RARY
COURT. U. S.
69

Supreme Court of the United States

October Term, 1968

In the Matter of:

EVELLE J. YOUNGER,

Appellant;

vs.

JOHN MARRIS, JR., et al.,

Appellees.

Docket No. 163

Office-Supreme Court, U.S.
FILED
APR 11 1969
JOHN F. DAVIS, CLERK

Duplication or copying of this transcript by photographic, electrostatic or other facsimile means is prohibited under the order form agreement.

Place Washington, D. C.

Date April 1, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

****

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

EVELLE J. YOUNGER,

Appellant;

vs. No. 163

JOHN HARRIS, JR., et al.,

Appellees.

Washington, D. C.
April 1, 1969

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

BEFORE

EARL WARREN, Chief Justice
HUGO L. BLACK, 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:

ALBERT W. HARRIS, JR., Esq.
Assistant Attorney General of
the State of California
Counsel for Appellant

SAM ROSENWEIN, Esq.
Counsel for Appellees

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 163, Evelle J. Younger, Appellant, versus John Harris, Jr., et al.

Mr. Harris.

ARGUMENT OF ALBERT W. HARRIS, JR., ESQ.

ON BEHALF OF APPELLANT

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

This is an appeal by the District Attorney of Los Angeles County in California from a judgment and order of the District Court in Los Angeles, a three-judge District Court, convened pursuant to a complaint filed by the appellees here holding the California criminal syndicalism act void on its face in all of its provisions and particulars and regardless of how it might be applied.

In addition, the three-judge District Court issued an injunction against the District Attorney, Mr. Younger, enjoining him from any further prosecution of John Harris, who was then under indictment in the Superior Court of Los Angeles County.

In arriving at this conclusion, one which has been appealed here by both the District Attorney, who is the party below, and the Attorney General of California, we contend that the District Court was wrong, that the District Court should have dismissed the complaint to start with and if it did reach

the question on the merits that the proper consideration of State law in California construing the criminal syndicalism act would have required the Court to hold that the statute was Constitutional and not unconstitutional and we ask this Court whichever it might choose to do, either send it back for purposes of being dismissed -- because we don't think it is a proper case to start with -- or if you wish to reach the merits, why, we think you should hold that it is a valid statute in light of the California decision.

We say that the Court should have dismissed this complaint below without any further ado.

John Harris had been indicted in September of 1966 and charged on two counts with violation of the criminal syndicalism act. He was charged with passing out leaflets which advocated criminal means for bringing about changes in our society in California.

The leaflets were appended to the indictments; as usual, under California procedure, he was furnished a transcript of all of the testimony at the grand jury, which shows the facts underlying the prosecution. None of that is before you. None of that was before the District Court.

Unlike the case you heard argued here earlier, there were not related counts involving the possession of weapons or such things. In addition, the criminal syndicalism act should not be confused with the criminal anarchy statute in

New York. They both stem from the same general idea and -- as does the Smith Act, which, of course, you have upheld. But the California act, instead of simply stigmatizing the advocacy of the overthrow by force or violence of the government, speaks quite differently.

It addresses itself to the advocacy of particular means of bringing about social change, and it lists those means and it lists them very specifically. It refers to the commission of a criminal offense. It refers to sabotage. It refers to unlawful acts of force and violence and it is only the advocacy of these criminal means, criminal ways of bringing about changes in the society, that are stigmatized. The objective must be a change, either in the political structure, or a change economically, the whole statute having been drafted at a time when the advocacy of economic change, and perhaps even, in this regard, a political change,was popular.

Your Honors have held recently without a case or controversy the District Court has no jurisdiction, has no jurisdiction Constitutionally. We think as to three of these plaintiffs it was clear that the Court had no jurisdiction.

Now, Harris filed this complaint and he was awaiting trial on his indictment. He had attacked the indictment in the State Court. He had asked the District Court of Appeals, our intermediate appellate Court, for a Writ of Prohibition. It was

denied there and he applied for a hearing in the State Supreme Court and denied there.

Under our procedures the higher Courts had the discretion to rule on a matter of that kind or not, as they see fit. He was not foreclosed from raising the Constitutional question later, if he was convicted, in the normal appellate process.

But he went into the Federal Courts and, perhaps sensing some problem under Section 2283, he brought along some additional plaintiffs. Two of them were members of the Progressive Labor Party. Harris, I believe, alleges and, I think as a matter of fact, was, himself, a member of the Progressive Labor Party.

They said they had advocated some doctrines seeking change in industrial ownership and so forth and they felt inhibited, in attempting through peaceful, nonviolent means, to advocate their program and, therefore, they wanted some relief.

Another plaintiff was brought it by the name of Broslawsky. He was a teacher at one of the State colleges out there and he said he thought about the doctrines of Karl Marx and he thought about the Communist Manifesto and even read from it and now he was uncertain as to what he could say in light of this statute.

Now, these are the only plaintiffs before the Court. The only action by the State that occurred was the indictment

of Harris. There were no arrests, searches, no announcements, manifestos, as you found in Dombrowski, about what anybody is going to do with this group or, as far as I know, to any of these plaintiffs. They have never been, with the exception of Harris, of course, charged with anything.

Indeed, the District Court after proceeding to find the California law unconstitutional on its face, stated, unequivocally, that they were under no apprehension and that there was no danger, whatever, that these three people would be prosecuted or that the Courts in California would entertain a prosecution on the grounds that they stated in the complaint.

Now, we say, having said that, they have no jurisdiction as far as these plaintiffs are concerned and we rely, as has already been mentioned here on your decision in Golden against Zwickler and we don't think that these people had presented any kind of a case or controversy to the Court.

Q Including the one under indictment?

A No, I will come to him in just a moment, Your Honor.

He does stand on a different foot. He was indicted.

Q Up to now you have just been dealing with those others?

A Exactly, exactly.

Q With respect to Harris, you are going to argue 2283, aren't you?

A Exactly, and we will argue some other things -- that there was no irreparable injury other than his own prosecution. There was no pattern of prosecution. There was not even any allegation that anybody else was bothered by this prosecution or was likely to be prosecuted or that any or all of the facts that you eluded to in Dombrowski were present.

We think, specifically, as to the injunction in connection with the prosecution of Harris, that that is barred by Section 2283 and that is developed in our briefs. I don't want to go into that in too much detail except to say this: That this case presented a very excellent situation for the application of the abstention doctrine and so you can see the value of 2283 in failing to restrain a State Court prosecution.

There are two complaints, basically, about the California statute. One is that it is vague. We don't know what it means. The other one is that it is overbroad. It prohibits things that they should be allowed to do.

The contention of Harris and his fellow plaintiffs is that they don't have State decisions thatwill clarify these points. Now had the Federal District Court declined to act on this case and had Harris ever been convicted in the appeal is no question but that any vagueness problem that there is -- I am not suggesting that there is a vagueness problem, they think there is -- could have been resolved by the State Courts and, in defining the conduct, the area of conduct

proscribed perhaps removed completely the overbreadth question and, thus, removed completely any necessity of a Constitutional adjudication.

After all, if the statute doesn't apply to what you might think is protective conduct, then you don't have anything to decide.

This case was a perfect vehicle for this to be done and not for the Federal District Court to show what we think, in all due respect, was unseemly haste in declaring a California State law unconstitutional.

Q Well, now, why? I expect Zwickler and Koota has a bearing in this, doesn't it on a declaratory judgment aspect on this ---

A Well, I ---

Q --- not on the injunctive aspect?

A Declaratory judgment aspect, Your Honor, we don't think Zwickler against Koota is controlling here. That prosecution, as I recall, had been completed in that case, in the State Courts.

Q Well, there was no prosecution pending when the lower court decided.

A Exactly, there was no prosecution pending.

Q And you say there is one here.

A Well, I think as to the declaratory judgment and as to Harris, I think that is true. I think it is a matter

of comedy. I don't think that makes it unimportant or insignificant.

Q Don't you think it is significant here, though, that the matter -- while in a normal case that might be some force, if there are two proceedings going on at the same time, involving the same questions, that maybe the Federal Court ought to wait until the State gets done. But in this case the State has already rejected this Constitutional claim.

A Well, it is ---

Q It has already been presented in the State Courts. It has been rejected.

A No, Your Honor, it was only presented by means of the interlocutory motion to set aside an indictment.

Q Isn't that a ---

A And the attempt to invoke the discretionary review in the Appellate Courts. You have no right to go to the Appellate Courts at that point.

Q I understand that but the trial court has already rejected it anyway.

A Oh, the trial court, certainly, on the merits. There is no question about it.

I think, in addition, in Zwickler you had a very clear claim of simply overbreadth, not of any vagueness. There was no problem of vagueness in the statute. The question was that it covered protective conduct and that was going to have

to be reached. Our case is quite different.

I would like to turn, if I might, to what I think is the more important question here and that is the merits of the decision. As I say, we think they should have dismissed it summarily but they didn't.

The District Court, of course, recognized, as we all recognize, that in Whitney against California this very Court unanimously had sustained a statute that was here being enforced. But I think what they didn't do was recognize what had happened in California since Whitney had been decided. I think that what they did not do was recognize that some of the very issues that were decided here were decided in Whitney.

If you go back and read Whitney again you may think of it as a discarded decision but the very same claim of vagueness thatis raised here and which was the foundation for the judgment below was discussed at very great length in Whitney and that there was no division in the Court on that question.

Justices Holmes and Grandite had no concern about the vagueness aspect of it. They didn't think it was vague. Indeed, the only problem they saw in the case was that the defendant should have had an opportunity to show that there was no clear and present danger arising from her particular conduct and they felt there was evidence that would show there was such clear and present danger, that is, some eminence of

violence, as I recall.

So, they joined in the opinion affirming the validity of the California criminal syndicalism act. Well, it has not been back before the United States Supreme Court since then and it would be naive to suggest that the thinking about the First Amendment and about the statute hasn't changed somewhat although the same test that you use over and over again from the Connelly decision, that the people shouldn't have to guess the meaning of words. That test was used in Whitney. It is basically the same test.

Nevertheless, there has been some changes in the approach and in the thinking. This was recognized in California. It was recognized no less than in 1946 in the Bascomb case, a case which construed the criminal syndicalism act in the light of changes in the law since Whitney had been decided.

Chief Justice Trainer, who was then an Associate Justice, recognized specifically that there has been a lot happening since Whitney was decided and we have got to look at this again in light of what has happened since then and he did. It is a long opinion and it discusses, I think, all of the cases that had intervened and all of the concerns that this Court has manifested over the years with the need for protecting free speech and drawing a line between free speech and illegal advocacy and he even, in that opinion, announced

a test which is even stricter than your own Dennis test.

He said that the danger aroused by the speech had to be imminent and the danger had to be a danger that the State could properly prohibit and let me remind you again that what is prohibited here is the advocacy of means, unlawful acts, criminal acts, violent acts.

Q Which case is that? I am sorry.

A That is the Danskin decision, Your Honor.

Q I see.

A Danskin versus San Diego Unified School District.

Q 171 Pac. 2d 885?

A Yes, sir, that is it.

Q Would that be it?

A Yes, sir.

Now, it might be suggested that this was not a criminal prosecution under the criminal syndicalism act. What it was was a case reviewing the action of a local school board in applying the civic center act in California.

That act required a loyalty oath, in effect, if you wanted to use a school room to hold a meeting, an oath that you did not or had not advocated the overthrow of the government. It was argued in the State Supreme Court that the civic center act and its oath requirement was the supplement to the criminal syndicalism act and it was to carry out the purposes of that act.

So, in order to appraise that argument Judge Trainer addressed himself to the criminal syndicalism act, what it meant and what it prohibeted and anybody who is in any doubt about what it prohibited can find, in that opinion, what it does prohibit.

He made it very clear that it did not prohibit the advocacy of abstract doctrines, the discussion of abstract theory. It was never intended to do that and it doesn't do that and no one should be in any doubt in California about the breach of the criminal syndicalism law.

Q The indictment does appear in the appendix here, doesn't it?

A It does not.

Q As I understand the complaint that the plaintiff Harris says he was indicted for violating the criminal syndicalism act for distributing and circulating leaflets bearing the imprint of the Progressive Labor Party. If that is all that he was doing it is pretty hard to see how he was violating the statute as you say it has now been authoritated to construe.

A We don't know, Your Honor. He was never tried. Maybe he was not in violation of the statute. No one can say at this point. That is the purpose of the whole trial system.

Q Yes.

A But, if I can just add this. The indictment, I think it is fair to say, did contain the leaflet that he

was handing out on these two occasions. That, apparently, is not a part of the record below. We didn't handle the case. The District Attorney handled it below.

If you explore the grand jury transcript, which, again is not part of the record, as I understand it, below -- indicentally that is not a secret document in California. The defendant gets a copy of it. So everybody knows what is in it.

What really happened here -- and I am not going to say that this can properly be prohibited. I don't think we have reached that point because the statute wasn't applied to him and he has the opportunity to trial to explore all of these issues.

This whole incident occurred in April, 1966, about six months after the great Watts riots. It grew out of the shooting and killing of a man named Leonard Deadwiler in Los Angeles. He was a black man and it turned out he was taking a pregnant wife to a hospital. Some confusion with the police officer and he sped away as I recall and the police officer chased him and later stopped him and later a coroner's inquest determined that the officer approached the car with a weapon, being fearful of the situation. He leaned into the car, the weapon went off and killed Mr. Deadwiler.

Now, there was great furor about that in the Los Angeles community. The District Attorney felt, in reviewing the case, that it did not call for an indictment but that the people had to know what had happened here. A coroner's inquest

was held, at which all the witnesses testified as to what had happened and I don't want to go into that.

They started it and then they had to stop because there was just too much disorder and unruly behavior so they moved it from where you would normally hold an inquest, where you would have three or four people, to the biggest courtroom in the county courthouse in Los Angeles, and that is some court, much bigger than this room. It holds several hundred people.

The place was completely braced with police. The audience was about 90 percent black. There was some disruption when witnesses -- booing of witnesses. This was the atmosphere at that courtroom. Mr. Harris was out there handing these leaflets out in this setting and the leaflet -- I am not going to read the whole thing -- says "Wanted for the murder of Leonard Deadwiler, Bobo the cop".

Q Where is that published in the record?

A Pardon me?

Q Where is that published in the record?

A Well, it is not, Your Honor. I have the indictment here. The gist of it was that Watts was a great concentration camp, Bobo was a guard and Deadwiler an inmate and we have to exterminate them before they exterminate us. That was the gist of it.

Q How do you make that? You say that that is advocating extermination of the police?

A Yes, we do.

Q And you say that he was calling on the people to go ahead and immediately to rise and attack the police.

A That is something for the trial court to determine and the jury to determine, I think.

Q What is your Constitutional theory?

A But he won't be convicted unless it rises to that level of advocacy.

Q Why is that? Certainly the language in the statute is broad enough to convict him for advocacy or even for approval; is that right?

A Well, that language doesn't stand alone, Your Honor; that language has been construed. It was construed in Danskin. It was construed, if you please, almost 50 years ago in a case called People against Malley that we cite, which was a prosecution under this very section, handing out leaflets and that sort of thing.

Q By the way, when was the last time before this that an indictment was laid under this statute in California?

A Well, it was a long time ago.

Q The statute was enacted in 1919?

A That is correct.

Q And then there were a lot of prosecutions then and then there were some more prosecutions in the '30's?

A I don't think there were many in the '30's. I

think both of them, I believe, were in the '20's.

Q And now the statute is a statute being used widely in California, do you know?

A I only know, in addition to this prosecution, of one other prosecution and that is of a group of American Nazis.

We found some things in the course of that investigation that we thought the Court might be interested in and appended those to our brief. There, of course, the terrorism, the only answer to terrorism, when they burn our flag, it is time for violence. All of this addressed toward violence, toward Negroes and people who, in the judgment of these people, are advocating very bad causes.

I think, Your Honor, we have tried to point out that there has been a change in our society. It isn't that somebody suddenly read the criminal syndicalism act, although I think, in all honesty, if you ask 1,000 people about it in California, you wouldn't get an answer from over one or two.

It isn't because somebody suddenly read it and said "Let's prosecute". It is because the advocacy, what is prohibited here, the advocacy of bombing, of chilling, of these things as means of social change. The advocacy that we have seen in California and the advocacy that this statute is directed to is the advocacy of bombing, killing the police, specific advocacy of specific acts.

This renewal of this kind of activity -- maybe this isn't what happened in the '20's or the turn of the century but it is said that that sort of thing happened with the anarchists and syndicalists.

We see the same thing happening again in California and elsewhere and this statute has suddenly again become, in one of the favorite words of some people, relevant. Maybe it wasn't for a long time but it is now.

Q Let me see if I understand your position. You are defending this statute on the grounds that it strikes at the advocacy of violence; is that right?

A That is correct.

Q And you are not trying to defend it on the words that are in the statute, about aiding and abetting.

A Well, I have to defend the statute as it is written and I do defend those ---

Q Well, if you defend the statute as it is written then you have got someother problems.

A Well, I think that you have to read those words in the light of the way thatthey have been construed, not as if I made them up here, advocates ---

Q That is not my question. My question is whether you are defending the statute in this litigation on the basis of the following language which appears in Section 11400. It says Criminal syndicalism means -- I will interpolate -- not

only any doctrine or precept advocating or teaching but also any doctrine aiding and abetting the commission of the crime of sabotage.

What I am trying to get at is whether your submission to us relies, to any material extent, upon the use in this statute of the phrase "commission of"?

A "Commission of"?

Q Yes, 11400

A You mean "aiding and abetting the commission of"?

Q Yes.

A Is it the "aiding and abetting"?

Q And the "commission of" as possibly distinguished --

A Well ---

Q I am not trying to suggest an argument to you. I am merely trying to clarify just what your position is.

A All right, this is what our position is: That advocating and teaching are the key words and they are words of art. Aiding and abetting is the customary expression in California to define an accomplice, a principal in the second class. It is not even written into most statutes -- committing murder is proscribed but if you aid and abet in the commission of murder you are punishable, as a principal, for murder.

We say those words are used here in connection with advocating and teaching and we refer to a subsidiary rule in this activity with guilty knowledge and so forth, just as if it

were any other crime.

Q You are defending this on the plain basis of statute that makes it a crime to teach or advocate the described act.

A As those words are understood by all of us and has been explained by this Court many, many times.

Q Right.

A And by the California Courts. I think I have to, Your Honor.

Q Mr. Harris, what was the date of the Danskin case?

A Well, it was in 1946, June, 1946, some years before Dennis and there hasn't been anything since because there hasn't been any prosecution. This case, had it been tried in the State Court and appealed, would have presented the issues.

Q How many sections of the law are involved here?

A Only one was prosecuted under the one that prohibits printing, circulating, distributing written ---

Q I take it you argue that none of the other sections should be reached by any court.

A Exactly. There is an express severability clause in the statute. There are cases -- and we have eluded to them ---

Q The Court below declared them all unconstitutional.

A Everything, every part of it, every word in it

and every application of it.

Thank you.

MR. CHIEF JUSTICE MARSHALL: Mr. Rosenwein.

ARGUMENT OF SAM ROSENWEIN, ESQ.

ON BEHALF OF APPELLEES

MR. ROSENWEIN: May it please the Court.

The statute that was presented to the District Court was a pure speech statute. It punishes advocacy, teaching, justifying, publishing, editing, circulating, assembly, joining. It was not a conduct statute. Our brief outlines the statutes that the State has. I am not going into the facts any more than counsel but I simply would like to say that all that is involved in this case is a young man distributing in civic center, not in the black area, in the civic center, outside, on the street while people were hawking newspapers and while men were distributing religious material as is customary in Los Angeles.

Just the same, this young man was distributing two leaflets and that is what he faces 28 years in jail for -- two counts, 14 years on each count.

Q He hasn't even been tried yet.

A No, he hasn't, but he faces that.

Q No, he faces the possibility.

A The possibility.

Now, in addition, as has been pointed out, he

raised the question of the Constitutionality of the statute and raised it in an appropriate manner in the State Courts -- 995, petition for writ of prohibition -- these are customary procedures. These are remedies in the State Court, are accepted. They are the tests for Constitutionality.

And then petition for rehearing denied each time and each time, as a matter of fact, the State opposing consideration by the Court. It was this record, on this basis, that the Court below, the three-judge Court, passed on consideration of the statute.

This man, these appellees, came to Court claiming their rights under Section 1983. That is the law of the United States. Those who are deprived of rights under that law are entitled to go to a Federal Court. So, they did. That Court, under the decisions of this Court, was compelled that no other way -- it was its duty to undertake consideration of the complaint that was presented.

A motion to dismiss was made by the State and acceptance, therefore, of everything that was alleged in the complaint. That complaint alleged that Harris faced indictment, that he had raised these issues and the State had refused to consider them.

It raised the question of the validity of the statute on its face, claiming that it violated the First Amendment. It was suppressive. It, obviously, was vague. It,

obviously was overbroad.

The cases that run from Fiske against Kansas, not the more recent ones, the cases that run from Young against Oregon, Thornhill against Alabama, Herndon against Lowry, all of these cases, including the decisions of this Court, the Keyishian, et cetera, and Dombrowski, all point in only one direction, that this statute is unconstitutional on its face.

The Court, therefore, felt that it was obliged to re-examine Whitney in the light of the developing Constitutional doctrine that had gone on since that time and it could only reach the conclusion that the statute on its face was clearly invalid.

This is not really disputed in the briefs, at least, by the appellant, because what they, in effect, say are really two aspects: One, that after all the State Courts had interpreted the criminal syndicalism law and interpreted it in such a way as to satisfy First Amendment guarantees and that, in any event, some of the petitioners do not have standing and that the one Harris cannot obtain his injuctive release because of Section 2283.

There is no, and cannot be, any serious claim that this statute today, on its face, is not unconstitutional and courts, three-judge courts, in Kentucky, in Mississippi, in Georgia,have all declared their statutes, criminal syndicalism statutes,to be unconstitutional on their face.

I might say that some of the judges in their opinions have indicated that they couldn't conceive of an argument that could today Constitutionally support the validity of a criminal syndicalism statute.

What is it, therefore, thatthe appellant is really arguing here? First, the argument is made that three of my appellees don't have standing, that a case or controversy is not presented. Is that accurate on this record?

They accepted our allegation that a teacher in a State college is teaching the doctrines of Karl Marx, is teaching about the Communist Manifesto, is teaching revolutionary doctrine and, in the light of the statute, and in the light of the indictment of this young man who distributed two leaflets, that this statute is going to be enforced; they feel inhibited, this teacher feels inhibited, uncertain as to what he can or cannot teach without offending this law.

The two members of the Progressive Labor Party and the leaflets for the Progressive Labor Party say that they and their organization advocates the replacement of capitalism by socialism. They advocate the abolition of the profit system. Under those circumstances, although they say they advocated in peaceful terms, they ask -- and are uncertain and feel inhibited as to what they can or cannot say without meeting some kind of a prosecution.

Q Your position, then, is that the requirements of

Dombrowski and Zwickler are satisfied if somebody merely alleges and proves, let us say, that he is engaging in some form of expression that a statute prohibits on its face; is that right.

A Yes. That is my ---

Q In other words, you don't need any overt acts by the State. In Dombrowski there were overt acts. In Zwickler there were overt acts by the State. But it is your submission now that such overt acts are not necessary provided only that a person in this case is engaged in the kind of teaching or advocacy that the statute on its face prohibits. But do you think that that is the narrow holding, that that is the holding of Dombrowski and Zwickler?

A I think that Dombrowski and Zwickler are at least indicative that where a statute is patently invalid on its face and where the parties indicate and it is accepted for the purpose of this record that they are engaged in the area of speech that may come, may be interpreted that they have a right, they have a standing -- and I might say, Your Honor speaks of overt acts. If you mean an indictment or a threatened indictment, I would say that that hasn't happened in this case. That may be true but we are asking for declaratory judgment ---

Q I want to ask you just this one question. In Dombrowski and Zwickler the State had taken certain types of

action short of indictment in both cases -- or in Dombrowski, anyway -- but the State had taken certain types of action that made a record of harassment or interference with or obstruction to the exercise of First Amendment rights; do you agree that that is the reading of those cases?

A Yes, that ---

Q Here with respect to these three persons, other than Mr. Harris, you have nothing of that sort?

A We don't have an exact replay of that but we do have overt acts.

Q What are the overt acts?

A I would say this: One, Harris has been indicted. There is a threat that this statute is going to be used and these persons have alleged, and it is accepted, that they are precisely in the area where this threat by the State against one person may flow to them. This does not come off the street as someone who really has no interest. These are persons who say, "We advocate socialism. We are teaching Marx. We are teaching those revolutionary doctrines that might be swept within the ambit of this statute."

That it seems to me, and if Your Honors will read this brief of the appellants and notice the pages devoted to documents and language that have nothing to do with this case. Apostles of violence are stalking California. California is toppling. It is absolutely essential that we have this law and

you will see that they intend to enforce this to the hilt and the enforcement is to suppress speech and protest, not conduct, because they have 100 statutes for that.

We think we have standing, we think all of us have standing.

Q The writer of the opinion for the three-judge Court rather disagreed with your prediction.

A He said he didn't think thatthey would be indicted. But he could -- I don't think that the writer would say they are not inhibited.

Q He said they do not stand in any danger of prosecution by the respondent, the present District of Los Angeles. Nor do we imply the existence of a likelihood that the Courts of California would entertain such prosecutions if instituted. That is the language; isn't it?

A That is a generous way of putting it. But there is another aspect that we are arguing and that is that our appellees are afraid to talk, are afraid to teach, and that is not denied. It is accepted for the purpose ---

Q Would we have to extend Dombrowski to give you relief?

A I don't think so. I think ---

Q Why not? What has the government of California done to anybody other than Harris?

A With respect to criminal syndicalism law?

Q What, if anything, has the government or any government official done to any one of the plaintiffs other than Harris?

A Well, Your Honor, they have not done anything, at this moment, overtly. They have not indicted them; they haven't ---

Q Then is it not true that we have to extend, because there were overt acts, right?

A I don't want to put into Dombrowski ---

Q Has anybody been searched?

A No, no.

Q Any documents taken from them?

A No.

Q Any threats against them?

A No, there hasn't been.

Q Well, would we have to extend Dombrowski?

A I don't think so and the reason I don't think so is because, as I read Dombrowski and here is why I hesitate to answer, Your Honor, as I read Dombrowski, it is true that there were those harassing events in Dombrowski but there was also the statement that if there is a patently invalid statute on its face abridging freedoms of speech, press, assembly and the right to petition for grievance as this statute does, then one who comes within the ambit and shows that he does come within the ambit would have a right to come into declaratory

relief or any injunctive relief if any were necessary.

Now, that is how I interpreted it and that is why I say it might not be necessary to extend it but if it is, if it is necessary to extend it, I ask the Court to extend it, not because I think that this will cause a whole flock of litigation to come into the Federal Courts any more than the habeas corpus situation which led the howls and outcrys and really have simmered down and much justice has been done in the light of the decision of this Court in Townsend against Burke.

I think that the Federal Courts can do the same screening, individual judges can look and see whether claims are frivolous and refuse to have a three-judge court, but if the statute is patently invalid on its face the three-judge court should be convened and should give the relief that the plaintiff is entitled to under the laws of the United States.

Q Well, patently invalid on its face covers a lot of ground; doesn't it? I suppose that is one of your major argument in this case. Do you also argue that even if the statute should be read as having been narrowed by some past decisions or even if we should assume that the California Courts would narrow it to some extent, do you contend that in this narrowed form the State wants to present it as unconstitutional?

A Yes, there are a number of aspects to that. My answer is, yes, with this explanation: First, if I have

reviewed very carefully the decisions of the California Courts since 1919, up to the last time they spoke on the criminal syndicalism law, and the construction there is fraud and is not restricted and does not follow the Constitutional doctrine enunciated by this Court in interpreting the Constitution.

I might say, following Danskin, counsel has pointed out that Danskin came, the issue was not directly presented nor the Court for simply saying, if you are trying to implement the criminal syndicalism law of course there has got to be a clear and present danger, of course, if the American Civil Liberties Union wants to use the school auditorium is not a clear and present danger and that was it.

If you read all of the decisions outlined in 22 and 23 of my brief and read the decisions that followed almost by 10 years the decision in Danskin and that is Black against Cutter Laboratories where Mrs. Walker, and I quote from it on Page 22, was a member of the Communist Party, whereupon, the Supreme Court of California said, "That constitutes a violation of the California criminal syndicalism act, per se.

So, from the construction, they are not limited and of course the Court refused to pass on it when we asked them to.

Q What is this Vogel case about, Mr. Rosenwein, the one cited by the three-judge District Court, by Judge Gray in his opinion, Vogel versus the County of Los Angeles?

A My recollection is ---

Q He says is an excellent example of the California Supreme Court's correct Constitutional views and he says that decision has particular relevance to the issue here at hand.

A Yes.

Q What is that about.

A It wasn't on criminal syndicalism or anything of that kind but it did have some First Amendment aspects and my recollection is I think it had something to do with political activities of employees and they were given some infringement along that line, and the Court felt that the Supreme Court was, of course, concerned about the First Amendment rights, but again the District Court down below said the plaintiff here went to the Courts all the way through and we are bound not to wait ---

Q It was on a preliminary motion, wasn't it, Mr. Rosenwein? I didn't understand that there was any decision on the merits of that motion beyond the trial courts.

A Oh, no, it went up.

Q I thought it was a decision to consider.

A Not a decision but a writ of prohibition was filed in the District Court of Appeals which was denied.

Q But not on the merits, I understood.

A Well, we have no way of knowing, no opinion.

Q Even in the trial court it was just a motion to dismiss the indictment?

A Yes, under Section 985, but there the Court ruled that the statute was Constitutional.

Q In what form?

A He issued an oral opinion.

Q Is that in the record?

A Not in our record here.

Q But did he understand the statute to mean what you say it means on its face ---

A Oh, yes, the documents were ---

Q --- or did he assume that the statute should be considered in narrower form?

A No, the arguments were made as to the invalidity, and at length, and I will say down below great reliance was placed on Whitney by the District Attorney asserting that Whitney governed and that should be the end of it.

The Court said, "I think it is Constitutional, I think we have to go to trial." That is when we sought review.

Now, as to 2283 I suscribe to the view ---

Q Do you really need the injunction?

A Well ---

Q You have a direct appeal here.

A That is the point.

Q Do you really need it in the lower court?

A I think thatyou would probably get assurances from the State that the judgment was affirmed, that they would

not prosecute. I assume you would get those but down below the injunction was issued to assure the State the right to appeal. I would say that I stand for the position, whether I need it or not, I stand for the position that 2283 is not about the grant of an injunction even in the pending case where there is a pending indictment.

I think where there is a declaratory judgment, for example, that a statute is unconstitutional on its face, then to effectuate the judgment, where irreparable injury is done by the face of the statute, then to effectuate the judgment, which is another exception of 2283, we should have a right to get whatever injunctive relief we need.

In addition, I think history and law would indicate that those who passed the Act of 1871, the predecessor to 1983, must have intended, even if they didn't say so, that the Federal Court should have the power to issue an injunction staying State Court proceedings, to protect civil rights when those situations arose.

Q Is the District Court saying anything at all on this?

A No, it wasn't raised by the other side. They didn't raise it, actually, in the jurisdictional statement either.

Well, for all those reasons, I would urge the affirmance of the judgment below. I think that the acts in the

criminal syndicalism laws, I might say, even the criminal anarchy laws, ought to be interred with the seditious liable laws, bad tendency tests and other relics of that kind.

Thank you.

MR. CHIEF JUSTICE MARSHALL: Mr. Harris.

REBUTTAL ARGUMENT OF ALBERT W. HARRIS, ESQ.

ON BEHALF OF APPELLEES

MR. HARRIS: I would only like to suggest this, that anybody who has lived in California or reads about California and thinks that there is any chilling of free speech and of the free expression of ideas and the teaching of almost anything under the sun, with all due respect to anyone who believes that, I have to say I can't believe it.

We have, I think, the broadest free speech, in California, of any place I know. Fifty years ago the District Court of Appeal in Malley held that it wasn't enough to just talk about revolution or something. You had to have the intent to bring about, which is the illegal means that you are advocating. In Danskin it was made very clear that this statute had nothing to do with abstract theories and to suggest that anybody is afraid to talk about Karl Marx ---

Q Danskin is part of another matter, isn't it? In that case Judge Trainer was trying to get out of a box that he was in because of Whitney and this discussion of the criminal syndicalism statute was dicta and was made necessary by the fact

that the statute that they had before them was considered to be an addition to the criminal syndicalism statute and that addition was held to be unconstitutional as directed to pure speech and in order to distinguish the Whitney and the criminal syndicalism statute Judge Trainer says that the criminal syndicalism statute can be applied only when there is imminent danger that the advocacy it seeks to prohibit will give rise to evils that the State may prevent. I was quoting from his opinion.

Are you suggesting to us that Danskin is an authoritative interpretation by the California Courts of the criminal syndicalism act?

A Yes. I think it is. I think he felt he had to reach that and I don't think that this statute should fall because of some debate about whether it was dicta or holding under that particular situation. I think it is very clear from the opinion.

Even if it weren't clear, Your Honor, I would suggest that this Court has a duty to construe the statute in light of your own decision, without regard to what California has decided. You have decided Dennis and Scales and Yates and these words are not new and you have given them very limited meaning and I think you have a duty to construe them in order to sustain the statute and not in order to destroy it.

Q Do you have any examples of a Federal Court in a declaratory judgment action like this attacking a State

statute of declaring the statute to be unconstitutional insofar as it reaches some things that it shouldn't reach but leaving -- but saying it is Constitutional in other respects?

For example, it is a claim that this statute is overbroad and reaches some kinds of teaching that it shouldn't, which I gather is essentially the claim; isn't it?

Can a Federal Court say that, yes, we agree the State statute is unconstitutionally overbroad and insofar as it reaches these forbidden areas that it is unconstitutional, and stop there?

Normally, I understand that the Federal Court has said -- to find it overbroad it just strikes down the statute.

A Well, that is certainly what it did here.

Q But do you see any barrier to just saying that it is unconstitutional insofar as it is overbroad which would leave the State in the position that you suggest, of enforcing the statute within the narrow valid area.

A No, I don't think it is a matter so much of application of the statute. I think that is what you are suggesting in ruling on the various applications that might be made ---

Q The attack is on its face. It says that it reaches some kinds of teaching that it shouldn't reach; isn't that right?

A Well, it is claimed that it is too vague, anyhow.

That is a little different concept.

Q That is right.

A They make both contentions and it was so held below.

Q Well, if it is the vagueness thing, I can understand this.

A I think the District Court has a duty to construe those words. You don't just read them as if you have never seen them before.

Q You mean they should act like a State Court and say this is what this statute means?

A Well, no. They aren't a State Court. I don't think they should, in that sense, try to be one but no lawyer that I know of picks up a statute and looks at it and says, well, here is the word teach, so it has got to have something to do with teaching in the classroom. None of us construe statutes like that.

The first thing we do is look at the statute and we start to look at the cases and that is just what the District Court didn't do.

Here, had it done that, I think it would have concluded that, as construed and as narrowed in the State construction, this statute is perfectly valid. I say it is valid on its face as it has been construed.

But even if you weren't satisfied and you thought

Danskin to go to something else and the other cases are old and so forth, still, in all, I think that Court has a duty to construe the statute,to uphold it, and not to strike it down.

This Court said so in Fox against Washington.

We have used the same words that you have upheld time and time and time again and now, I think, to turn around and say they are too vague or overbroad, we don't understand them would be contrary to your own decision, absolutely unnecessary for the protection of anybody's rights.

Thank you.

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