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Brandenburg v. Ohio (1969): Defining and Arguing Hate Speech

Klan Identity 'Rigged' Says Brandenburg

BY BOB WEBB
Of The Enquirer Staff

An Arlington Heights television repairman hotly denied membership in the Ku Klux Klan Saturday and charged his identity as an imperial officer of the organization was "rigged."

Clarence Brandenburg, 46, 18 Anna St., issued his denial as two charges against him await consideration by the Hamilton County Grand Jury Tuesday.

"I have never been initiated into the Klan," he declared in an interview at his home. "I surely don't have the four degrees in the Klan necessary to be an officer."

Prosecutor Ray Shannon announced Friday the grand jury will consider charges that Mr. Brandenburg advocated criminal syndicalism and joined with others to commit misdemeanors in disguise.

Mr. Brandenburg was arrested August 6 in his shop at 618 Mill St., Arlington Heights, after he was reported to have led a KKK meeting June 28 at 350 Two-Mile Rd., Cincinnati.

HE REPEATED his initial denial that he was at the meeting filmed by WLW-T.

"Cincinnati police have by the national wizard of the Klan, James R. Venable of Atlanta, Ga., and it is made out to me," Mr. Brandenburg said. "That I'll not deny."

But he said the card came in the mail after someone recommended him to the national wizard.

Asked about a recent picture of him outside his shop in a hood and robe, Mr. Brandenburg had a quick explanation: "My wife made that gold robe for me. There's no law against wearing something like that."

Standing next to him in the picture was Richard Hanna, 21, dressed as a member of the American Nazi Party. Hanna, who gave his address Saturday as 218 East Sixth St., Newport, was convicted in Arlington Heights Mayor's Court Friday night for disturbing the peace with his speech August 7 at Mr. Brandenburg's shop.

Although he told the court he was quitting the ANP, Hanna declared his intent Saturady to rejoin the storm troopers "in about a month."

"WE'RE DIFFERENT from the German Nazis (of World War II)," he declared. "We don't believe in killing, for one thing. There are about 60 storm troopers in the

Today—Tomorrow

Less than two weeks ago, a man who identified himself as Mr. Brandenburg telephoned The Enquirer and spoke of his Klan membership and activities.

In Saturday's face-to-face interview Mr. Brandenburg declared:

"It doesn't matter what you publish. I may deny it tomorrow. Conditions could change, you know."

machine gun staccato, said his American airman father was shot down, but not killed, by the German Luftwaffe in World War II.

Mr. Brandenburg said if his case goes to court, "I would prefer that I be tried out of state, because I couldn't get a fair trial in Ohio — I've already been tried in the press and television."

Reports of his alleged KKK ties cost him his television repair business, he declared.

"I hadn't had a single repair job since August 6 until Saturday, when an old friend called me," Mr. Brandenburg remarked. "And when people find out who I am, they won't buy the (household) things I'm trying to sell through newspaper ads."

He said he attended a recent Klan meeting at Stone Mountain, near Atlanta, "but it was a meeting to which the public was invited—I was there only as an observer."

THE RED HOOD police confiscated from his shop was "a plant," Mr. Brandenburg said.

"It is the color the national officers were wearing at the Stone Mountain meeting, but I don't know how it got into my place," he added.

"This whole business of me being a Klan officer was rigged." He declined to identify the alleged riggers, but said the top people in the national Klan "must have known about it."

Mr. Brandenburg said he has three teen-age children in school, "but I don't know how much long they'll be able to stay there."

Guns seized from his shop by police "were for my protection," he declared. "My life has been threatened several times. The only persons I ever killed were Jap-

Car Dives Into Creek.

Photo of Clarence Brandenburg in his Ku Klux Klan robes and article following his arrest in connection with a KKK rally.
Sept. 20, 1964 Cincinatti Esquirer

Recommended for:
11th Grade US History
12th Grade Government
Undergraduate History

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This case from the late 1960s, about the right of Ku Klux Klan members to call for racial violence, marks an important turning point in the law of free speech. The court firmly and finally rejected the notion that one could be punished for publicly advocating for a crime – closing the books on the long period in which left-wing advocacy for revolution had been criminalized. And it announced a new rule that was very protective of even the right to advocate for crime – a rule that still guides the law today, and that embodies, for many commentators, the essence of modern free speech law.

The case is therefore a good one to teach to show students the basics of free speech law. It is also a short decision issued by a unanimous court (rather than being signed by one judge, the decision was issued per curiam, or for the court, normally a sign that it is non-controversial). Leaving out the two concurrences, the decision runs for only about five pages, and its reasoning is fairly straightforward. It thus serves as a useful case to teach students how to read a supreme court decision.

This teaching guide includes:

1. A structured guide to explaining the case to students
2. A classroom exercise on the value of tolerating hateful speech
3. A classroom exercise to think about the harms of hateful speech

Note: there are links throughout this guide to the end of the document where an appendix houses excerpts of the Supreme Court decision and an external link to the entire resource.

Classroom Exercise I: How to read the court case

Contents (Links to Pages)🔗

Overview

This exercise will introduce students to the Brandenburg case itself and help them begin to grapple with its main debates. It works best as a whole classroom activity, although the reading may be assigned as homework to be reviewed before class. The goal of this lesson is for students to be able to draw connections between Brandenburg and the relevant constitutional amendments, as well as understand the complexity of free speech logic as seen in the case.

The place to begin is by having students read the decision and asking them to identify the facts in the case. This can be assigned as homework or conducted as a guided reading in the classroom. In clear prose, the court outlines the essential facts on pp.444-447 of the decision. The key details for students to grasp are that Clarence Brandenburg was a member of the KKK in Ohio, and late in the June of 1964 he was filmed at a meeting of about a dozen Klansmen making racist statements and suggesting that if the U.S. continues to "suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." He then proposed marching on Washington DC on July 4.

The next question is how Brandenburg was charged. The court tells us in the opening sentences of its decision – he was convicted under an Ohio Criminal Syndicalism statute for advocating the "duty, necessity or propriety" of crime or violence. The law dated from 1919, one of a series of state laws – 20, the courts tells us on p.447 – passed during the First Red Scare in an effort to criminalize revolutionary socialist and anarchist parties.

So what question is the Supreme Court answering in this case? Whether the Ohio Syndicalism law is constitutional, or whether it violates Brandenburg's First and Fourteenth Amendment rights (p.444). The First Amendment issue is straightforward – he was sentenced to jail and fined for his speech.

But you might want to explain the 14th Amendment piece to your students, particularly if it is a more advanced class, or if you have spent time discussing federalism. The First Amendment says only that "Congress shall make no law"– in the 19th century, it was understood that it did not apply to state laws, like the Ohio law in question here, it only applied to the federal government. (To the extent that one wanted to challenge state laws, you had to rely on whatever bills of rights were included in state constitutions.) **But beginning in the 1920s, the Supreme Court began to hold that the First Amendment did apply to the states** – they did so by ruling that the 14th Amendment's guarantees of "due process" included the First Amendment right to free speech and free press, and thus that the First Amendment applied to state as well as federal laws. This process is known as incorporation. One needn't get into this with students unless they are curious – the upshot is that there is no discrete 14th Amendment issue at stake in this case; **the 14th Amendment is being cited as a way to activate the free speech issues.**

And what did the Supreme Court rule? In the final paragraph, the court outlines that the law is unconstitutional, because it punishes "mere advocacy." This, it suggests, is too broad. In the highlighted section on p.447, the Court argues that previous decisions have made clear that you can only bar advocacy of crime if it the speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

Find the text of the First Amendment Here

Find the text of the Fourteenth Amendment Here

This is known as the Brandenburg test, and it still guides the law today. The idea is that if someone is advocating that a crime should be committed, then that should be protected speech unless the crime is likely to be committed right away. Only in that case is it appropriate to criminalize speech to prevent the crime from happening, to treat the speech as *causing* the crime in some direct sense. In all other cases, if a crime is committed, we hold the person committing the crime accountable. We give the speaker wide latitude to express their point of view to encourage full expression; and we trust that people are not easily persuaded to commit crimes. Rather than run the risk of repressing politically valuable speech, we trust in the deterrent power of the criminal laws. And we trust, too, that in the interim between the speech and the criminal act, there is plenty of time for individuals to reconsider and there is plenty of time for others to speak out against committing the crime.

To illustrate this point, I use a little sequence of hypotheticals:

If I hate a building on campus – I think it is named for someone whose politics I abhor; I find it aesthetically awful; I have some other extreme gripe – and I say it should be torn down, does that meet the standard?

Students should see that it doesn't, and for obvious reasons – it is not directed to inciting lawless action, that action is not imminent, and it is not likely to produce the action. And by calling for destruction in this more abstract way, I am expressing the strength of my political feelings about the building.

What if I say someone should dynamite it overnight in a few months, over the school break?

That is explicitly directed to a crime, but is neither imminent nor likely, and so doesn't meet the standard.

But what if there is a protest outside the building, I have a megaphone, and I tell the crowd to smash the building right now?

Well, if the crowd is angry, and the crime looks likely to happen, and I am explicit that I want the crowd to break the law, I might have a problem.

But as students should see, this is a very hard standard to prove, and so the Brandenburg test is very protective of free speech.

At this point, I normally need to clarify that this is about public advocacy for law-breaking. Conspiring to commit a crime is an entirely different matter – we don't consider it a matter of free speech because it is done privately. There are no communicative benefits to the planning of the crime – there is no risk that we will chill public discussion or critique or the venting of anger – and so the same First Amendment issues do not arise. Conspiring to commit a crime is, of itself, a crime.

The final question to explore is how did the court get to this conclusion? It reviewed a series of previous cases in which it had ruled on criminal advocacy cases, and distilled from them its test, which had not previously been stated so plainly. The cases are listed on 447-448, and two things are important to draw out. The first is that there was a case on the books from 1927 – *Whitney v. California* – in which the law in question was very similar to the Ohio law (they were passed around the same time). In that case, the Supreme Court ruled that it was constitutional to punish a woman – Anita Whitney – for joining an organization – the Communist Party – that advocated revolution. The decision was part of a long sequence of cases in which the Court had ruled that it was constitutional to criminalize Communist speech. This approach led to McCarthyism and the Second Red Scare. In the Dennis case in 1951, the Supreme Court ruled that it was constitutional to send 11 Communist Party leaders to jail for "conspiring to advocate" revolution – for teaching that revolution is an ultimate end-goal of the Communist movement (a decision that falls far short of the test established in *Brandenburg*!).

But, and this is the **second piece of context to provide**, over the late 1950s and early 1960s, as the fears of the McCarthy period cooled, the Court began to rethink these decisions, and to outline new tests that protected much more speech. These are the cases cited on 447-448, and which form the basis for the test newly elaborated in *Brandenburg*. And making that the standard required also overturning the *Whitney* decision from four decades earlier – an example of how the law evolves, and earlier precedent is overturned.

That explains the internal logic of the case. The remainder of class can be devoted to asking students to work through how they think about this decision. Normally, students find themselves quite uncomfortable with the fact that the Court has ruled in favor of a KKK member, and that it seemed to treat the case as the culmination of its tortured relationship with Communist speech rather than confronting directly the fact that this was a Klansman advocating racial violence.

The following two exercises can be useful for helping students work through these questions.

Classroom Exercise II: Thinking about free speech principles, not politics

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Overview

To help students grapple with the complexity of the *Brandenburg* case, I provide them with information about who his legal team was and what their motivations were for representing him. Included in this exercise is an interview with one of Brandenburg's lawyers and a series of questions I find useful in prompting student discussion about this complicated topic.

Take students to the top of the case and ask them to **identify the lawyers representing Brandenburg.** The first lawyer named is Allen Brown – he was a Jewish lawyer for the American Civil Liberties Union (ACLU). The other lawyers were also civil libertarians, including the fourth name: Eleanor Holmes Norton. Norton worked for the ACLU at the time, and later went on to serve for decades as Washington DC's congressional representative. These were not, in other words, lawyers who shared Brandenburg's politics. Here is a short clip of Norton explaining her role in the case:

C-SPAN: Supreme Court Landmark Case *Brandenburg v. Ohio*

I ask students what they think of Norton's idea that she has a duty to defend the speech of speakers who would not defend her speech? There is no easy answer to this question, which will be deeply personal to individual students – **the key is just to let students begin to work through their ideas about the importance of neutrality in speech rights.**

I often pose some additional questions to prompt more discussion. **Do students share Norton's concerns about governments deciding which sorts of speech to prosecute? Do they share her faith that a "free for all" will produce a decent outcome? Do they share her faith that courts will apply neutral principles to protect all speech? Is it smart politics for liberals like the ACLU to defend groups that would not respect their rights? Or is it naïve?**

Classroom Exercise III: What's the harm in hateful speech?

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Overview

Students can be surprised to see that nowhere in the Court's opinion does the court discuss Brandenburg's speech as hateful or racist speech. As it seeks to assess whether Brandenburg's speech might cause a harm that would justify punishment, the court focuses exclusively on the harm that the specific violence Brandenburg advocates – "revengeance" after the July 4 march – might actually come to pass. This is because of the Ohio law under which Brandenburg was charged (making it illegal to advocate crime) – and underlining this point can be a useful moment to discuss with students the Supreme Court's role as an appeals court, limited to hearing the specifics of the cases that come before it.

But what if there had been a law barring Brandenburg's speech because it was racist? Many other countries have hate speech laws, which criminalize speech because it is racist or derogatory. The U.S. does not; American free speech law protects the right to say even racist or hateful things.

The facts of *Brandenburg* offer an opportunity for students to think through how they feel about this controversial free speech question. **As with Exercise II, the goal is not to lead students to a "correct" answer, but to help them understand some of the ways that the arguments have been made, and to begin to develop their own philosophies of free speech.**

Classroom Exercise III: Toleration Arguments

The arguments for tolerating even hateful speech flow from Eleanor Holmes Norton's perspective on free speech that we looked at in Exercise II; they also flow from the idea of a "marketplace of ideas" that was established in *Abrams v. United States* (1919), which is dealt with in the Free Speech Teaching Guide 1. In short, they are that that **any standards that could be established will be vague and open to abuse, that there is much risk in allowing governments to pick and choose which speech to censor, and that there are benefits to society for allowing the airing out of controversial ideas – where they can be critiqued, rebutted, and, where necessary, debated – rather than driving them underground, where they may gain the mystique of "secret knowledge."**

The arguments against tolerating such speech require identifying harms that would be **sufficient to justify censorship.** In *Brandenburg*, the Court measured the likelihood that Brandenburg's speech would cause the sort of mob violence on July 4 that he called for; the court found that such an outcome was not sufficiently imminent, likely, and explicit to punish the speech. But that is not the only harm one could imagine wanting to regulate.

Next, I provide two important examples of such arguments for restricting racist speech to avoid different types of harm.

Classroom Exercise III: Restriction Arguments

An argument could be made that racist speech can lead to crimes in a more general sense, by heightening racial animosity, and degrading the status of some members of the community so much that they seem legitimate targets for violence. *Brandenburg* was decided in 1969, but the case began with Brandenburg's speech 1964 at a time when the conflict over civil rights was causing very real political violence: in the September before Brandenburg's speech, for instance, a splinter group of the Ku Klux Klan bombed the 16th Street church in Alabama, killing four Black girls. One obviously cannot hold Brandenburg himself accountable for these crimes – they happened before his speech – but **do students think that censoring hateful, violent speech like his would make such crimes less likely? And what about the risks of such censorship? And is it sufficient that bombing is outlawed?**

The second argument, as made by philosopher Jeremy Waldron, **argues that the harm of hate speech is not that it will lead to crime, but that hateful speech is, of itself, an attack on the dignity of particular groups of people and denies them of full inclusion in the political community.** Whether or not this sort of speech leads to a crime, Waldron suggests, this is itself harmful enough to justify censorship. After all, it is illegal to defame individual people under U.S. law – though in the case of individual libel charges there are complex rules intended to balance this principle with the First Amendment; and any similar group defamation law would need to be similarly complex. **But one can ask students whether the sorts of statements Brandenburg made in the footnote on p.446 are sufficiently harmful to the respect and status of members of the community that they fall outside the protections of the First Amendment.**

In *Brandenburg*, the court did not consider these issues. But thinking about the case in these contexts helps students better understand the stakes of the free speech questions involved and also helps them think about how the court identifies the harms it analyzes in its decisions.

U.S. Reports: *Brandenburg v. Ohio*, 395 U.S. 444 (1969)

BRANDENBURG *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 492. Argued February 27, 1969.—Decided June 9, 1969.

Appellant, a Ku Klux Klan leader, was convicted under the Ohio Criminal Syndicalism statute for "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." Neither the indictment nor the trial judge's instructions refined the statute's definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action. *Held:* Since the statute, by its words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action, it falls within the condemnation of the First and Fourteenth Amendments. Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. *Whitney* v. *California*, 274 U. S. 357, overruled.

Reversed.

Allen Brown argued the cause for appellant. With him on the briefs were *Norman Dorsen, Melvin L. Wulf, Eleanor Holmes Norton,* and *Bernard A. Berkman.*

Leonard Kirschner argued the cause for appellee. With him on the brief was *Melvin G. Rueger.*

Paul W. Brown, Attorney General of Ohio, *pro se,* and *Leo J. Conway,* Assistant Attorney General, filed a brief for the Attorney General as *amicus curiae.*

PER CURIAM.

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for "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." Ohio Rev. Code Ann. § 2923.13. He was fined $1,000 and sentenced to one to 10 years' imprisonment. The appellant challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution, but the intermediate appellate court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal, *sua sponte,* "for the reason that no substantial constitutional question exists herein." It did not file an opinion or explain its conclusions. Appeal was taken to this Court, and we noted probable jurisdiction. 393 U. S. 948 (1968). We reverse.

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan "rally" to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present

other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews.[1] Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

> "This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.
>
> "We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."

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[1] The significant portions that could be understood were:
"How far is the nigger going to—yeah."
"This is what we are going to do to the niggers."
"A dirty nigger."
"Send the Jews back to Israel."
"Let's give them back to the dark garden."
"Save America."
"Let's go back to constitutional betterment."
"Bury the niggers."
"We intend to do our part."
"Give us our state rights."
"Freedom for the whites."
"Nigger will have to fight for every inch he gets from now on."

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of "revengeance" was omittted, and one sentence was added: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." Though some of the figure in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. E. Dowell, A History of Criminal Syndicalism Legislation in the United States 21 (1939). In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, Cal. Penal Code §§ 11400–11402, the text of which is quite similar to that of the laws of Ohio. *Whitney* v. *California*, 274 U. S. 357 (1927). The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. Cf. *Fiske* v. *Kansas*, 274 U. S. 380 (1927). But *Whitney* has been thoroughly discredited by later decisions. See *Dennis* v. *United States*, 341 U. S. 494, at 507 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[2] As we.

[2] It was on the theory that the Smith Act, 54 Stat. 670, 18 U. S. C. § 2385, embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality. *Dennis* v. *United States*, 341 U. S. 494 (1951). That this was the basis for *Dennis* was emphasized in *Yates* v. *United States*, 354 U. S. 298, 320–324 (1957), in which the Court overturned con-

said in *Noto* v. *United States*, 367 U. S. 290, 297–298 (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." See also *Herndon* v. *Lowry*, 301 U. S. 242, 259–261 (1937); *Bond* v. *Floyd*, 385 U. S. 116, 134 (1966). A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. Cf. *Yates* v. *United States*, 354 U. S. 298 (1957); *De Jonge* v. *Oregon*, 299 U. S. 353 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931). See also *United States* v. *Robel*, 389 U. S. 258 (1967); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964).

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime

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victions for advocacy of the forcible overthrow of the Government under the Smith Act, because the trial judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action.

in terms of mere advocacy not distinguished from incitement to imminent lawless action.[3]

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action.[4] Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney* v. *California, supra,* cannot be supported, and that decision is therefore overruled.

Reversed.

MR. JUSTICE BLACK, concurring.

I agree with the views expressed by MR. JUSTICE DOUGLAS in his concurring opinion in this case that the "clear and present danger" doctrine should have no place

[3] The first count of the indictment charged that appellant "did unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform . . . ." The second count charged that appellant "did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism . . . ." The trial judge's charge merely followed the language of the indictment. No construction of the statute by the Ohio courts has brought it within constitutionally permissible limits. The Ohio Supreme Court has considered the statute in only one previous case, *State* v. *Kassay*, 126 Ohio St. 177, 184 N. E. 521 (1932), where the constitutionality of the statute was sustained.

[4] Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action, for as Chief Justice Hughes wrote in *De Jonge* v. *Oregon, supra,* at 364: "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." See also *United States* v. *Cruikshank,* 92 U. S. 542, 552 (1876); *Hague* v. *CIO,* 307 U. S. 496, 513, 519 (1939); *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 460–461 (1958).