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Constitutional Law--Freedom of Speech and Group Libel (Beauharnais v. Illinois, 72 Sup. Ct. 725 (1952))

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penal legislation may be practicable to protect individuals or groups from libelous and insulting attacks upon their religious beliefs. When applied to blasphemy of the Godhead, however, it is grossly inadequate. The statute in the instant case is a legitimate effort of the duly-chosen officials of the State of New York to prevent the offensive reviling of the Deity. It is respectfully submitted that such an interest is paramount to the incidental dangers ordinarily inherent in prior restraints upon speech.

CONSTITUTIONAL LAW — FREEDOM OF SPEECH AND GROUP LIBEL.—Appellant, convicted of violating a statute [1] forbidding the exhibition of lithographs portraying lack of virtue of a class of citizens,[2] contended that the statute contravened the Fourteenth Amendment because it was vague and unlawfully abridged freedom of speech and press. On certiorari, the United States Supreme Court, with four Justices dissenting, *held* that this state law proscribing libels directed at a defined group is constitutional unless it "is a wilful and purposeless restriction," and that this law, as construed by the state court, provided an ascertainable standard of guilt. *Beauharnais v. Illinois,* 72 Sup. Ct. 725 (1952).

Libelous utterances were criminal at common law [3] because of their tendency to provoke a breach of the peace; [4] truth alone, therefore, was not a defense.[5] As far as groups were concerned, however,

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(Purdon, 1930); R. I. GEN. LAWS c. 610, § 16 (1938); VT. REV. STAT. c. 371, § 8493 (1947).

[1] ILL. REV. STAT. c. 38, § 471 (1951), which states: "It shall be unlawful for any person . . . to . . . present or exhibit in any public place in this state any lithograph . . . which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. . . ."

[2] The lithograph was framed as a petition, and the specific libel contained therein was the following warning: "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, SURELY WILL." Beauharnais v. Illinois, 72 Sup. Ct. 725, 740 (1952) (dissenting opinion).

[3] See State v. Burnham, 9 N. H. 34, 38 (1837); Commonwealth v. Clap, 4 Mass. 163, 169 (1808); King v. Summers, 1 Lev. 139, 83 Eng. Rep. 337 (K. B. 1665).

[4] Rex v. Saunders, T. Raym. 201, 83 Eng. Rep. 106 (K. B. 1670); *see* State v. Avery, 7 Conn. 266, 269 (1828).

[5] Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304 (1825); 20 HALSBURY'S LAWS OF ENGLAND 384 (2d ed. 1936).

the law of criminal libel afforded very limited protection. Notwithstanding dicta to the contrary,[6] courts were unwilling to entertain group libel prosecutions unless some individual was directly or impliedly libeled.[7] It was thought wiser to tolerate the demagogue than to allow any possible limitation or restraint upon freedom of speech.[8]

The attitude of the courts, coupled with the activities of professional hate mongers,[9] led to agitation for[10] and the enactment of[11] group libel statutes as a means of preventing group disaffection. Such legislation, however, was susceptible to constitutional attacks for abridging free speech,[12] or for vagueness which would preclude a successful criminal prosecution.[13]

English law specified that ". . . the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published. . . ." 6 & 7 VICT. c. 96, ¶ 6 (1843).

In the United States the justification for publishing a criminal libel depends upon the law of the particular jurisdiction, *e.g.*, N. Y. PENAL LAW § 1342 (provides that publication is justified if the matter is true and was published with good motive and for justifiable ends). N. Y. CONST. Art. I, § 8 contains a similar justification. This provision was added to the constitution as a result of People v. Croswell, 3 Johns. Cas. 337 (N. Y. 1804) (prosecution for seditious libel).

[6] *See* Palmer v. Concord, 48 N. H. 211, 216 (1868); Ryckman v. Delavan, 25 Wend. 196 (N. Y. 1840); Sumner v. Buel, 12 Johns. 475, 478 (N. Y. 1815).

[7] People v. Edmondson, 168 Misc. 142, 4 N. Y. S. 2d 257 (Gen. Sess. 1938) (exhaustive analysis of prior English and American group libel prosecutions).

[8] *Id.* at 154, 4 N. Y. S. 2d at 268.

[9] See Note, 61 YALE L. J. 252, 253-254 (1952).

[10] See Tanenhaus, *Group Libel*, 35 CORN. L. Q. 261, 293-297 (1950); Note, 47 COL. L. REV. 595, 608-612 (1947) (draft of proposed group libel statute with both criminal and civil remedies).

[11] See Note, 61 YALE L. J. 252, 255-256 (1952).

[12] "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U. S. 47, 52 (1919) (emphasis added). Though this test originated as a dictum in a case involving a federal espionage act, the Court has reiterated it in cases concerning the constitutionality of state laws regulating other kinds of speech. For a general discussion of this doctrine, see Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COL. L. REV. 313 (1952).

In United States v. Dennis, 183 F. 2d 201, 212 (2d Cir. 1950), *aff'd*, Dennis v. United States, 341 U. S. 494 (1951), Judge Learned Hand reformulated this test with the statement that the question now is ". . . whether the gravity of the 'evil,' discounted by its improbability justifies such invasion of free speech as is necessary to avoid the danger." See Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1 (1951).

[13] "To compel . . . [men] . . . to guess on peril of indictment . . . to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess." International Harvester Co. v. Kentucky, 234 U. S. 216, 223-224 (1914); *accord*, Winters v. New York, 333 U. S. 507 (1948); Lanzetta v. New Jersey, 306 U. S. 451 (1939).

The instant statute was the first of its kind to be subjected to a test of constitutionality.[14] The decision in the principal case, therefore, is of dual significance: first, it gives constitutional approval[15] to the extension of criminal law to protect racial and religious groups from being libeled; and, second, it establishes the constitutional standards by which similar statutes will be gauged.

In deciding this case the Court ignored one of its previous caveats — *i.e.*, laws regulating civil liberties will be subjected to stricter tests of constitutionality than those dealing with property rights[16]—and deviated from its policy of according a weak presumption of constitutionality to state statutes regulating civil liberties.[17] Asserting that libelous speech is similar to obscene speech, and therefore enjoys no constitutional protection,[18] the Court rejected the application of the "clear and present danger" test as necessary to sustain the statute, and concluded its substantive due process inquiry on a rephrasing of the rule that a legislative judgment determining that a certain class of speech is punishable because it presents a substantive evil is conclusive on the Court and is constitutional unless it "is an arbitrary or unreasonable exercise of the police power. . . ." [19]

In its procedural due process inquiry the Court held that the construction of the statute as " 'a form of criminal libel law' " adequately limited it[20] so that it was not void for failure to provide an

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[14] The statute declared unconstitutional in State v. Klaprott, 127 N. J. L. 395, 22 A. 2d 877 (Sup. Ct. 1941), was not a group libel statute. *See* Beauharnais v. Illinois, 72 Sup. Ct. 725, 735 n. 23 (1952).

Bevins v. Prindable, 39 F. Supp. 708 (E. D. Ill.), *aff'd mem.*, 314 U. S. 573 (1941), which has been said to have upheld the constitutionality of the instant statute expressly avoided that issue. *Id.* at 712.

[15] ". . . [O]ur finding that the law is not constitutionally objectionable carries no implication of approval of the wisdom of the legislation or of its efficacy." Beauharnais v. Illinois, *supra* note 14 at 736.

[16] United States v. Carolene Products Co., 304 U. S. 144, 152 n. 4 (1938).

[17] *E.g.*, Thomas v. Collins, 323 U. S. 516, 530 (1945); West Virginia State Board of Education v. Barnette, 319 U. S. 624, 639 (1943); Taylor v. Mississippi, 319 U. S. 583, 589 (1943); see Note, 2 CATH. U. L. REV. 101, 111 (1952); see also 26 ST. JOHN'S L. REV. 342, 345 (1952).

[18] "Libelous utterances, not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class." Beauharnais v. Illinois, *supra* note 14 at 735; *see* Chaplinsky v. New Hampshire, 315 U. S. 568, 571-572 (1942).

[19] Gitlow v. New York, 268 U. S. 652, 670 (1925).

Compare the language quoted in the text with that expressed in the principal case: ". . . [W]e cannot deny to a State power to punish . . . [libelous utterances] directed at a defined group, unless we can say that this [is] a wilful and purposeless restriction unrelated to the peace and well-being of the State." Beauharnais v. Illinois, 72 Sup. Ct. 725, 731 (1952).

[20] Beauharnais v. Illinois, *supra* note 19 at 729; *cf.* Fox v. Washington, 236 U. S. 273 (1915).

ascertainable standard of guilt [21] or for penalizing protected speech.[22] This construction did not create a new crime but merely extended an old one,[23] thus making it unnecessary for the Illinois court to give content to words which lacked an inherent meaning,[24] inasmuch as such words had acquired a determinative meaning through long use.[25] Consequently, the statute sufficiently defined the crime so that men did not have to guess at the illegal conduct,[26] but, at most, ran the risk of estimating it incorrectly.[27]

Whether or not this decision is constitutionally sound, the advisability of enacting such remedial legislation might be questioned unless the need is urgent, because it will tend to discourage constructive criticism.[28] Furthermore, in a state such as New York [29] other means are available to protect the social [30] and economic [31] interests of ethnic and religious groups. It should be clearly recognized, however, that the wide latitude of unrestricted speech called for applies to situations where the social, political, and economic interests of defined groups are affected. Where speech is directed at the individuals of a defined religious group there is less reason for freedom. But when it consists of attacks against the Deity in whom that group

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[21] Beauharnais v. Illinois, *supra* note 19 at 734; *cf.* Lanzetta v. New Jersey, 306 U. S. 451 (1939); Hygrade Provision Co. v. Sherman, 266 U. S. 497 (1925); International Harvester Co. v. Kentucky, 234 U. S. 216 (1914).

[22] Beauharnais v. Illinois, *supra* note 19 at 734; *but cf.* Winters v. New York, 333 U. S. 507 (1948); Thornhill v. Alabama, 310 U. S. 88 (1940); Herndon v. Lowry, 301 U. S. 242 (1937); Stromberg v. California, 283 U. S. 359 (1931).

[23] Beauharnais v. Illinois, 72 Sup. Ct. 725, 729 (1952); *but cf.* Connally v. General Construction Co., 269 U. S. 385, 391 (1926).

[24] *E.g.*, contempt, derision, and obloquy. See note 1 *supra.*

[25] *See* Sproles v. Binford, 286 U. S. 374, 393 (1932). See Omaechevarria v. Idaho, 246 U. S. 343, 348 (1918) (where determinative meaning was established by custom and general understanding).

[26] Beauharnais v. Illinois, *supra* note 23 at 729; *but cf.* Winters v. New York, *supra* note 22 at 519; Connally v. General Construction Co., 269 U. S. 385 (1926); International Harvester Co. v. Kentucky, 234 U. S. 216 (1914).

[27] See Nash v. United States, 229 U. S. 373, 377 (1913).

[28] The fear of being stigmatized as a group libeler may be sufficient to deter a member of a particular group from offering severe but constructive criticism that would ultimately enhance the group's position in society.

[29] N. Y. PENAL LAW § 1340 (criminal libel). This statute has been construed as not applicable to group libel prosecutions. People v. Edmondson, 168 Misc. 142, 4 N. Y. S. 2d 257 (Gen. Sess. 1938).

[30] N. Y. CIVIL RIGHTS LAW § 40 (provides for equal rights in places of public accommodation, resort, amusement, hospitalization and education); N. Y. CIVIL RIGHTS LAW § 40-b (prohibits refusal of admission to and ejection from places of entertainment).

[31] N. Y. CIVIL RIGHTS LAW § 40-a (prohibiting inquiry concerning religion or religious affiliations of persons seeking employment in public schools); N. Y. CIVIL RIGHTS LAW § 43 (prohibiting discrimination by labor organizations); N. Y. EXEC. LAW §§ 290-301 (creation of state agency with power to prevent discrimination in employment because of race, creed, color or national origin).

reposes its belief, the criticism is not constructive and ought legitimately to be inhibited by preventive or remedial enactments.

CORPORATIONS—FOREIGN CORPORATIONS—INTEREST OF STOCKHOLDERS IN CORPORATE PROPERTY SEIZED BY GOVERNMENT UNDER TRADING WITH THE ENEMY ACT.—American stockholders of a corporation organized in a neutral country seek to intervene in a suit by the corporation to recover property seized by the United States under the provisions of the Trading With the Enemy Act.[1] Petitioners claim that the corporation, allegedly dominated by officers in conspiracy with Germany during the war, would not adequately protect their interest in the specific assets. The appellate court denied the petition, declaring that the stockholders have no legal interest in the property.[2] In reversing, the Court *held* that when the Government seizes the assets of a non-enemy foreign corporation, the severable interest of innocent stockholders in the assets must be fully protected. *Kaufman v. Societe Internationale,* 72 Sup. Ct. 611 (1952).

Ecclesiastical corporations, forerunners of the modern corporation, were born of the necessity of devising a means of holding property in perpetuity.[3] From this early beginning, the courts later developed the fiction of a distinct legal entity [4] capable of holding title to property in its own name, separate from any legal interest in the stockholders.[5] The existence of this corporate entity encouraged stockholders to invest in business, since they could now do so without subjecting their personal fortunes to the risks of business.[6]

Justice Holmes, in *Klein v. Board of Supervisors,* spoke of the corporation as a person and its ownership as "a non-conductor that makes it impossible to attribute an interest in its property to its

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[1] 40 STAT. 411 (1917), 50 U. S. C. APP. § 1 *et seq.* (1946), as amended, 55 STAT. 839 (1941), 50 U. S. C. APP. § 4 *et seq.* (Supp. 1946).

[2] Kaufman v. Societe Internationale, 188 F. 2d 1017 (D. C. Cir. 1951).

[3] 1 FLETCHER, CORPORATIONS 5 (11th ed. 1931). Presumedly, the aggregation of parishioners could not take title to the property to insure continuous succession to the right to utilize the property.

[4] *See* Farmers Loan & Trust Co. v. Pierson, 130 Misc. 110, 114, 222 N. Y. Supp. 532, 538 (Sup. Ct. 1927) (excellent summary of the corporate entity theory in the United States).

[5] R. I. Hospital Trust Co. v. Doughton, 270 U. S. 69 (1926); *see* Warrior River Terminal Co. v. Alabama, 58 So. 2d 100, 101 (Ala. 1952); Corporation Comm'r v. Consolidated Stage Co., 63 Ariz. 257, 161 P. 2d 110, 111 (1945); Miller v. McColgan, 17 Cal. 2d 432, 110 P. 2d 419, 421 (1941). See also BALLANTINE, CORPORATIONS 288 (1946).

[6] See Elenkrieg v. Siebrecht, 238 N. Y. 254, 144 N. E. 519 (1924); Hanson v. Bradley, 298 Mass. 371, 10 N. E. 2d 259, 263 (1937).