CLASH OF AMERICAN IDEALS: INCITEMENT AND THE FIRST AMENDMENT

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The January 6, 2021, insurrection at the Capitol has renewed interest in the dynamic between incitement speech and First Amendment protections. Below we provide a brief overview of some landmark cases in this area, in addition to some cases of more recent vintage.

The United States legal system has long struggled to balance the value of free speech and the importance of protecting public order and safety—a balancing act that is "as persistent as it is perplexing." *Niemotko v. Maryland*, 340 U.S. 268, 275 (1951) (Frankfurter, J., concurring). Though the First Amendment's language is absolute, the Supreme Court instructs that it "does not embrace certain categories of speech," including incitement of imminent lawless action. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245–46 (2002). The "line between unlawful incitement and permissible showmanship—between a plea for physical action and a figurative chumming of political waters—is unclear." Clay Calvert, *First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer*, 51 Conn. L. Rev. 117, 125 (2019).

For decades, courts fashioned this line by asking (in various iterations) whether the speaker created a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety." *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). In 1949, when racial segregation was the status quo, Irving Feiner was arrested and convicted of disorderly conduct after addressing a large crowd through a loud-speaker system on a public sidewalk. *Feiner v. New York*, 340 U.S. 315, 316–19 (1951). Feiner urged his listeners to attend a meeting at the Syracuse Hotel, then made "derogatory remarks" about President Truman and various local political officials, urging African Americans to "rise up in arms and fight for equal rights." *Id.* In upholding Feiner's conviction, the Supreme Court explained that his speech created a clear and present danger by aggravating a large crowd and ignoring police requests to stop. *Id.* at 320.

Ultimately, in 1969, the Supreme Court announced a more speech-protective test in *Brandenburg v. Ohio*, which courts still rely on today. There, a leader of a Ku Klux Klan group in Ohio was convicted under the Ohio Criminal Syndicalism Act after holding a cross-burning rally and proclaiming in part that if the government "continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken." *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969). The Supreme Court struck down the Ohio statute as unconstitutional, emphasizing the difference between "abstract teaching of moral propriety or even moral necessity to resort to force and violence" and "preparing a group for violent action and steeling it to such action." *Id.* at 447–48.

The Court's decision in *Brandenburg* led to a three-part test to determine whether speech incites imminent lawless action: (1) ***intent*** to cause illegal action; (2) ***imminence*** of illegal action; and (3) ***likelihood*** of such action. *Id.* at 448–49.

The Court clarified its imminence requirement in *Hess v. Indiana*, 414 U.S. 105 (1973). In that case, the speaker was arrested during an antiwar demonstration at Indiana University's campus for shouting, "We'll take to the f****** street [later or again]." *Id.* at 107. The Court held that states could not punish this speech because, "at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time." *Id.* at 108.

More recently, the legal community revisited the incitement standard after incidents during the 2016 presidential campaign and the August 2017 "Unite the Right" rally in Charlottesville, Virginia. In March 2016, several protestors attended then-candidate Trump's campaign rally in Louisville, Kentucky "with the intention of peacefully protesting." *Nwanguma v. Trump*, 903 F.3d 604, 606 (6th Cir. 2018).

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On five different occasions, Trump issued directives to "get 'em out of here," referring to the protestors. *Id.* In response, audience members assaulted, punched, and shoved the protestors, who later filed tort claims against Trump for incitement to riot, among other things. *Id.* at 606–07. The complaint described "a chaotic and violent scene in which a crowd of people turned on three individuals." *Id.* at 608.

The Western District of Kentucky denied Trump's motion to dismiss, reasoning that the phrase "'get 'em out of here' is stated in the imperative" and was "an order, an instruction, a command" that is not entitled to First Amendment protection. *Nwanguma v. Trump*, 273 F. Supp. 3d 719, 727 (W.D. Ky. 2017), *rev'd and remanded*, 903 F.3d 604 (6th Cir. 2018). The Sixth Circuit granted Trump's interlocutory appeal—*see In re Trump*, 874 F.3d 948 (6th Cir. 2017)—and then reversed the district court's decision. The Sixth Circuit explained that incitement speech must specifically advocate for unlawful action and that "not a single word encouraged violence or lawlessness." *Nwanguma*, 903 F.3d at 610. Although "Trump's words may *arguably* have had a tendency to encourage unlawful use of force," this was not enough under the *Brandenburg* test. *Id.*

In the wake of the violent Charlottesville rally, several major public universities cancelled events where Richard Spencer, a notorious white nationalist who was present at Charlottesville, planned to participate. Each of the universities explained that they feared Mr. Spencer would jeopardize public safety by inciting violence. Clay Calvert, *First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer*, 51 Conn. L. Rev. 117, 145–49 (2019). As one university president put it, "the First Amendment does not require our University to risk imminent violence." Press Release, Pennsylvania State University, *Richard Spencer Is Not Welcome to Speak at Penn State* (Aug. 22, 2017), http://news.psu.edu/story/478590/2017/08/22/administration/richard-spencer-not-welcome-speak-penn-state. Spencer challenged that assertion by filing claims against the universities under 42 U.S.C. § 1983, alleging violations of his civil rights.

Spencer prevailed in his case against Auburn University. *See Padgett v. Auburn Univ.*, No. 3:17-CV-231-WKW, 2017 WL 10241386 (M.D. Ala. Apr. 18, 2017). Citing *Brandenburg*, the Middle District of Alabama explained, first, that "Auburn did not produce evidence that Mr. Spencer's speech is likely to likely to incite or produce imminent lawless action." *Id.* at *1. The evidence showed that both Auburn University and Spencer were prepared to bolster security. *Id.* And, the court noted that the university's concern for Spencer's ideology, along with the listeners' reaction to that ideology, constituted viewpoint discrimination. *Id.*

At least two individuals were convicted under the Anti-Riot Act for their participation in Charlottesville, along with two other violent, white-supremacist rallies. At each rally, the defendants assaulted counter-protestors, including by chasing them down, punching, and choking them. *United States v. Miselis*, 972 F.3d 518, 526–27 (4th Cir. 2020). The defendants appealed their convictions on the grounds that the Anti-Riot Act was facially overbroad. *Id.* at 525. The Fourth Circuit agreed in part, but it upheld the defendants' convictions under the Act's surviving provisions. *Id.* at 525–26, 547. The court explained that several of the Act's provisions "sweep[] up a substantial amount of speech that retains the status of protected advocacy under Brandenburg insofar as it encompasses speech tending to 'encourage' or 'promote' a riot . . . , as well as speech 'urging' others to riot or 'involving' mere advocacy of violence." *Id.* at 530.

Speech enjoys broad protection under current precedent, even if that speech could pose a threat to public safety, and even if it is "offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). On February 16, 2021, however, Representative Bennie Thompson (D-Miss.)—chairman of the House Homeland Security Committee—sued former president Donald Trump and his lawyer, Rudy Giuliani, in the United States District Court for the District of Columbia, alleging that their speech incited the January 6 violence at the Capitol. *See Thompson v. Trump*, 1:2021-cv-00400 (D.D.C.).

This lawsuit and others could represent a new era in incitement jurisprudence, forcing courts to reappraise the delicate balance between free speech and social order. If nothing else, it will underscore that this Republic resolves differences in courts of law, not through violence that has "the probability [to cause] serious injury to the State." *Whitney v. California*, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring).