NATIONAL JUDICIAL COMPETITION

Kentucky YMCA Youth Association

INTRODUCTORY PACKET

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VOCABULARY

Amicus curiae brief: "Friend of the court"• brief; a brief filed by a person, group, or entity that is not a party to the case but nonetheless wishes to provide the court with its perspective on the issue before it. The person or entity is called an "amicus"•; the plural is "amici."•

Concurring opinion: Sometimes a judge votes with the majority of the court on the outcome of a case, but wants to write a separate **concurring opinion** (or "concurrence"•). For example, a "concurrence in the judgment"• may give different reasons for reaching the same conclusion.

Court of appeals: The thirteen courts of appeals are federal courts that hear appeals "" mostly from federal district (i.e., trial) courts, but also from federal administrative agencies. Of all the cases the Supreme Court hears, the vast majority come from federal **courts of appeals**. A **court of appeals** is often referred to by the name or number of its circuit (i.e., "Ninth Circuit").

Circuit: The United States is divided into thirteen **circuits** with a different court of appeals(see a map here). Eleven of the **circuits** are numbered first to eleventh. The District of Columbia has its own that hears many cases involving the federal government. The Federal Circuit's jurisdiction is not geographic. Instead, it hears cases involving particular subject matters, such as patents and international trade. Courts of appeals are often referred to by the name or number of their **circuit**; for example, the "Ninth Circuit."•

Grant of certiorari (or "cert. grant"•): The Supreme Court **grants certiorari** when it decides, at the request of the party that has filed a petition for certiorari, to review the merits of the case. For roughly every 100 petitions for certiorari received by the court, about one petition is granted. (If the Supreme Court *denies* certiorari in a case, then the lower court decision stands; the decision to deny certiorari does not make precedent.)

"Held": Holding a case in abeyance, pending the disposition of another case.
Opinion: When it decides a case, the Court generally issues an **opinion**, which is a substantive and often long piece of writing summarizing the facts and history of the case and addressing the legal issues raised in the case.

Order: An order is an instruction or direction issued by the Court. Unlike an opinion, which analyzes the law, an order tells parties or lower courts what they are to do. For example, the Court can order certiorari granted or denied in a case; it can order a lower court to re-examine a case in light of a new point or theory; or it can order the parties in a case to conduct oral arguments on a certain date.

Per curiam opinion: An unsigned opinion, written for the Court as a whole by an unidentified Justice, is called a **per curiam opinion**. (In Latin, "per curiam" literally means "by the court.") Written dissents from per curiam opinions, however, are signed.

Petition for certiorari: When a party in a case is unhappy with the result at the lower court level (that is, in a state court of last resort or in a federal court of appeals), he has the option to file a brief asking the Supreme Court to hear its case. That brief is a **petition for certiorari**.

Petitioner: The petitioner is the party asking the Supreme Court to review the case because she lost the dispute in the lower court. Her name goes first in the case name. (For example, George W. Bush was the petitioner in *Bush v. Gore*.)

Respondent: The respondent is the party that won in the lower court. His name goes second in the case name. (For example, Al Gore was the respondent in *Bush v. Gore*.)

Remand: The term "remand"• means "to send back,"• and refers to just that "‟ a decision by the Supreme Court to send a case back to the lower court for further action. When it **remands** a case, the Court generally includes instructions for the lower court, either telling it to start an entirely new trial, or directing it, for example, to look at the dispute in the context of laws or theories it might not have considered the first time around.

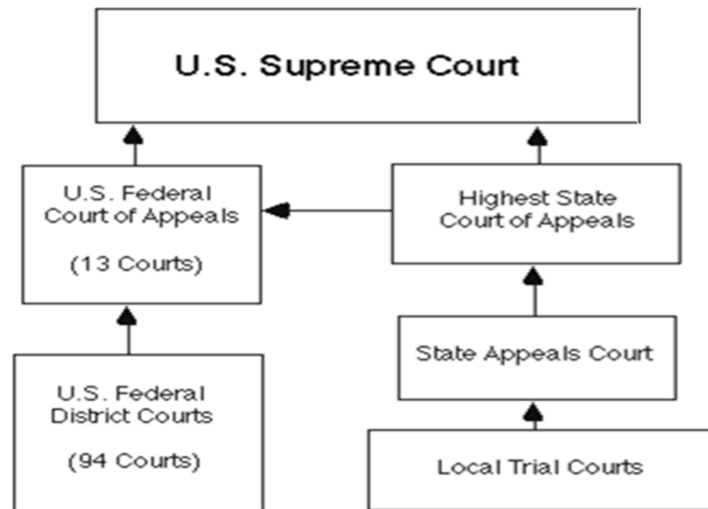
Summary reversal: The Court issues a **summary reversal** when it grants certiorari in a case and overturns the decision below without written briefs or oral argument on the merits. When the Court reaches a judgment this way, it generally issues a per curiam opinion.

Vacate: When the Supreme Court **vacates** a lower court ruling, it strips that ruling of effect, often in order to send the case back to the lower court for further proceedings.

Excerpt from SCOTUS Blog

Further terms can be found at: https://www.nycourts.gov/lawlibraries/glossary.shtml

ROAD TO THE SUPREME COURT



Partial diagram from the Maxwell School of Citizenship and Public Affairs at Syracuse University

Types of US Courts

There are two types of courts in the United States for hearing a case: trial and appellate.

Trial Courts

Trial courts are generally where cases start. There are two types of trial courts: criminal and civil, and although the procedures are different, the general structure is the same. Each side in a case has the opportunity to learn or discover as many facts about the case as possible before trial. At the trial, the parties will present their evidence in order to convince a judge or jury that the facts are favorable to their side. The judge and the jury will reach their decision, or verdict, which is the end for most cases.

Appellate Courts

If the judge made a mistake in the law or the trial procedure, the parties can appeal the case to the appellate court. It is important to note that courts of appeal are not set up to re-hear cases in their entirety. Instead, courts of appeal typically address whether a lower court made serious mistakes of law. Additionally, an appellate court can usually take cases from courts of special jurisdiction as well.

Supreme Court

This is the highest court in any jurisdiction. If an appellate court makes an error, or if the parties think the law as it stands is unjust, they can appeal from the appellate court to the supreme court.

State and Federal Courts

The United States operates under a Federalist structure – i.e. there are state governments and the federal government. Each government has its own Court system that can lead to the Supreme Court level. The differences between federal and state courts are defined mainly by jurisdiction. Jurisdiction refers to the kinds of cases a court is authorized to hear.

State Courts

State courts have broad jurisdiction, so the cases individual citizens are most likely to be involved in -- such as robberies, traffic violations, broken contracts, and family disputes -- are usually tried in state courts. The only cases state courts are not allowed to hear are lawsuits against the United States and those involving certain specific federal laws: criminal, antitrust, bankruptcy, patent, copyright, and some maritime cases.

Federal Courts

Federal court jurisdiction, by contrast, is limited to the types of cases listed in the Constitution and specifically provided for by Congress. For the most part, federal courts only hear:

Cases in which the United States is a party;
Cases involving violations of the U.S. Constitution or federal laws (under federal-question jurisdiction);
Cases between citizens of different states if the amount in controversy exceeds $75,000 (under diversity jurisdiction); and
Bankruptcy, copyright, patent, and maritime law cases.

Excerpt from FindLaw.

Note from the Author:

Cases are first heard on the "trial" level (Local Trial Courts and U.S. Federal Courts). These cases determine the "facts" of a case (what party committed what actions). The party that loses a case can then appeal to a higher court (State Appeals Court and U.S. Federal Court of Appeals). These higher courts interpret the law, but do not dispute the facts (i.e. they determine if an action was legal or constitutional, not if an action did or did not take place). Parties can continue appealing through the diagram above until they reach the Supreme Court of the United States (SCOTUS).

WHAT IS APPELLATE LAW?

NJC is a simulation of Supreme Court arguments. Thus, they write appellate law opinions.

Terms in Appellate Litigation

Most opinions that you read in law school are appellate opinions, which means that they decide the outcome of appeals. An "appeal" is a legal proceeding that considers whether another court's legal decision was right or wrong. After a court has ruled for one side, the losing side may seek review of that decision by filing an appeal before a higher court. The original court is usually known as the trial court, because that's where the trial occurs if there is one. The higher court is known as the appellate or appeals court, as it is the court that hears the appeal.

A single judge presides over trial court proceedings, but appellate cases are decided by panels of several judges. For example, in the federal court system, run by the United States government, a single trial judge known as a District Court judge oversees the trial stage. Cases can be appealed to the next higher court, the Court of Appeals, where cases are decided by panels of three judges known as Circuit Court judges. A side that loses before the Circuit Court can seek review of that decision at the United States Supreme Court. Supreme Court cases are decided by all nine judges. Supreme Court judges are called Justices instead of judges; there is one "Chief Justice" and the other eight are just plain "Justices" (technically they are "Associate Justices," but everyone just calls them "Justices").

During the proceedings before the higher court, the party that lost at the original court and is therefore filing the appeal is usually known as the "appellant." The party that won in the lower court and must defend the lower court's decision is known as the "appellee" (accent on the last syllable). Some older opinions may refer to the appellant as the "plaintiff in error" and the appellee as the "defendant

How to Read a Legal Opinion

in error." Finally, some courts label an appeal as a "petition," and require the losing party to petition the higher court for relief. In these cases, the party that lost before the lower court and is filing the petition for review is called the "petitioner." The party that won before the lower court and is responding to the petition in the higher court is called the "respondent."

Confused yet? You probably are, but don't worry. You'll read so many cases in the next few weeks that you'll get used to all of this very soon.

Excerpt from Orin S. Kerr's "How to Read a Legal Opinion" (2007).

HOW TO READ A CASE (American Bar)

In order to argue a Supreme Court case you will have to understand the legal rights of each party. The most applicable way to understand these rights is to read Court cases. The following two excerpts will teach you how to do that.

vol. 13 n. 1

Reading a U.S. Supreme Court opinion can be intimidating. The average opinion includes 4,751 words, and is one of approximately 75 issued each year. It might be reassuring, however, to know that opinions contain similar parts and tend to follow a similar format. There are also useful things to identify amid the pages to help focus reading. Here is a basic guide for reading a U.S. Supreme Court opinion.

1. Identify the parts
Typically, a U.S. Supreme Court opinion is comprised of one or more, or all, of the following parts:

- **Syllabus**
  The syllabus appears first, before the main opinion. It is not part of the official opinion, but rather, a summary added by the Court to help the reader better understand the case and the decision. The syllabus outlines the facts of the case and the path that the case has taken to get to the Supreme Court. The last portion of the syllabus sometimes summarizes which justice authored the main opinion, which justices joined in the main opinion, and which justices might have issued concurring or dissenting opinions.
- **Main Opinion**
  Following the syllabus is the main opinion. This is the Court's official decision in the case. In legal terms, the opinion announces a decision and provides an explanation for the decision by articulating the legal rationale that the justices relied upon to reach the decision. The main opinion may take different forms, depending on how the justices decide certain issues. Sometimes decisions are unanimous— all of the justices agree and offer one rationale for their decision, so the Court issues one unanimous opinion. When more than half of the justices agree, the Court issues a majority opinion. Other times, there is no majority, but a plurality, so the Court issues a plurality opinion. Typically, one justice is identified as the author of the main opinion. Per curiam opinions, however, do not identify any authors, and are simply, opinions of the Court.
- **Concurring and Dissenting Opinions**
  Often, there are multiple opinions within the document because the justices are not in agreement. Justices who agree with the result of the main opinion, or the resolution of the dispute between the two parties, but base their decision on a different rationale may issue one or more concurring opinion(s). Likewise, justices who disagree with the main opinion in both result and legal rationale may issue one or more dissenting opinion(s).

2. Understand the formal elements
Regardless of which, or how many, parts comprise the opinion, they will share several formal elements. Headings typically include the Court term in which the opinion was announced, case docket number, argument dates, and decision date. Another important element is the case name, which helps determine the parties involved in the case (see sidebar). Finally, there might be an explanation of where the case came from before reaching the Court. Often, there is a note about certiorari, an order by which a higher court reviews the decision of a lower court. For example, an opinion may reference "Certiorari for the United States Court of Appeals for the Ninth Circuit." That means the Court reviewed the case from the lower court, the U.S. Court of Appeals of the Ninth Circuit.

3. Read purposefully
When reading an opinion, it is important to focus on a few "big picture" takeaways:

- **Facts**
  Pinpoint the facts of the case, or the "story"—who, what, when, and where. Supreme Court cases tend to begin with a person, place, thing, or event, often in everyday scenarios. The goal is to be able to tell the story of the case, including its procedural history.
- **Legal Dispute(s)**
  What are the legal issues in the case? What questions are being presented? Is the Court interpreting the Constitution or a statute—e.g., an act of Congress? Try to identify the parties' particular dispute(s) and their main arguments.
- **Disposition**
  Generally, the end of the main opinion includes the disposition, or what action the Court is taking. When reviewing decisions from a lower court, the Supreme Court basically has three options:
  - **Affirm**—allow the lower court's ruling to stand;
  - **Reverse, Void, or Vacate**--over-turn the lower court's ruling; or
  - **Remand**--send the case back to a lower court for retrial.

Sometimes the Court combines the last two of these options—reverse and remand—and not only overturns the lower court's decision, but also orders a retrial.

- **Law**
  The main opinion will include a section on law, which includes the Court's legal reasoning or holding. In some opinions, this will be clearer than others, but try to identify at least one principle of law that the Court outlines as a basis for its ruling. Sometimes, the opinion cites past cases—legal precedent, policy, or outlines other considerations. Finally, were there any concurring or dissenting opinions? If so, try to determine the differences in reasoning.
- **Significance and Scope**
  Consider the significance of the opinion. This may not be readily apparent simply from reading the text of the opinion. What do you think will be its application beyond the particular facts of the case? Consider other possible fact patterns to which it might apply. What else do you think will be the consequence of the opinion, especially considering its holding or legal reasoning? What precedent might it establish?

E*xcerpt from the American Bar's Insight on Law and Society (2012).*

HOW TO READ A CASE (Kerr)

III. WHAT YOU NEED TO LEARN FROM READING A CASE

Okay, so you've just read a case for class. You think you understand it, but you're not sure if you learned what your professor wanted you to learn. Here is what professors want students to know after reading a case assigned for class:

Know the Facts

Law professors love the facts. When they call on students in class, they typically begin by asking students to state the facts of a particular case. Facts are important because law is often highly fact-sensitive, which is a fancy way of saying that the proper legal outcome depends on the exact details of what happened. If you don't know the facts, you can't really understand the case and can't understand the law.

Most law students don't appreciate the importance of the facts when they read a case. Students think, "I'm in law school, not fact school; I want to know what the law is, not just what happened in this one case." But trust me: the facts are really important.[2]

[2] If you don't believe me, you should take a look at a few law school exams. It turns out that the most common form of law school exam question presents a long description of a very particular set of facts. It then asks the student to "spot" and analyze the legal issues presented by those facts. These exam questions are known as "issue-spotters," as they test the student's ability to understand the facts and spot the legal issues they raise. As you might imagine, doing well on an issue-

Know the Specific Legal Arguments Made by the Parties

Lawsuits are disputes, and judges only issue opinions when two parties to a dispute disagree on a particular legal question. This means that legal opinions focus on resolving the parties' very specific disagreement. The lawyers, not the judges, take the lead role in framing the issues raised by a case.

In an appeal, for example, the lawyer for the appellant will articulate specific ways in which the lower court was wrong. The appellate court will then look at those arguments and either agree or disagree. (Now you can understand why people pay big bucks for top lawyers; the best lawyers are highly skilled at identifying and articulating their arguments to the court.) Because the lawyers take the lead role in framing the issues, you need to understand exactly what arguments the two sides were making.

Know the Disposition

The "disposition" of a case is the action the court took. It is often announced at the very end of the opinion. For example, an appeals court might "affirm" a lower court decision, upholding it, or it might "reverse" the decision, ruling for the other side. Alternatively, an appeals court might "vacate" the lower court decision, wiping the lower-court decision off the books, and then "remand" the case, sending it back to the lower court for further proceedings. For now, you should keep in mind that when a higher court "affirms" it means that the lower court had it right (in result, if not in reasoning). Words like "reverse," "remand," and "vacate" means that the higher court though the lower court had it wrong.

Understand the Reasoning of the Majority Opinion

To understand the reasoning of an opinion, you should first identify the source of the law the judge applied. Some opinions interpret the Constitution, the founding charter of the government. Other cases

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spotter requires developing a careful and nuanced understanding of the importance of the facts. The best way to prepare for that is to read the fact sections of your cases very carefully.

interpret "statutes," which is a fancy name for written laws passed by legislative bodies such as Congress. Still other cases interpret "the common law," which is a term that usually refers to the body of prior case decisions that derive ultimately from pre-1776 English law that the Colonists brought over from England.[3]

In your first year, the opinions that you read in your Torts, Contracts, and Property classes will mostly interpret the common law. Opinions in Criminal Law mostly interpret either the common law or statutes. Finally, opinions in your Civil Procedure casebook will mostly interpret statutory law or the Constitution. The source of law is very important because American law follows a clear hierarchy. Constitutional rules trump statutory (statute-based) rules, and statutory rules trump common law rules.

After you have identified the source of law, you should next identify the method of reasoning that the court used to justify its decision. When a case is governed by a statute, for example, the court usually will simply follow what the statute says. The court's role is narrow in such settings because the legislature has settled the law. Similarly, when past courts have already answered similar questions before, a court may conclude that it is required to reach a particular result because it is bound by the past precedents. This is an application of the judicial practice of "stare decisis," an abbreviation of a Latin phrase meaning "That which has been already decided should remain settled."

In other settings, courts may justify their decisions on public policy grounds. That is, they may pick the rule that they think is the best rule, and they may explain in the opinion why they think that rule is best. This is particularly likely in common law cases where judges are not bound by a statute or constitutional rule. Other courts will rely on morality, fairness, or notions of justice to justify

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[3] The phrase "common law" started being used about a thousand years ago to refer to laws that were common to all English citizens. Thus, the word "common" in the phrase "common law" means common in the sense of "shared by all," not common in the sense of "not very special." The "common law" was announced in judicial opinions. As a result, you will sometimes hear the phrase "common law" used to refer to areas of judge-made law as opposed to legislatively-made law.

their decisions. Many courts will mix and match, relying on several or even all of these justifications.

Understand the Significance of the Majority Opinion

Some opinions resolve the parties' legal dispute by announcing and applying a clear rule of law that is new to that particular case. That rule is known as the "holding" of the case. Holdings are often contrasted with "dicta" found in an opinion. Dicta refers to legal statements in the opinion not needed to resolve the dispute of the parties; the word is a pluralized abbreviation of the Latin phrase "obiter dictum," which means "a remark by the way."

When a court announces a clear holding, you should take a minute to think about how the court's rule would apply in other situations. During class, professors like to pose "hypotheticals," new sets of facts that are different from those found in the cases you have read. They do this for two reasons. First, it's hard to understand the significance of a legal rule unless you think about how it might apply to lots of different situations. A rule might look good in one setting, but another set of facts might reveal a major problem or ambiguity. Second, judges often reason by "analogy," which means a new case may be governed by an older case when the facts of the new case are similar to those of the older one. This raises the question, which are the legally relevant facts for this particular rule? The best way to evaluate this is to consider new sets of facts. You'll spend a lot of time doing this in class, and you can get a head start on your class discussions by asking the hypotheticals on your own before class begins.

Finally, you should accept that some opinions are vague. Sometimes a court won't explain its reasoning very well, and that forces us to try to figure out what the opinion means. You'll look for the holding of the case but become frustrated because you can't find one. It's not your fault; some opinions are written in a narrow way so that there is no clear holding, and others are just poorly reasoned or written. Rather than trying to fill in the ambiguity with false certainty, try embracing the ambiguity instead. One of the skills of top-flight lawyers is that they know what they don't know: they know

when the law is unclear. Indeed, this skill of identifying when a problem is easy and when it is hard (in the sense of being unsettled or unresolved by the courts) is one of the keys to doing very well in law school. The best law students are the ones who recognize and identify these unsettled issues without pretending that they are easy.

Understand Any Concurring and/or Dissenting Opinions

You probably won't believe me at first, but concurrences and dissents are very important. You need to read them carefully. To understand why, you need to appreciate that law is man-made, and Anglo-American law has often been judge-made. Learning to "think like a lawyer" often means learning to think like a judge, which means learning how to evaluate which rules and explanations are strong and which are weak. Courts occasionally say things that are silly, wrongheaded, or confused, and you need to think independently about what judges say.

Concurring and dissenting opinions often do this work for you. Casebook authors edit out any unimportant concurrences and dissents to keep the opinions short. When concurrences and dissents appear in a casebook, it signals that they offer some valuable insights and raise important arguments. Disagreement between the majority opinion and concurring or dissenting opinions often frames the key issue raised by the case; to understand the case, you need to understand the arguments offered in concurring and dissenting opinions.

Excerpt from Orin S. Kerr's "How to Read a Legal Opinion" (2007).

SAMPLE CASE (Brandenburg v. Ohio)

This is a seminal case on Hate Speech. Use what you learned from the two preceding texts to read and understand the case.

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

Brandenburg v. Ohio
No. 492
Argued February 27, 1969
Decided June 9, 1969
395 U.S. 444

Syllabus

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 (Majority Opinion)

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 [395 U.S. 444, 445] 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 [395 U.S. 444, 446] 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." [395 U.S. 444, 447]

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 n should be returned to Africa, the Jew returned to Israel." Though some of the figures 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 [395 U.S. 444, 448] 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 [395 U.S. 444, 449] 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.

Footnotes

[Footnote �] ERRATA: "omittted" should be "omitted."

[Footnote 1] The significant portions that could be understood were:

"How far is the n[redacted] going to - yeah."

"This is what we are going to do to the n[redacted]."

"A dirty n[redacted]."

"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 n[redacted]."

"We intend to do our part."

"Give us our state rights."

"Freedom for the whites."

"N[redacted] will have to fight for every inch he gets from now on."

[Footnote 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 convictions [395 U.S. 444, 448] 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.

[Footnote 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.

[Footnote 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).

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 [395 U.S. 444, 450] in the interpretation of the First Amendment. I join the Court's opinion, which, as I understand it, simply cites Dennis v. United States, 341 U.S. 494 (1951), but does not indicate any agreement on the Court's part with the "clear and present danger" doctrine on which Dennis purported to rely.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I desire to enter a caveat.

The "clear and present danger" test was adumbrated by Mr. Justice Holmes in a case arising during World War I - a war "declared" by the Congress, not by the Chief Executive. The case was Schenck v. United States, 249 U.S. 47, 52 , where the defendant was charged with attempts to cause insubordination in the military and obstruction of enlistment. The pamphlets that were distributed urged resistance to the draft, denounced conscription, and impugned the motives of those backing the war effort. The First Amendment was tendered as a defense. Mr. Justice Holmes in rejecting that defense said:

"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. It is a question of proximity and degree."

Frohwerk v. United States, 249 U.S. 204 , also authored by Mr. Justice Holmes, involved prosecution and punishment for publication of articles very critical of the war effort in World War I. Schenck was referred to as a conviction for obstructing security "by words of persuasion." Id., at 206. And the conviction in Frohwerk

was sustained because "the circulation of the paper was [395 U.S. 444, 451] in quarters where a little breath would be enough to kindle a flame." Id., at 209.

Debs v. United States, 249 U.S. 211 , was the third of the trilogy of the 1918 Term. Debs was convicted of speaking in opposition to the war where his "opposition was so expressed that its natural and intended effect would be to obstruct recruiting." Id., at 215.

"If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief." Ibid.

In the 1919 Term, the Court applied the Schenck doctrine to affirm the convictions of other dissidents in World War I. Abrams v. United States, 250 U.S. 616 , was one instance. Mr. Justice Holmes, with whom Mr. Justice Brandeis concurred, dissented. While adhering to Schenck, he did not think that on the facts a case for overriding the First Amendment had been made out:

"It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country." Id., at 628.

Another instance was Schaefer v. United States, 251 U.S. 466 , in which Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented. A third was Pierce v. United States, 252 U.S. 239 , in which again Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented.

Those, then, were the World War I cases that put the gloss of "clear and present danger" on the First Amendment. Whether the war power - the greatest leveler of them all - is adequate to sustain that doctrine is debatable. [395 U.S. 444, 452] The dissents in Abrams, Schaefer, and Pierce show how easily "clear and present danger" is manipulated to crush what Brandeis called "[t]he fundamental right of free men to strive for better conditions through new legislation and new institutions" by argument and discourse (Pierce v. United States, supra, at 273) even in time of war. Though I doubt if the "clear and present danger" test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace.

The Court quite properly overrules Whitney v. California, 274 U.S. 357 , which involved advocacy of ideas which the majority of the Court deemed unsound and dangerous.

Mr. Justice Holmes, though never formally abandoning the "clear and present danger" test, moved closer to the First Amendment ideal when he said in dissent in Gitlow v. New York, 268 U.S. 652, 673 :

"Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

We have never been faithful to the philosophy of that dissent. [395 U.S. 444, 453]

The Court in Herndon v. Lowry, 301 U.S. 242 , overturned a conviction for exercising First Amendment rights to incite insurrection because of lack of evidence of incitement. Id., at 259-261. And see Hartzel v. United States,322 U.S. 680 . In Bridges v. California, 314 U.S. 252, 261 -263, we approved the "clear and present danger" test in an elaborate dictum that tightened it and confined it to a narrow category. But in Dennis v. United States, 341 U.S. 494 , we opened wide the door, distorting the "clear and present danger" test beyond recognition. 1

In that case the prosecution dubbed an agreement to teach the Marxist creed a "conspiracy." The case was submitted to a jury on a charge that the jury could not convict unless it found that the defendants "intended to overthrow the Government `as speedily as circumstances would permit.'" Id., at 509-511. The Court sustained convictions under that charge, construing it to mean a determination of "`whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'" 2 Id., at 510, quoting from United States v. Dennis, 183 F.2d 201, 212.

Out of the "clear and present danger" test came other offspring. Advocacy and teaching of forcible overthrow of government as an abstract principle is immune from prosecution. Yates v. United States, 354 U.S. 298, 318 . But an "active" member, who has a guilty knowledge and intent of the aim to overthrow the Government [395 U.S. 444, 454] by violence, Noto v. United States, 367 U.S. 290 , may be prosecuted. Scales v. United States, 367 U.S. 203, 228 . And the power to investigate, backed by the powerful sanction of contempt, includes the power to determine which of the two categories fits the particular witness. Barenblatt v. United States, 360 U.S. 109, 130 . And so the investigator roams at will through all of the beliefs of the witness, ransacking his conscience and his innermost thoughts.

Judge Learned Hand, who wrote for the Court of Appeals in affirming the judgment in Dennis, coined the "not improbable" test, 183 F.2d 201, 214, which this Court adopted and which Judge Hand preferred over the "clear and present danger" test. Indeed, in his book, The Bill of Rights 59 (1958), in referring to Holmes' creation of the "clear and present danger" test, he said, "I cannot help thinking that for once Homer nodded."

My own view is quite different. I see no place in the regime of the First Amendment for any "clear and present danger" test, whether strict and tight as some would make it, or free-wheeling as the Court in Dennis rephrased it.

When one reads the opinions closely and sees when and how the "clear and present danger" test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous. Second, the test was so twisted and perverted in Dennis as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.

Action is often a method of expression and within the protection of the First Amendment.

Suppose one tears up his own copy of the Constitution in eloquent protest to a decision of this Court. May he be indicted? [395 U.S. 444, 455]

Suppose one rips his own Bible to shreds to celebrate his departure from one "faith" and his embrace of atheism. May he be indicted?

Last Term the Court held in United States v. O'Brien, 391 U.S. 367, 382 , that a registrant under Selective Service who burned his draft card in protest of the war in Vietnam could be prosecuted. The First Amendment was tendered as a defense and rejected, the Court saying:

"The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration." 391 U.S., at 377 -378.

But O'Brien was not prosecuted for not having his draft card available when asked for by a federal agent. He was indicted, tried, and convicted for burning the card. And this Court's affirmance of that conviction was not, with all respect, consistent with the First Amendment.

The act of praying often involves body posture and movement as well as utterances. It is nonetheless protected by the Free Exercise Clause. Picketing, as we have said on numerous occasions, is "free speech plus." See Bakery Drivers Local v. Wohl, 315 U.S. 769, 775 (DOUGLAS, J., concurring); Giboney v. Empire Storage Co.,336 U.S. 490, 501 ; Hughes v. Superior Court, 339 U.S. 460, 465 ; Labor Board v. Fruit Packers, 377 U.S. 58, 77(BLACK, J., concurring), and id., at 93 (HARLAN, J., dissenting); Cox v. Louisiana, 379 U.S. 559, 578(opinion of BLACK, J.); Food Employees v. Logan Plaza, 391 U.S. 308, 326 (DOUGLAS, J., concurring). That means that it can be regulated when it comes to the "plus" or "action" side of the protest. It can be regulated as to [395 U.S. 444, 456] the number of pickets and the place and hours (see Cox v. Louisiana, supra), because traffic and other community problems would otherwise suffer.

But none of these considerations are implicated in the symbolic protest of the Vietnam war in the burning of a draft card.

One's beliefs have long been thought to be sanctuaries which government could not invade. Barenblatt is one example of the ease with which that sanctuary can be violated. The lines drawn by the Court between the criminal act of being an "active" Communist and the innocent act of being a nominal or inactive Communist mark the difference only between deep and abiding belief and casual or uncertain belief. But I think, that all matters of belief are beyond the reach of subpoenas or the probings of investigators. That is why the invasions of privacy made by investigating committees were notoriously unconstitutional. That is the deep-seated fault in the infamous loyalty-security hearings which, since 1947 when President Truman launched them, have processed 20,000,000 men and women. Those hearings were primarily concerned with one's thoughts, ideas, beliefs, and convictions. They were the most blatant violations of the First Amendment we have ever known.

The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.

The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre.

This is, however, a classic case where speech is brigaded with action. See Speiser v. Randall, 357 U.S. 513, 536-537 (DOUGLAS, J., concurring). They are indeed inseparable and a prosecution can be launched for the overt[395 U.S. 444, 457] acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution. Certainly there is no constitutional line between advocacy of abstract ideas as in Yates and advocacy of political action as in Scales. The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience. 3

[Footnote 1] See McKay, The Preference For Freedom, 34 N. Y. U. L. Rev. 1182, 1203-1212 (1959).

[Footnote 2] See Feiner v. New York, 340 U.S. 315 , where a speaker was arrested for arousing an audience when the only "clear and present danger" was that the hecklers in the audience would break up the meeting.

[Footnote 3] See MR. JUSTICE BLACK, dissenting, in Communications Assn. v. Douds, 339 U.S. 382, 446 , 449 et seq. [395 U.S. 444, 458]

Excerpt from Justia Law.

HOW TO BRIEF A CASE

Briefing a case is a way to take notes, summarize, and better understand and remember a case.

How to Brief a Case Using the "IRAC" Method

When briefing a case, your goal is to reduce the information from the case into a format that will provide you with a helpful reference in class and for review. Most importantly, by "briefing" a case, you will grasp the problem the court faced (the issue); the relevant law the court used to solve it (the rule); how the court applied the rule to the facts (the application or "analysis"); and the outcome (the conclusion). You will then be ready to not only discuss the case, but to compare and contrast it to other cases involving a similar issue.

Before attempting to "brief" a case, read the case at least once.

Follow the "IRAC" method in briefing cases:

Facts[*]
Write a brief summary of the facts as the court found them to be. Eliminate facts that are not relevant to the court's analysis. For example, a business's street address is probably not relevant to the court's decision of the issue of whether the business that sold a defective product is liable for the resulting injuries to the plaintiff. However, suppose a customer who was assaulted as she left its store is suing the business. The customer claims that her injuries were the reasonably foreseeable result of the business's failure to provide security patrols. If the business is located in an upscale neighborhood, then perhaps it could argue that its failure to provide security patrols is reasonable. If the business is located in a crime-ridden area, then perhaps the customer is right. Instead of including the street address in the case brief, you may want to simply describe the type of neighborhood in which it is located. (Note: the time of day would be another relevant factor in this case, among others).

*Procedural History**
What court authored the opinion: The United States Supreme Court? The California Court of Appeal? The Ninth Circuit Court of Appeals? (Hint: Check under the title of the case: The Court and year of the decision will be given). If a trial court issued the decision, is it based on a trial, or motion for summary judgment, etc.? If an appellate court issued the decision, how did the lower courts decide the case?

Issue
What is the question presented to the court? Usually, only one issue will be discussed, but sometimes there will be more. What are the parties fighting about, and what are they asking the court to decide? For example, in the case of the assaulted customer, the issue for a trial court to decide might be whether the business had a duty to the customer to provide security patrols. The answer to the question will help to ultimately determine

[*] This applies to case briefs only, and not exams. Use the IRAC method in answering exams: Issue/Rule/Analysis/Conclusion.

whether the business is liable for *negligently* failing to provide security patrols: whether the defendant owed plaintiff a duty of care, and what that duty of care is, are key issues in negligence claims.

Rule(s):
Determine what the relevant rules of law are that the court uses to make its decision. These rules will be identified and discussed by the court. For example, in the case of the assaulted customer, the relevant rule of law is that a property owner's duty to prevent harm to invitees is determined by balancing the foreseeability of the harm against the burden of preventive measures. There may be more than one relevant rule of law to a case: for example, in a negligence case in which the defendant argues that the plaintiff assumed the risk of harm, the relevant rules of law could be the elements of negligence, and the definition of "assumption of risk" as a defense. Don't just simply list the cause of action, such as "negligence" as a rule of law: What rule must the court apply to the facts to determine the outcome?

Application/Analysis:
This may be the most important portion of the brief. The court will have examined the facts in light of the rule, and probably considered all "sides" and arguments presented to it. How courts apply the rule to the facts and analyze the case must be understood in order to properly predict outcomes in future cases involving the same issue. What does the court consider to be a relevant fact given the rule of law? How does the court interpret the rule: for example, does the court consider monetary costs of providing security patrols in weighing the burden of preventive measures? Does the court imply that if a business is in a dangerous area, then it should be willing to bear a higher cost for security? Resist the temptation to merely repeat what the court said in analyzing the facts: what does it mean to you? Summarize the court's rationale in your own words. If you encounter a word that you do not know, use a dictionary to find its meaning.

Conclusion
What was the final outcome of the case? In one or two sentences, state the court's ultimate finding. For example, the business did not owe the assaulted customer a duty to provide security patrols.

Note: "Case briefing" is a skill that you will develop throughout the semester. Practice will help you develop this skill. Periodically, case briefs will be collected for purposes of feedback. At any time, you may submit your case brief(s) for feedback.

Excerpt from California State University Northridge.

SAMPLE BRIEF (Brandenburg v. Ohio)

Brandenburg v. Ohio

Citation. 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430, 1969 U.S. 1367.

Brief Fact Summary. An Ohio law prohibited the teaching or advocacy of the doctrines of criminal syndicalism. The Defendant, Brandenburg (Defendant), a leader in the Ku Klux Klan, made a speech promoting the taking of vengeful actions against government and was therefore convicted under the Ohio Law.

Synopsis of Rule of Law. Speech can be prohibited if it is "directed at inciting or producing imminent lawless action" and it is likely to incite or produce such action.

Facts. The Ohio Criminal Syndicalism Act (the "Act") made it illegal to advocate "crime, sabotage, violence or . . . terrorism as a means of accomplishing industrial or political reform." It also prohibited "assembling with any society, group, or assemblage or persons formed to teach or advocate the doctrines of criminal syndicalism. The Defendant, a leader in the Ku Klux Klan, made a speech promoting the taking of revenge against the government if it did not stop suppressing the white race and was therefore convicted under the Act.

Issue. Did the Statute, prohibiting public speech that advocated certain violent activities, violate the Defendant's right to free speech under the First and Fourteenth Amendments of the United States Constitution (Constitution)?

Held. Yes.
(Per Curiam) The Act properly made it illegal to advocate or teach doctrines of violence, but did not address the issue of whether such advocacy or teaching would actually incite imminent lawlessness. The mere abstract teaching of the need or propriety to resort to violence is not the same as preparing a group for violent action. Because the statute failed to provide for the second part of the test it was overly broad and thus in violation of the First Amendment of the Constitution.
Concurrence.
Justice Hugo (J. Black) I agree with Justice William Douglas (J. Douglas) in his concurring opinion of this case that the "clear and present danger" doctrine should have no place in our interpretation of the First Amendment of the Constitution.
J. Douglas argues that the how the "clear and present danger" test has been applied in the past is disconcerting. First, the threats to which it was applied were often loud but puny. Second, the test was so perverted as to make trial of those teachers of Marxism all out political trials, which had the effect of eroding substantial parts of the First Amendment of the Constitution.

Discussion. In order for "incitement to violence" speech to be constitutionally barred, Brandenburg sets a new standard. The language must (1) expressly advocate violence; (2) advocate immediate violence and (3) relate to violence likely to occur.

Excerpt from Case Briefs.

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