February 1970

Constitutional Law--Freedom of Expression

Charles Blaine Myers Jr.
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr
Part of the Constitutional Law Commons, and the First Amendment Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol72/iss1/16
CASE COMMENTS

Nixon Club type of racial discrimination and sham membership policy. Such a club might well be found to:

1) violate the 1964 Civil Rights Act; and
2) fail to qualify as a private club under West Virginia law.

Although not examined here, such a West Virginia club might logically be in violation of the West Virginia Human Rights Act which prohibits denial of admission to public accommodations because of race, and of the West Virginia Constitution which prohibits the sale of intoxicating liquors in a "saloon or other public places".

James Roy Gerchow

Constitutional Law—Freedom of Expression

The appellant, a member of the Ku Klux Klan, had invited a television reporter to a Klan "rally." Films of this gathering were broadcast on both a Cincinnati station and a national network. Portrayed were several hooded figures, some carrying firearms, and several engaged in the burning of a cross. A number of racially derogatory remarks were comprehensible, and one non-violatile speech by the appellant was presented in its entirety. The appellant was convicted under the Ohio Syndicalism Statute of "advocat[ing] ... the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for 'voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.' On appeal, the ap-

1970

Published by The Research Repository @ WVU, 1970
pellant challenged the constitutionality of this statute, but his conviction was affirmed by both the intermediate appellate court of Ohio and the Ohio Supreme Court. Subsequently, the United States Supreme Court heard his appeal, Held, reversed. The Ohio statute, in its language and application, fails to distinguish between the mere advocacy of ideas and that advocacy which is directed towards incitement to imminent lawless action. As a result, the statute contravenes the protections of the first and fourteenth amendments. Brandenburg v. Ohio, 395 U.S. 444 (1969).

Brandenburg is the most recent of a rather long series of cases which have been concerned with the constitutionally permissible degree of governmental control over the freedoms of speech and assembly. The problem is perplexing, although basic: it must balance and reconcile society's interest in the protection of the freedom of individual expression with its concomitant interest in the preservation of peace, order, and the government itself.

The Court has experienced considerable difficulty in its search for a concrete and workable standard to determine the point where speech and expression lose constitutional protection. The position of the Court in Brandenburg on the surface appears to be quite clear. Before any sanctions may be placed upon speech, it must be shown that the speech is something more than the advocacy of mere ideas or an abstract philosophy. The Court noted that recent decisions “... have fashioned the principle that the constitutional guaranties of free speech and free press do not permit a state to forbid or proscribe advocacy ... except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action.”8 When measured by this test, the Court held that the Ohio statute was unconstitutional. If interpreted literally, it would serve to punish not only those who would incite others to lawlessness, but also those who would do no more than merely participate in an assembly which advocated some offensive doctrine. It was also noted that no construction of the statute by Ohio courts has brought it within constitutionally permissible limits.4

4 Id. at 449 n.3. The only case in which the constitutionality of the Ohio statute had been tested was in State v. Kassay, 126 Ohio 177, 184 N.E. 521 (1932). The constitutionality of the statute was sustained, and the opinion reflected the sensitivity to “insurrection from within” of that period. The defendant had been indicted for justifying an act which apparently never occur-
The Brandenburg decision expressly overruled the well known case of Whitney v. California,\(^5\) noting that Whitney has been discredited by a number of more recent decisions.\(^6\) The Whitney decision upheld a California statute very similar in its language to the Ohio statute involved in Brandenburg. In Whitney, the appellant was a member of and delegate to the Communist Labor Party of California, which allegedly advocated the commission of crimes and terrorism by unlawful means. Her conviction was upheld on the basis that a "state in the exercise of its police power may punish those who abuse this freedom [of speech] by utterances inimical to the public welfare."\(^7\) Whitney relied on the earlier case of Gitlow v. New York,\(^8\) in which it was held that a legislative determination of what is and what is not a danger to the public welfare should be given great weight.

However the Court also began to recognize that the standard applied in Whitney was too broad. Prohibition of mere advocacy of violent means of accomplishing political and economic change would serve to widen the scope of governmental control over free speech to such an extent that the first amendment would red, for he was never indicted for doing the act. The court at times used rather harsh words:

To assert that this statute is unconstitutional is to assert that those who advocate and teach the necessity and propriety of the employment of violence and terrorism ... may go their length unchallenged, and that they are even under the protection of the Bill of Rights and beyond legislative and judicial processes. Such an assertion does violence to the genius of our institutions ... The various statutes on criminal syndicalism ... are designed to punish those of communistic habits of thought who prefer force to reason." Id. at 191, 184 N.E. at 527.

Judge Allen, dissenting, strongly suggested that the statute was unconstitutional, stating that it had "no limitation of time, ... place, nor of circumstance." Id. at 195, 184 N.E. at 528.

\(^{274}\) U.S. 357 (1927).


\(^{274}\) U.S. 357 (1927).

\(^{26}\) U.S. 652 (1925). The defendant was convicted in New York for the statutory crime of criminal anarchy. He was business manager of a paper which published a "Left Wing Manifesto" and also a "Communist Program." The Court stated that once the legislature, in the exercise of its constitutional discretion, has determined which utterances come within the prohibited class, then the Court may not consider whether a specific utterance within that class is, in and of itself, likely to bring about the substantive evil. Id. at 670.
be deprived of its force and effect. In searching for a more just standard, the “clear and present danger” test became prominent. It was first introduced by Justice Holmes in Schenck v. United States, where it was stated that the clear and present danger test looks to the manner in which the words were used to determine if there is a clear and present danger that they will bring about the “substantive evils” which Congress has a right to prevent. In subsequent dissenting opinions in Abrams v. United States and Gitlow, Holmes made it quite clear that he intended the doctrine to have a limited scope. Being a necessarily subjective test, the clear and present danger standard is itself subject to a number of different interpretations.

The most recent case in which the clear and present danger test has been expressly applied is Dennis v. United States. A closer analysis, however, reveals that the Court adopted a standard more closely related to Judge Hand’s “balancing test.” It is apparent that Judge Hand was not an advocate of the clear and present danger test, for he stated that the rule: “[I]nvolves in every case a comparison between interests which are to be appraised quantitatively . . . . In each case the court must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of

---

249 U.S. 47 (1919). The defendant was charged with attempts to cause insubordination in the military and obstruction of enlistment. His conviction was affirmed.

250 U.S. 616, 624 (1919).

268 U.S. 652 (1925). Justice Holmes felt that there was no present danger of an attempt to overthrow the government, and, therefore, that case did not come under the “clear and present danger” concept which he had introduced in Schenck.

Although the “clear and present danger” doctrine was first introduced in 1919, it did not actually become the prevailing standard until 1937 when it was applied in Herndon v. Lowry, 301 U.S. 242 (1937). It was subsequently applied in several other cases, including Pennekamp v. Florida, 328 U.S. 331 (1946) and Taylor v. Mississippi, 319 U. S. 583 (1943). It remained prevalent up through Dennis, since when time it has lain dormant. There is a noticeable difference in the application of the doctrine in Herndon, where is was strictly interpreted, and in Dennis, where it was given a rather broad interpretation. For related articles, see Antieau, Dennis v. United States: Precedent, Principle, or Persuasion? 5 VAND. L. REV. 141 (1952); Antieau, The Rule of Clear and Present Danger: Scope of Its Applicability, 48 MICH. L. REV. 811 (1950); McKay, The Preference For Freedom, 34 N.Y.U.L. REV. 1582 (1959); Mendelson, Clear and Present Danger—From Schenck to Dennis, 52 COLO. L. REV. 313 (1952); Richardson, Freedom of Expression and the Function of Courts, 65 HARV. L. REV. 1 (1951); 60 W. VA. L. REV. 91 (1957).


35 Judge Hand expounded his views in United States v. Dennis, 183 F.2d 201 (2d. Cir. 1950).
free speech as in necessary to avoid the danger." The Supreme Court on appeal actually applied this balancing test, and Justice Frankfurter, in a concurring opinion, emphasized that the clear and present danger test is "not a substitute for the weighing of values."

A third view, which might appropriately be called the "absolutist view," is that which has often been expounded by Justices Black and Douglas, and is quite recognizable in Justice Douglas' concurring opinion in Brandenburg. This view expresses the idea that there should be no governmental control over speech, except in those cases where it is clear that the speech is accompanied by action. Dissenting in Yates v. United States, Justice Black stated, "[T]he First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal." The basis for this "absolutist view" would seem to be that, while sounding good in theory, the "clear and present danger" and "balancing" tests are too easily manipulated by the courts. It would follow, therefore, that once the door is opened to any justifiable control over free speech, there is no guarantee that this control will not be abused in the future, thereby negating the effect of the first amendment. Although Justices Black and Douglas have expounded these views at every opportunity, there is little indication that they will be adopted by the majority of the Court.

Just which of the other two standards "clear and present danger" or "balancing" has become the prevailing doctrine since Dennis is not clear. A study of cases since 1951 reveals that the Court has adopted neither. Instead, it appears that the Court has been attempting to find some satisfactory accommodation between the "clear and present danger" test and the "balancing" test. The Brandenburg decision falls in line with the recent cases. The most prominent of these, and the one which Brandenburg most closely

15Id. at 212.
16341 U.S. at 514-15. Indeed, the Court cited Judge Hand's very words, concluding that "[t]he Court must examine judicially the application of the statute to the particular situation to ascertain if the Constitution prohibits the conviction."
17Id. at 543.
18354 U.S. 298 (1937).
19Id. at 340. This concept was justified by Justice Black on the theory that "The First Amendment provides the only kind of security system that can preserve a free government—one that leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us." Id. at 344.
resembles, is *Yates v. United States*, where the Court held that the Smith Act does not prohibit the advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end. The essential distinction was that those to whom advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something.

It is this idea which most clearly points out the departure the Court has taken since Dennis. In *Dennis*, the Smith Act was justified on the grounds that it was "directed at advocacy, not discussion." In his dissent in *Brandenburg*, however, Justice Douglas pointed out that "the quality of the advocacy turns on the depth of the conviction." It is this problem which has caused much of the confusion in free speech cases, and the Court has become more aware of the necessity of distinguishing between advocacy of ideas and advocacy of action. The decisions in *Yates*, *Brandenburg*, and other related cases reflect this awareness. It would appear, therefore, that the standard which has evolved from these cases, while not strikingly different from those standards previously announced, sufficiently adopts the concepts of both to result in a much more workable standard.

While it is clear that *Brandenburg* does not present any revolutionary new doctrine, the decision does point to the need for a less cavalier attitude on the part of state courts when interpreting their own statutes. Had the Ohio court made an attempt to narrowly interpret the statute, there might have been no need for the Supreme Court to intervene.

---

2954 U.S. 298 (1957). The defendants were convicted for violation of the Smith Act, in that they were active members of the Communist Party of the United States. The case was remanded for retrial on the grounds that the trial judge's instructions allowed convictions for mere advocacy, unrelated to its tendency to produce overt action.

18 U.S.C. § 2385 (1964). One violates the Smith Act when he "knowingly or willfully advocates . . . the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States;" or "organizes . . . any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of . . . any such society, group, or assembly of persons, knowing the purpose thereof." It can be seen that the language is quite similar to the Ohio statute.


Court to strike it down. It should be noted that many other states, including West Virginia,\textsuperscript{25} have similar statutes. Perhaps the major burden should fall on legislators to re-evaluate their states' broad criminal syndicalism legislation; but, in any case, state courts should take notice of the \textit{Brandenburg} decision, bearing in mind that a proper interpretation of the statutes are essential if they are to survive future challenges such as the one involved in \textit{Brandenburg}.

\textit{Charles Blaine Myers, Jr.}

---

**Constitutional Law — Inter-Institutional Juvenile Transfer: Due Process and Equal Protection**

Michael Edward Shone, fifteen, was committed to the Boys Training Center by a Maine juvenile court pursuant to statutory authority.\textsuperscript{1} Thirteen days afterwards, Shone was deemed "incorrigible" by the administrators of the Training Center, and upon the approval of the Commissioner of Mental Health and Corrections, he was transferred to the Men's Correctional Center.\textsuperscript{2} This

\textsuperscript{25} W. VA. \textit{Code} ch. 61, art. 1, § 5 (Michie 1966):
It shall be unlawful for any person to speak, print, publish, or communicate . . . any teachings, doctrines or counsels in sympathy with or in favor of ideals, institutions, or forms of government hostile . . . to those now . . . existing under the Constitution and laws of this State or of the United States, or in sympathy with or in favor of the propriety, duty, and necessity of crime, violence or other unlawful means of terrorism, as a means of accomplishing economic or political reform, or in sympathy with or in favor of the overthrow of organized society, the unlawful destruction of property or the violation of law.

\textsuperscript{1} ME. REV. STAT. ANN., tit. 15, § 2714 (Supp. 1967) provided in part that "[a] boy between the ages of 11 and 17 may be committed to the Boys Training Center . . . . All commitments of such children shall be for the term of their minority, unless sooner discharged by the superintendent . . . ."

\textsuperscript{2} At the time of Shone's transfer, ME. REV. STAT. ANN., tit. 34, § 801 (Supp. 1967) provided in part that:
the Men's Correctional Center . . . shall be maintained for the confinement and rehabilitation of: (1) Males between 16 and 17 years of age . . . after being adjudicated by the juvenile court to have committed juvenile offenses. (2) Males over 15 years of age. Males over 15 years of age determined in accordance with Title 15, section 2717 to be incorrigible while under commitment to the Boys Training Center. . . . The provisions for the safekeeping or employment of such inmates shall be made for the purpose of teaching such inmates a useful trade or profession, and improving their mental and moral condition. . . ."

\textit{Shone v. Maine, 406 F.2d 844, 845 n.2 (1969).}