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Supreme Court of the United States

OCTOBER TERM, 1922.

No. 770.

BENJAMIN GITLOW,
Plaintiff-in-Error,
against
THE PEOPLE OF THE STATE OF NEW YORK,
Defendants-in-Error.

Brief of the State of New York in Support of the Constitutionality of Sections 160 and 161 of the Penal Law of the State of New York (Chapter 371 of the Laws of 1902).

Statement of Facts.

The legislature of the State of New York at its session in the year 1902 passed an act defining criminal anarchy and providing for the punishment of certain acts of criminal anarchy. The law was approved by the Governor and became effective April 3, 1902 (Chapter 371 of the Laws of the State of New York of 1902). That statute is now a part of the Penal Law of the State of New York

and Sections 160 and 161, which are the only ones with which we are concerned, read as follows:

"Sec. 160. *Criminal anarchy defined.* Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

"Sec. 161. *Advocacy of criminal anarchy.* Any person who:

"1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

"2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or,

"3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

"4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of per-

sons formed to teach or advocate such doctrine,

"Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both."

On July 5, 1919 the plaintiff-in-error (hereinafter referred to as the defendant) published and thereafter circulated a publication called "The Revolutionary Age," containing an article entitled "The Left Wing Manifesto" (pp. 171 and 172).

Thereafter and in November, 1919, the defendant was indicted by the grand jury of New York County for having violated the above quoted sections of the Penal Law (fols. 37-149). The text of the published article appears in the indictment (fols. 40-142).

The defendant was duly tried and convicted of such crime by a jury and sentenced to serve not less than five years and not more than ten years in State Prison (fols. 151-156).

From such conviction an appeal was taken to the Appellate Division of the State of New York, First Department, where the conviction was unanimously affirmed (fols. 157-160).

The opinion of the Appellate Division was written by Mr. Justice Laughlin and appears in the record at folios 171-293. Thereafter an appeal

was taken to the Court of Appeals of the State of New York, where the conviction was again affirmed (fols. 295-302).

The prevailing opinion written by Judge Crane appears at folios 305-340; a concurring opinion by Chief Judge Hiscock appears at folios 341-374; a dissenting opinion written by Judge Pound at folios 375-391.

Judges Hogan, McLaughlin and Andrews concurred with the prevailing opinions. Judge Cardozo concurred with the dissenting opinion (fol. 392).

The dissenting opinion was upon the ground that the publication did not actually violate the statute. None of the judges in either the Appellate Division or Court of Appeals arrived at the conclusion that the statute was unconstitutional.

A writ of error was granted by this court (pp. 165-166) and it is on that writ that this case is now before the court.

The assignments of errors (fols. 416-428) are eleven in number. The first five are the only ones involving the question of the constitutionality of the statute and all of them are directed to the same point and are merely motions made in the course of the trial, based on the proposition that the statute under which the defendant was indict-

ed and tried is unconstitutional in that it is in contravention of that clause of the fourteenth amendment of the Constitution of the United States which provides:

> "nor shall any State deprive any person of life, liberty or property without due process of law."

Whether or not the defendant was guilty of violating this statute and whether or not errors were committed on the trial of the action are questions which do not properly concern this office. It is our duty only to uphold the constitutionality of the statute.

In passing, however, it may be said that the defendant can scarcely be said to urge in his brief that he did not violate the statute nor that any errors were committed on the trial. Indeed those questions were settled by the Court of Appeals. Therefore, this brief will be directed entirely to the question of whether or not the statute violates the above quoted clause of the fourteenth amendment.

POINT I.

Freedom of speech and of the press is subject to control by penal statutes.

Numerous penal statutes punishing the saying or publishing of forbidden matter have been held constitutional; otherwise no statute forbidding

profanity, obscenity, the advocacy of murder or treason would be constitutional.

Fox vs. Washington, 236 U. S. 273.
Gilbert vs. Minnesota, 254 U. S. 325.
Schenck vs. U. S., 249 U. S. 47.

POINT II.

The limitations on the states contained in the Fourteenth Amendment is only as to rights granted to citizens of the United States by its constitution or statutes.

Presser vs. Illinois, 116 U. S. 252.

At page 266 the court says:

> "It is only the privileges and immunities of citizens of the United States that the clause relied on was intended to protect. A State may pass laws to regulate the privileges and immunities of its own citizens, provided that in so doing it does not abridge their privileges and immunities as citizens of the United States. * * * * The question is, therefore, had he a right as a citizen of the United States, in disobedience of the State Law, to associate with others as a military company, and to drill and parade with arms in the towns and cities of the State? *If the plaintiff in error has any such privilege he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred.*" (Italics are ours).

POINT III.

The first amendment of the Constitution does not, by virtue of the adoption of the Fourteenth Amendment, curtail the rights of the states to limit the freedom of speech and of the press.

Maxwell vs. Dow, 176 U. S. 581.
U. S. vs. Cruikshank, 92 U. S. 542.

At page 552 the court says:

> "The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States."

POINT IV.

There is no common law right of citizens to free speech other than the English common law.

Smith vs. Alabama, 124 U. S. 465.

We quote from page 478:

> "There is no common law of the United States, in the sense of a national customary

law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes."

And again on the same page it is said:

"There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority."

Robertson vs. Baldwin, 165 U. S. 275.

Quoting from page 281:

" * * * The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally ex-

> pressed. Thus, the freedom of speech and of the press (Art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurous to public morals or private reputation."

It is conceded in appellant's brief that under the English common law the defendant would not have been immune from punishment for the publication in question.

This court has held specifically that there is no national common law other than the English common law as expressed in the constitution and its amendments. It follows, therefore, that unless there is some express prohibition on the State of New York it had the constitutional right to pass the statute now being challenged. We have also shown that there is no such prohibition. The first amendment was purely a limitation on the power of Congress and that limitation has not been extended to the States by the fourteenth amendment.

POINT V.

Similar legislation has been held constitutional.

Fox vs. Washington, 236 U. S. 273.
Gilbert vs. Minnesota, 254 U. S. 325.

The statute in the Fox case was as follows:

> "Every person who shall wilfully print, publish, edit, issue, or knowingly circulate,

> sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross misdemeanor."

We find nothing in that statute which provides that the "advocating" of certain doctrine must result in actual breach of the peace or that such doctrine must be advocated under circumstances which are likely to occasion breach of the peace yet it was held constitutional.

In the Gilbert case, the statute under discussion was as follows (page 326):

> "Sec. 2. Speaking by word of mouth against enlistment unlawful.—It shall be unlawful for any person in any public place, or at any meeting where more than five persons are assembled, to advocate or teach by word of mouth or otherwise that men should not enlist in the military or naval forces of the United States or the state of Minnesota.
>
> "Sec. 3. Teaching or advocating by written or printed matters against enlistment unlawful.—It shall be unlawful for any person to teach or advocate by any written or printed matter whatsoever, or by oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States."

This statute clearly was intended to prohibit the teaching or advocating a doctrine as such without limiting it as to time, place or circumstances. This court held the statute constitutional. The dissenting opinion in that case points out clearly the effect of the statute in the following language (we quote from page 334):

> "The Minnesota statute was enacted during the World War; but it is not a war measure. The statute is said to have been enacted by the State under its police power to preserve the peace;—but it is in fact an act to prevent teaching that the abolition of war is possible. Unlike the Federal Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 219, it applies equally whether the United States is at peace or at war. It abridges freedom of speech and of the press, not in a particular emergency, in order to avert a clear and present danger, but under all circumstances. The restriction imposed relates to the teaching of the doctrine of pacifism and the legislature in effect proscribes it for all times. The statute does not in terms prohibit the teaching of the doctrine. Its prohibition is more specific and is directed against the teaching of certain applications of it. This specification operates, as will be seen, rather to extend, than to limit the scope of the prohibition."

It, therefore, must be assumed that this court arrived at its conclusion in holding the statute constitutional with full understanding of the effect of such decision.

Appellant urges that both in the Fox case and the Gilbert case and in the cases under the Fed-

eral Espionage Act the peculiar circumstances under which the offenses were committed gave rise to the decisions holding the acts constitutional. We cannot subscribe to any such reasoning.

It is familiar doctrine that a statute may be held constitutional in part and unconstitutional in part, but it is a strange doctrine that a statute may be constitutional sometimes and unconstitutional at other times, depending on the state of the public mind or the state of the weather.

POINT VI.

The statute in question is a valid exercise of the police power of the state.

Counsel for defendant on page 20 of his brief points out clearly the reason why the statute in question is a proper limitation by the state upon the right of free speech. He says in speaking of the advocate of doctrines prohibited by the statute:

> "His views may be silly, his remedies preposterous. Their mere utterance creates some danger that unthinking members of the community may undertake to act upon them. But he is not to be punished either for their foolishness or for the danger incident to mere utterance—for the danger inherent in the doctrines themselves, as distinct from a danger arising from their utterance in particular circumstances."

The State of New York learned by tragic experience the "danger that unthinking members of the community may undertake to act upon them."

In the fall of 1901 President McKinley visited the Pan American Exposition at Buffalo. There was no public unrest; there was no state of war; there were no great strikes or riots in progress; there was no reason to apprehend any anarchistic teachings would cause a great public disaster; yet an "unthinking member of the community" did "undertake to act upon them", and the President was murdered, not because the assassin had any personal grievance against him, but simply because he represented organized government.

The People of the State of New York discovered, much to their chagrin, that the real perpetrators of the crime, Emma Goldman and her like, could not be punished, for want of any statute forbidding the teaching of the silly doctrine which caused a silly man to murder the President.

The next session of the legislature of the State of New York passed the act now being attacked. If the act had contained the limitations which it is contended were necessary to make it constitutional; that is, that the propaganda sought to be forbidden must be such as to cause danger of a particular breach of the peace, or a breach of the

peace by some certain person or at a particular time or place or against some certain person or persons, then of course it could not have accomplished the object for which it was passed; that is to prevent the dissemination of a doctrine as such, which working insidiously on a perverted mind would cause another tragedy, perhaps not of the same kind, but nevertheless a tragedy which it is the duty of the state to avoid if possible.

Counsel's statements that he who promulgates such dangerous doctrines, which work upon the minds of "unthinking members of the community" so that they may cause some great public calamity "is not to be punished either for their foolishness or for the danger incident to mere utterance," does not logically follow.

It is the height of folly to punish only the unthinking perpetrators of the crime after it has been committed and let the real criminal, the instigator of the crime who by his "doctrine *qua* doctrine," under the guise of liberty of speech and freedom of the press, has brought about such a state of mind in some of his less well balanced hearers or readers as to make such a crime possible.

Reduced to its simplest terms the statute forbids the advocacy of murder and treason. Surely the state has the right to protect itself, and the

government of which it is a part, from assaults or from the advocacy of assaults intended to overthrow the very constitutions and governments which such advocates attempt to hide behind for protection. Surely the state has a right to pass laws prohibiting doctrines, the necessary result of which has been and is violence and disorder.

POINT VII.

The judgment of this court should uphold the constitutionality of the statute under which the defendant was convicted; and there being no question of the violation of that statute by the defendant and that he had a fair trial, by all the due processes of law, the judgment of conviction should be affirmed.

Respectfully submitted,

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