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CASES CITED.

OTHER AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM (1951)

No. 118

JOSEPH BEAUHARNAIS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

RESPONDENT'S BRIEF.

The Opinion Below.

The opinion has been reported and is cited as *The People of the State of Illinois,* Appellee v. *Joseph Beauharnais,* Appellant, 408 Ill. 512.

Jurisdiction.

Although petitioner's brief refers to petitioner as appellant and to Illinois as appellee, this cause is here on *certiorari* under Sub. Sec. 3, Sec. 1257, of the Federal Judicial Code and not on appeal.

No question is raised as to this Court's jurisdiction.

The Questions Presented.

The questions presented are:

I.

DOES THE FOURTEENTH AMENDMENT PROTECT THE PRINTED UTTERANCES UPON WHICH PETITIONER WAS CONVICTED?

II.

If this question should be answered "Yes", petitioner's conviction would of course have to be reversed. If this question be answered "No", then there arises the further question:

IF PUBLICATIONS SUCH AS THOSE OF THE PETITIONER ARE NOT PROTECTED BY THE FOURTEENTH AMENDMENT, IS THE ILLINOIS STATUTE IN QUESTION, AS CONSTRUED, LIMITED AND APPLIED BY THE SUPREME COURT OF ILLINOIS, SUFFICIENTLY DEFINITIVE FAIRLY TO APPRISE THOSE SUBJECT TO IT OF THE OFFENSE THAT IS PROHIBITED?

III.

If petitioner's publication is not directly protected by the Fourteenth Amendment and if the State statute under which he has been convicted is not unconstitutional, then petitioner presses questions as to the respective functions *under State law* of judge and jury. We say that these questions, though raised and argued, are not cognizable here.

ARGUMENT.

I.

The Fourteenth Amendment does not protect the printed utterances which were the basis for petitioner's conviction in this case.

Petitioner contends that the Fourteenth Amendment implicitly inhibits, not only previous restraints of, but punitive sanctions applied after the printed publication of libel, provided only that the offender defames a sufficiently large group to invest his utterances with the protective mantle of the Constitution of the United States and

Petitioner says that so precious is the right to "portray depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" and to expose them to "contempt, derision, or obloquy" that this privilege to defame is immune, not only to injunction at the hands of a single judge or punishment under a general disorderly conduct statute, but to the considered and deliberate enactments of a state legislature which, taking cognizance of inter-racial tensions, discriminations and persecutions, finds clear and present danger of substantive evil in the printed dissemination of such utterances as those published by petitioner and prohibited by the statute here assailed.

What are the "substantive evils" of which the Illinois legislature may reasonably have found "clear and present danger" from such onslaughts upon races as those published by petitioner?

They are:

First, defamation of character is such an evil *per se* as to be subject to civil and criminal sanctions everywhere. Cf. *White* v. *Nicholls,* 44 U. S. 266. Had petitioner libeled particularly named or otherwise specifically identified individuals, no matter how numerous they might be, a statute punishing him would not even suggest a substantial constitutional question. But because petitioner's aspersions were cast upon many persons comprehended in the collective term "Negroes" his counsel perceive an infraction of his constitutional rights in the enforcement of a statute which, not by authorizing previous restraint, but rather by moderate punishment after the defamatory publication, subjects him to a fine for this gigantic libel.

We say that petitioner cannot gain constitutional protection from the consequence of libel by multiplying victims and identifying them by a collective term.

Second, Illinois, like many but not all other States, has so far taken cognizance of racial and religious discrimination as a "substantive evil" as to prohibit such discrimination in hotels, theatres, eating houses, stores, shops and the like. Illinois has enacted a Civil Rights Act which effectively prohibits and punishes discrimination on the basis of race or religion. Illinois Civil Rights Act, Ill. Rev. Stats. 1951, Ch. 38, pars. 125 to 128j, pp. 1342-1343.

Now most certainly printed publications which expose members of minority groups to "contempt, derision or obloquy" tend *directly and immediately* to incite such prejudice as results in the discriminations denounced, prohibited and punished by Illinois' Civil Rights Act. Petitioner and his counsel nowhere dispute the inevitable tendency of utterances such as those of petitioner to encourage violations of the Illinois Civil Rights Act.

Petitioner assumes without arguing that the "substantive evil" of which there must be "clear and present danger" must be the "evil" of an imminently likely eruption of riot, affray or other tumultuous civil disorder. His counsel cite no case, nor do they invoke any premise of logic, that requires the "substantive evil" of which there must be "clear and present danger" to be that of a breach of the peace. If there were such a restriction on the right of a State or the National government's power to regulate speech, then most of the laws against slander, libel, mendacious advertising of securities or other wares and the like would be unconstitutional.

Petitioner's contention that the publication in question is protected by freedom of assembly need not long detain us. The very purpose of the petition was to importune the city council to pervert and prostitute its authority by enacting an ordinance segregating Negroes as to residence. Since such an ordinance, if passed and enforced, would be so clearly unconstitutional as to render its authors and enforcers amenable to prosecution under both the Federal and State Civil Rights Act, this petition amounted to a solicitation to commit a crime. The Constitution has never protected those who solicit particular persons, in this case the city council, to commit a particular offense, in the immediate future, in this case a violation of Federal and State civil rights statutes. Cf. *Schenck* v. *U. S.,* 249 U. S. 47, holding that those who adjure an ordinance to disobey a draft law may be punished.

We submit that we vindicate the present point by the following premises and their conclusion:

> **[First premise:]** Racial and religious discriminations such as are prohibited by the Illinois Civil Rights Act are a substantive evil which the State may prevent or minimize.

[Second premise:] Publications like those of petitioner directly tend to incite the sort of discrimination that is constitutionally prohibited by the Illinois Civil Rights Act.

[Conclusion:] Petitioner's publications are not protected by the Fourteenth Amendment.

Third, even if the "substantive evil" of which there must be "clear and present danger" has to be an evil manifested by overt physical violence [we earnestly deny this assumption], Illinois' General Assembly could take realistic cognizance that printed incitements to racial and religious hatred are very likely to culminate in riots, murders, lynchings and other orgies of cruelty which it is the *first and greatest duty of government,* upon the performance of which duty rests its ability to discharge all of its other functions, *to prevent.*

A government that cannot effectively prevent riots, lynchings and mass murders is not much of a government. And, we submit, no government need wait until such incendiary publications of those of petitioner have actually ignited the pyres of the lynching bee before moderately chastising the author of such printings as those of petitioner.

Illinois' history of carnage against the Negro is so sorry and so bloody as to be a matter of history and therefore of judicial notice. From the "Springfield riots of 1908", perhaps as ghastly a holocaust of genocide as has ever occurred in the United States, down to the Cicero riots, which, having occurred after [we do not say because of] petitioner's publications, have passed from news into history, the scroll of Illinois' history has been stained with blood spilled from Negroes simply because they were Negroes.

Every riot has its incitement in words. The words may be the hue and cry of "Lynch the nigger." Or they may be

the deliberately calculated appeals to hatred of the monger of race hatred, such as petitioner. But it is by calumny of race that riots are started.

Was there "clear and present danger" that petitioner's publication would incite violence? Petitioner himself, in the very publication that is the basis for this case against him, says that there was imminent danger of an affray. He said in the first paragraph of his diatribe against the Negroes:

> "Whereas, the white population of the City of Chicago, particularly on the South Side of said city, are seething, nervous and agitated because of the constant and continuous invasion, harassment and encroachment by the Negroes upon them, their property and neighborhoods and—
>
> "Whereas, there have been disastrous incidents within the past year, all of which are fraught with grave consequences and great danger to the Peace and Security of the people, * * *".

Nor need judges be purblind as a court to what they all know as men about how totalitarian regimes arise from virulent racism. Even though the evil may be remote in time, if it is so great as to threaten the very fabric and tissue of our form of government by violence, attempts to mobilize revolutionary bands may be punished now. *Dennis* v. *U. S.*, 341 U. S. 495.

Finally, as the Illinois Supreme Court held, the words in question were "fighting words." Cf. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568.

This determination that petitioner's language constituted "fighting words" was eminently reasonable. At least it does not call for reversal by this court.

II.

The Illinois statute is constitutional.

If this court agrees with us that the Fourteenth Amendment does not directly and *ex propio vigore* protect petitioner's obloquy upon the Negro, then the question arises: Is the Illinois statute here assailed so "vague and indefinite" that no person can be punished under it?

To answer this question, we need go no further than the language by which this court itself defined libel at common law. In *White* v. *Nicholls,* 44 U. S. 266, this court, without even the aid of statute, thus formulated the minimal *criterion* for libel:

> "It is enough if the defendant induce a bad opinion to be held of the plaintiff, or make him contemptible or ridiculous."

Now if, without statutory enactment, this court can declare it actionable to make the plaintiff "ridiculous", certainly the legislature of Illinois can make it libelous to hold the victims up to "contempt, derision or obloquy" or, even more specifically, to portray their alleged "depravity, criminality or unchastity."

To be sure, close questions may arise in the administration of this law. They arise under all laws, from the simplest to the most complex. Such terms as, e.g., negligence in the common law or under the Federal Employers' Liability Act, to say nothing of such statutory phrases as "unfair trade" and "combinations in [unreasonable] restraint of trade", precipitate grave questions in particular cases. But statutes containing these words, which, like the words used to denounce group libel in the instant statute, have a well settled common law meaning, are not for that reason unconstitutional.

Winters v. *New York,* 333 U. S. 507, cited and relied upon petitioner, is, to the extent that it is relevant at all, helpful to the State. There the statute, as authoritatively construed by New York's highest court, inhibited publication of compilations of stories of crime "so massed as to become the vehicles for inciting violent and depraved crimes." In striking down this statute, this court observed that "The clause has no technical or common law meaning." But the language of the Illinois statute is nothing but a declaration of the common law of libel and slander, extended to groups.

We submit that Illinois could not have more definitely framed this instant measure, that it couched this act in common law terms, and that it is not so vague or indefinite as to be unconstitutional.

III.

No substantial Federal question as to instructions is presented on this record.

Petitioner contends that the Trial Judge and the Supreme Court of Illinois decided questions of fact.

Even if there were true, it would not, on a record from a State court in a case arising wholly under State law, suggest any Federal question.

Petitioner's counsel forget that in State courts, where only State substantive law is invoked, there is no Federal constitutional right to a trial by jury *at all. Bute* v. *Illinois,* 333 U. S. 640. If Illinois might have denied trial by jury altogether in misdemeanor cases, *a fortiori,* she might limit the function of the jury to an ascertainment of what petitioner said and did, leaving the matter of appraising any question of substantive evil to the Court. This would be true even if the question of "substantive evil" were one of

fact; for there is no Federal right to have even questions of fact decided by a jury when the substantive statute is a State statute.

However, as petitioner impliedly recognizes, even if the partition of functions between judge and jury were to be determined in a State court by Federal law, where the Legislature has recognized an evil, the question of whether petitioner's admitted conduct comes within the purview of the statute is one for the court, not the jury. *Dennis* v. *U. S.*, 341 U. S. 495.

In any event, the instructions which petitioner tendered, although copied or adapted from the *reasoning* expressed in this court's opinions, were not rules of law but statements of this court's *rationes decidendi.* They were certainly not applied to petitioner's case. There was no error in refusing to give them.

Conclusion.

For the reasons urged in this brief, the judgment here under review should be affirmed.

Respectfully submitted,

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