Fromm/Great Free Speech Cases/Carcieri/Session 2
Clear and Present Danger to Incitement to Imminent Violence

Under our law, free speech is the rule, not the exception

John Stuart Mill's Harm principle

Reasons for protecting speech: Truth, Self-government, Autonomy

Schenck v. U.S. 249 U.S. 47 (1919)

Facts: Defendant (D) used the U.S. mails to send a document describing conscription as slavery, blaming the war on cunning politicians and a capitalist mercenary press, and calling on conscripts to assert their opposition to the draft. He was indicted for conspiracy to violate the Espionage Act, conspiracy to use the mails to send non-mailable matter, and unlawful use of the mails for transmission of that matter.

Issue: Whether this indictment violates the Free Speech Clause. H: No

Rationale (Justice Holmes): "The character of every act depends on the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. 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. When a nation is at war many things that might be said it time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight …."

Abrams v. U.S., 250 U.S. 616 (1919)

F: Defendants (D's) distributed thousands of copies of two leaflets on New York streets. The first called the President a coward and a hypocrite, claimed that German militarism and allied capitalism were crushing the Russian Revolution, and called it a crime for U.S. workers to fight that revolution. The second advised munitions factory workers that their products were being used to murder their compatriots in Russia, and called for a general strike.

P: D's were convicted under the 1917 Espionage Act as amended of conspiracy to encourage resistance to the U.S. effort in World War I, and for incitement to curtail production of things necessary for that war effort.

I: Whether a conviction for publishing leaflets advocating violent resistance to an ongoing national war effort violates the Free Speech Clause. H: No

R: Men must be held to intend and be accountable for the likely effects of their acts.

R: Whatever their intent, D's' plan of action necessarily involved defeat of the U.S. war program.

R: The plain purpose of D's' propaganda was to excite disaffection, sedition, riots, and revolution in order to defeat national wartime efforts (and so the intent required by the statute is satisfied).

Gitlow v. New York, 268 U.S. 652 (1925)

F: New York's criminal anarchy statute made it a felony to advocate the violent overthrow of organized government. Defendant was an official of the Socialist Party's Left Wing Section, whose official paper published and mailed several thousand copies of the Manifesto. Although there was no evidence of any effect resulting from the Manifesto's publication, it condemned moderate socialism and urged revolutionary mass action, e.g., industrial strikes, to destroy the parliamentary state.

I: Whether the statute, as applied by state courts, denied liberty of expression without due process of law in violation of the 1st and 14th Amendments. H: No

R: The Manifesto is not an expression of philosophical abstraction; it is direct incitement to the use of violent means to overthrow organized government.

R: Although free speech is among the fundamental liberties protected by the due process clause of the 14th Amendment, it is not an absolute right.

R: There is a strong presumption in favor of the statute's validity.

R: The speech in question by its nature creates a clear and present danger.

R: A state need not wait until speech has had its effect in order to suppress it.

Whitney v. CA, 274 U.S. 357 (1927)

F: D was a member of the Communist Labor Party (CLP) and attended its convention as a delegate. Although her resolution that the party attempt to gain political power by the ballot was rejected in favor of a revolutionary platform advocating the seizure of power, she remained at the convention and did not resign from the party. She was then charged and convicted under California's criminal syndicalism statute with knowing membership in an organization advocating violent revolution.

I: Whether conviction for advocating peaceful, lawful political change under a statute criminalizing membership in an organization advocating criminal syndicalism violates liberty without due process under the 1st and 14th Amendments. H: No

R: A state may punish utterances that tend to incite crime and endanger government.

R: Since defendant is simply attempting to review the evidence, she raises a question of fact, not law, which is thus foreclosed by the jury verdict.

R: D was convicted of conspiracy, which is more dangerous than individual action.

Justices Brandeis and Holmes, concurring

"This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial that to justify resort to abridgment of free speech and assembly as the means of protection. To reach sound conclusions on these matters, we must bear in mind why a State is, ordinarily denied the power to prohibit dissemination of social, economic, and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequences.

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty ....

They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path to safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent.... Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it.... But even advocacy of law-breaking, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated ....

If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.... Among free men, the deterrents ordinarily to be applied are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly."

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

F: Defendant gave a speech at a Ku Klux Klan rally. He made many racist statements, and said the following: "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppression the white, Caucasian race, it's possible that there might have to be some revengeance taken… Thank you." On this basis, D was convicted under a state criminal syndicalism statute for "advocating 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 assembling … to teach or advocate the doctrines of criminal syndicalism." He was fined $1000, sentenced to one to ten years' imprisonment, and challenged his conviction and punishment on First Amendment grounds.

The Supreme Court ruled for Brandenburg, reversing his conviction. As it wrote, "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."