



UNPROTECTED SPEECH

Fighting Words

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SEMINAL CASES

FIGHTING WORDS

Chaplinsky v. New Hampshire, 315
U.S. 568 (1942)

OBSCENITY

Miller v. California, 413 U.S. 15
(1973)

INCITEMENT OF IMMINENT LAWLESS ACTION

Brandenburg v. Ohio, 39 U.S. 444
(1969)

TRUE THREAT

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DEFAMATION

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U.S. 1 (1993)

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U.S. 46 (1988)

Fighting Words

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)

Chaplinsky was convicted under a state statute for verbally attacking the City Marshall by calling him a “damned racketeer” and a “damned Fascist”

This case took place during WWII, at a time in which accusations of racketeering or fascism were taken quite seriously

The Court held that Chaplinsky’s epithets were “fighting words” which were “likely to provoke the average person to retaliation, and thereby cause a breach of the peace”

There have been no other holdings on fighting words since 1942

Do you think there are words that would rise to that level today?

Obscenity

Miller v. California, 413 U.S. 15 (1973)

Marvin Miller sent advertisements for adult books and films he had for sale through a mass mailing campaign which depicted sexual acts.

Recipients who received the mail did not willingly request or grant permission to receive the mailed advertisements.

The Court ruled in favor of the State of California, saying Miller engaged in obscenity.

Obscenity (cont.)

Miller v. California, 413 U.S. 15 (1973)

The court found obscenity was determined by:

Whether the average person, applying contemporary standards of the community, would find that the work only appeals to the prurient interest of others

Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law

Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value

Incitement of Imminent Lawless Action

Brandenburg v. Ohio, 39 U.S. 444 (1969)

The leader of the Ku Klux Klan was convicted under the Ohio statute for threatening that “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 [sic] taken”

The Court found in favor of the Klan, stating “**speech that merely advocates rather than actually incites violence shall be protected by the First Amendment**”

The Court stated that a governmental entity may not forbid or proscribe advocacy of the use of force or law violations except where such advocacy incites or produces imminent lawless action and is likely to produce such action

True Threat

Virginia v. Black, 538 U.S. 343 (2003)

Barry Black and others were convicted of violating a Virginia statute that makes it a felony “for any person..., with the intent of intimidating any person or group..., to burn...a cross on the property of another, a highway or other public place,” and specifies that “any such burning...shall be prima facie evidence of an intent to intimidate a person or group”

The Court held that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional

Defamation

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1993)

Milkovich, Maple Heights High School's wrestling coach, testified at a hearing concerning a physical altercation at a recent wrestling meet

After the hearing, Theodore Daidium published an article in the local newspaper saying that anyone at the wrestling meet “knows in their heart” that Milkovich lied at the hearing

Milkovich sued Daidium and the paper for defamation, alleging that the article accused him of perjury, damaged his occupation, and constituted libel

The Supreme Court found against the newspaper, stating that Milkovich was not a public figure and the defamatory statements were factual assertions, not constitutionally-protected opinions

But...See Another Case

Hustler Magazine v. Falwell, 485 U.S. 46 (1988)

Jerry Falwell, a world-famous minister, brought a lawsuit against Hustler magazine for defamation for portraying him in a cartoon parody which suggested he had an incestuous relationship with his mother and preached only when he was drunk

The Court found the parody to be protected speech, saying public figures like Falwell, and public officials, may not have a defamation claim without showing actual malice by the author, because such a standard is necessary to give adequate breathing space to the First Amendment



The Importance of Analyzing the Activity Before Taking Action

Considerations

Three-Step Analysis

Considerations

Free expression on public college campuses does not guarantee unfettered access to property simply because it is owned or controlled by a government entity

Public institutions have the right to impose reasonable regulations compatible with the institutional mission by carefully applying the type of expression to the location of the expression and using a viewpoint neutral time, place and manner approach based on the location

Not all locations on campus have the same type of standards on restricting expression

Three-Step Analysis

STEP 1: Are there 1st Amendment implications in the activity presented?

Does it include any components of “expression” (not conduct)

Consider: not just speech, but leafleting, signs, bulletin boards, chalking, clothing, etc.

Does it have a religious component?

Does it involve a campus newspaper, radio, TV station?

Does it involve a group activity on campus, i.e., demonstration, protest, walkout, rally?

Is there a request for meeting room space?

Does it involve group or organization official recognition?

Three-Step Analysis (cont.)

STEP 2: Are there any clear exceptions to the 1st Amendment at issue?

Each potential exception requires a separate analysis to the specific set of facts presented

Courts will apply exceptions very narrowly

Must be applied with extreme caution

Three-Step Analysis (cont.)

STEP 3: Analysis of facts identified in Steps 1 & 2 in consideration of the location on campus (the “forum”)

Any restriction based solely on the message to be delivered will always be prohibited (unless it's one of the exceptions)

Institution can apply a content (message) neutral “time, place, and manner” limitation, but it must do so with careful consideration of the facts and the location and document the decision

For Example...

Campus Occupation or Mass Sit-In Demonstrations

There is no First Amendment right to occupy or block egress to a campus building, office or interfere with university operations (Chermerinsky & Gillman, 2017).

- Concordia University in February of 2020 – upon announcing the University would close at the end of the spring 2020 semester, students engaged in a walk-out and staged a sit-in at the University President's office.
 - One main talking point was that the University had not created space for the students to voice their opinions and concerns.



UNDERSTANDING THE IMPORTANCE OF LOCATION IN REGULATING A FIRST AMENDMENT ACTIVITY

Understanding Location (Forum)

Traditional Public Forum

Campus mall, public streets through campus, public sidewalks

Designated Public Forum

Areas the institution designates for “free speech” such as green space, campus mall areas

Limited Public Forum

Auditoriums, meeting rooms, athletic facilities

Non-public Forum

Classrooms, residence halls, campus offices

Traditional Public Forum & Designated Public Forum

A traditional public forum requires the most limited application of restrictions to any form of expression

Any limitation to the speech, assembly, or other forms of expression must serve a significant interest of the institution:

- Not disrupting the delivery of education

- Not posing a significant health or safety risk (but one can't speculate on the risk—it must be imminent and specific)

- Placing a priority on the use of the space to support the institutional mission

- Not blocking the ingress or egress of buildings, hallways, offices

Limited Public Forum

The institution is only required to meet a “reasonableness” standard when applying limitations in this space

An activity may be limited based on the nature of the location and type of activity, but it cannot be limited based on the message of the activity

Any limitation must be related to legitimate, clearly articulated standards based on the type of the location

Limitations cannot restrict more speech or expression than is necessary

Schools must be careful about “prior restraints of speech,” that is anything that would be unnecessary and may limit or chill the expression

Non-Public Forum

Any location that the institution has not opened for general public discourse, such as classrooms, offices, etc.

May limit the location (forum) for its intended purpose only

May apply limitations on the subject matter being discussed and the identity of the speaker, but not based on the speaker's message

- For example, institution may limit classroom discussion to the subject matter of the course being taught, but not on the opinion that the faculty member or student would have about what is being discussed

May restrict commercial solicitation in residence halls

May restrict someone from an office whose message is not consistent with the nature of the office

Any limitation must maintain viewpoint neutrality

Limitation must be reasonable

THANK YOU!

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