



MASARYK UNIVERSITY
FACULTY OF LAW

MVV60K

Media Law

Freedom of Speech

II.



Tests - Supreme court of the U.S.A.

I. Bad tendency doctrine

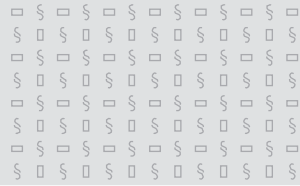
- *Whitney v. California* 274 U.S. 357 (1927)
- It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. [...] It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. *Gitlow v. New York* (1925)

II. Clear and present danger doctrine

- I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times. *ABRAMS v. U S, Holmes dissenting*

III. Imminent lawless action

IV. Preferred position doctrine



Tests- Supreme court of the U.S.A.

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

- „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.“

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

- „[T]he 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.“
- Important is the content.



Fighting Words

- ***Chaplinsky v. New Hampshire* 315 U.S. 568 (1941)**
 - It is well understood that the right of free speech is not absolute at all times and under all circumstances. For example, lewd or obscene speech, profane or libelous speech may legitimately be limited. This also included 'fighting words': [Words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace.
- ***R.A.V. v. City of St. Paul* 505 U.S. 377 (1992)**
 - Although the phrase in the ordinance, "arouses anger, alarm or resentment in others," has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to "fighting words," the remaining, unmodified terms make clear that the ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas - to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality - are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.



Restriction of speech

- assessment of particular categories of speech
(negative content regulation), e.g.:
 - indecency
 - protection of the state (public order)
 - protection of the state organs (incl. protection of the court proceedings)
 - regulation of elections
 - etc.
- **prior restraints** (incl. general censorship)
- **incidental restrictions**



Obscenity, indecency,... in Europe

- **Handyside v. the United Kingdom 7 December 1976:**
 - *In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.*
- **Open Door Counselling Ltd. and Dublin Well Woman v. Ireland (1992):**
 - This can be a political question.



Obscenity, indecency,... in Europe and elsewhere

■ "A ver" Case (Spain):

- *public morality -- as a shared ethical component of social life -- is liable to take different forms across different periods and in different countries and is conventionally not immutable from a social point of view.*

■ Korea:

- *Obscenity is a sexually blatant and undisguised expression that distorts human dignity or humanity. It only appeals to prurient interests and, if taken as a whole, does not possess any literary, artistic, scientific, or political value.*



Obscenity, indecency,... in the Europe

- Obscene Publications Act 1959 (U.K.):
 - For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as **to tend to deprave and corrupt** persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.
- Czech Republic:
 - ***IV. ÚS 606/03***
 - Incidence on person with common feelings
 - question of art



Protection of youth and infancy

- Council Directive 89/552/EEC (*Television without frontiers*).
 - Article 22: Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction **do not include programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence.** This provision shall extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.
- Case E-8/97:
 - *The exception in the second sentence of Article 22, first paragraph does not extend to programmes 'which might seriously impair the physical, mental or moral development of minors' dealt with in the first sentence of Article 22, first paragraph.*



Obscenity, indecency,... in the U.S.A.

- JACOBELLIS v. OHIO, 378 U.S. 184 (1964):

- *... I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since Roth and Alberts, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.*



Obscenity, indecency,... in the U.S.A.

- **Miller v. California** 413 U.S. 15 (1973):
 - *Taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political or scientific value.*
 - *(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interests; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.*



Obscenity, indecency,... in the U.S.A.

■ UNITED STATES v. ONE BOOK CALLED "ULYSSES,,:

- *The reputation of "Ulysses" in the literary world, however, warranted my taking such time as was necessary to enable me to satisfy myself as to the intent with which the book was written, for, of course, in any case where a book is claimed to be obscene it must first be determined, whether the intent with which it was written was what is called, according to the usual phrase, pornographic, that is, written for the purpose of exploiting obscenity. If the conclusion is that the book is pornographic, that is the end of the inquiry and forfeiture must follow. But in "Ulysses," in spite of its unusual frankness, I do not detect anywhere the leer of the sensualist. I hold, therefore, that it is not pornographic.*



Reality television - Big brother series

- One of the key rationales for regulatory intervention refers to the power of broadcasting to intrude into people's lives and to influence their lives.
- Regulate such tv series?
 - regulate reality television?



Public order

- Right to criticize the Government.
- **Castells v. Spain 23 April 1992:**
 - *In the case under review Mr Castells did not express his opinion from the senate floor, as he might have done without fear of sanctions, but chose to do so in a periodical. That does not mean, however, that he lost his right to criticize the Government.*
- **Thorgeir Thorgeirson v. Iceland 25 June 1992:**
 - Press as a public watchdog.
 - High protection of political debates.



Public order - the question of war

- Government propaganda
- censorship
- interest of people
- interest of government

