

MODULE 4

# Incitement, Fighting Words and True Threats

Schenck · Abrams · Whitney · Dennis · Brandenburg · Chaplinsky · R.A.V. · Virginia v. Black ·  
Counterman

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# Where we are on the map

*Modules 4 to 6 are the branch of speech the Court has left outside full protection.*

## MODULE 1

### First Amendment Values

Truth · democracy · autonomy ·  
tolerance

## MODULE 1

### Speech vs. Conduct

Pure speech · expressive conduct ·  
government speech

## MODULE 2

### Content-Based vs. Content-Neutral

Strict against intermediate — and the  
exceptions

## MODULES 4-6

### Disfavored Categories

Incitement · solicitation of crime ·  
threats · fighting words · defamation ·  
commercial · sexual speech

## MODULE 7

### Place of Speech

Public forum doctrine. Where it happens  
does the work.

## MODULE 3

### Four Facial Failures

Prior restraint · vagueness · overbreadth  
· compelled speech

## THROUGHOUT

### Related Protections

Press · assembly → association · petition — and the religion clauses

*Every category in this branch is narrow — and the Court keeps it that way.*

# Incitement: a history

*Four eras, four tests — and the direction is always toward more protection.*

## WORLD WAR I, 1919

- Schenck, Frohwerk, Debs, Abrams.
- Clear and present danger.

## 1920s AND 1930s

- Gitlow and Whitney.
- Deference to the legislature.

## 1940s TO 1960s

- Dennis.
- Learned Hand's formula.

## 1969 TO TODAY

- Brandenburg.
- Intent, imminence, likelihood.

*Each era protects more speech than the last.*

# Schenck: clear and present danger

*Leaflets against the draft, 1917. Holmes, for a unanimous Court.*

## THE TEST

- A clear and present danger.
- “A question of proximity and degree.”

## WAR VERSUS PEACE

- What may be said in peace
- may not be said in war.

“Falsely shouting fire in a theatre and causing a panic.” Not “crowded.”

# Abrams: Holmes in dissent

*Eight months after Schenck, Holmes changes sides.*

## THE MARKETPLACE

- “Free trade in ideas.”
- Truth is tested in competition.

## THE LIMIT

- Only an imminent threat.
- Require intent.

“It is an experiment, as all life is an experiment.”

# Whitney: deference, and Brandeis

*The 1920s: the legislature decides what is dangerous.*

## THE COURT

- Defer to the legislature.
- Overturn only the unreasonable or arbitrary.

## BRANDEIS, CONCURRING

- Only an emergency justifies repression.
- The danger must be imminent.

“The remedy to be applied is more speech, not enforced silence.”

# Dennis: Learned Hand's formula

*Leaders of the Communist Party, convicted under the Smith Act.*

**Gravity of the evil × its probability > the cost to speech**

## WHAT IT DOES

- A grave enough evil needs no imminence.

## WHAT IT LEAVES OUT

- First Amendment values.

# Brandenburg: the test today

*A Klan rally in Ohio, 1964. A per curiam opinion, 1969.*

1

**Directed to inciting**

Intent.

2

**Imminent lawless action**

Not someday.

3

**Likely to produce it**

The element my board leaves out.

## INCITEMENT VERSUS ADVOCACY

- Incitement: not protected. Advocacy, even of force: protected.

# Fighting words: Chaplinsky

*A street preacher, a city marshal, and two epithets.*

## THE DEFINITION

- Words that “inflict injury,” or
- “tend to incite an immediate breach of the peace.”

## WHY

- They provoke an immediate violent reaction.
- They break the channels of communication.

*“Well-defined and narrowly limited classes of speech.” Watch them narrow.*

# Snyder v. Phelps: offensive, and protected

*Picketing near a soldier's funeral. A preview of Module 5.*

## THE CLAIM

- Intentional infliction of emotional distress.
- A jury verdict for the father.

## THE COURT

- Speech on public issues.
- Offensive — and protected.

“We cannot react to that pain by punishing the speaker.”

# Group libel and hate speech

*Not a disfavored category — with one old case never overruled.*

## GROUP LIBEL

- Beauharnais upheld a ban, 1952.
- Called into question by New York Times v. Sullivan.
- Never overruled.

## HATE SPEECH

- Not a disfavored category.

## SKOKIE

- A neo-Nazi march through a Jewish community.
- Protected.

*The First Amendment protects offensive speech.*

# R.A.V.: no side-taking inside a category

*A burning cross on a Black family's lawn, and a St. Paul ordinance.*

## THE ORDINANCE

- Fighting words — but only those about race, religion, gender.

## THE COURT

- Struck down.
- No viewpoint lines inside a category.

“Fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”

# Virginia v. Black: true threats

*Cross burning with intent to intimidate.*

## THE HOLDING

- A ban on cross burning with intent to intimidate: upheld.
- Presuming the intent: not.

## A TRUE THREAT

- A serious expression of intent to commit unlawful violence.
- No need to intend to carry it out.

*The open question: what must the speaker know?*

# Counterman: recklessness is enough

*Hundreds of unwanted messages to a stranger on Facebook.*

## INCITEMENT

- Intent.

## TRUE THREATS

- Recklessness: conscious disregard of a substantial risk.

## NOT ENOUGH

- A reasonable person's reading alone.

*The speaker's mind matters — how much depends on the category.*

# Violent speech: no new categories

*Crush videos and violent video games. A preview of Module 6.*

## STEVENS, 2010

- Depictions of animal cruelty.
- No “freewheeling authority” to add categories.

## BROWN, 2011

- Violent video games for minors.
- Protected.

*The list is closed. History defines the categories, not balancing.*

# For discussion: the council meeting

*A hypothetical. Every category in this module is in play.*

## THE FACTS

- A post: “Meet at her office ... bring whatever it takes.”
- “I know where she parks.”
- A window is broken.
- Later, a face-to-face confrontation.

## QUESTIONS FOR DISCUSSION

1. Incitement?
2. A true threat? What must he have known?
3. Fighting words?
4. Can the city ban “hateful speech”?
5. What would Holmes and Brandeis say?

# Module 4 on one slide

*One line per category.*

## THE LINE, ONE CATEGORY AT A TIME

- Incitement: intent, imminence, likelihood (Brandenburg).
- Fighting words: face to face, likely to provoke a fight (Chaplinsky).
- Hate speech: no category of its own.
- Inside a category: no viewpoint lines (R.A.V.).
- True threats: at least recklessness (Virginia v. Black; Countertermen).
- New categories: none (Stevens; Brown).

*Next — Module 5: defamation and emotional distress.*

Next: Module 5 — Defamation and Emotional Distress. Chemerinsky, per the syllabus.