association** for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals, is clear. We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State.

We find no repugnancy in the Syndicalism Act as applied in this case to either the due process or equal protection clauses of the Fourteenth Amendment...Judgment *Affirmed*.

CONCURRENCE: Justice Brandeis/Holmes...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 the Fourteenth Amendment...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...**

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.

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 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. 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 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. 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.**

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.**

Every now and then, the author's choice of words are extraordinarily profound, are they not?
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Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom...**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 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, waste lands 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. 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, 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, 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.

Brandeis and Holmes concurred with the result because the defendant failed to raise an issue as to whether there was a “clear and present danger of serious evil.” Normally issues not raised are not considered. But, they found other evidence which tended to establish the presence of a conspiracy to commit crimes.