

Panel IV: Free Speech, Incitement, and Ideas

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Gitlow Revisited: Ideas, Incitement, and Crimes

An enraged King Henry II famously asked several of his barons, while the court met in Normandy, “Will no one rid me of this turbulent priest?!” King Henry was referring, of course, to Thomas Becket, the incumbent Bishop of Canterbury and head of the Roman Catholic Church in England. Becket had steadfastly insisted on preserving the independence of the ecclesiastical courts (much to King Henry’s dismay). Subsequently, several of these same barons went from Normandy, in France, to Canterbury, in England, and proceeded to assassinate Becket on December 29, 1170. On January 6, 2021, then-President Donald Trump told his followers, toward the end of a mass rally on the Ellipse (a park located about two miles from the U.S. Capitol) that “[W]e fight. We fight like hell. And if you don’t fight like hell, you’re not going to have a country anymore.” A bit later, he said “So let’s walk down Pennsylvania Avenue.” Are either of these statements “incitements” to unlawful action under governing First Amendment doctrine? And, if not, does it much matter given that the statements could easily be charged as either solicitations or conspiracies rather than as incitements?

Under *Brandenburg*, “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.” In King Henry’s case, it was literally impossible for his admonition to produce imminent action. By way of contrast, Trump’s angry mob could have acted immediately (and did), but Trump’s language did not clearly advocate a specific illegal action; at least arguably, “fight[ing] like hell” constitutes hyperbolic political speech of the sort *Watts* held protected under the First Amendment. Whether or not the incitement question matters, however, is open to some serious doubts because a savvy prosecutor would almost certainly not charge incitement (in either case) but instead would allege solicitation of a crime or a conspiracy to commit a crime. *Brandenburg*, which adopts the approach that Justice Holmes advocates in his *Gitlow* dissent, does not cabin the bite of either solicitation or conspiracy charges and *U.S. v. Williams* squarely holds that speech soliciting a crime enjoys no protection whatsoever under the First Amendment’s Free Speech Clause.

In *Gitlow*, Holmes argued that “[t]he only difference between the expression of an opinion and an incitement in the narrower sense is the speaker’s enthusiasm for the result.” He rejected prosecuting Gitlow for his publications because they created at most a danger that was “futile and too remote from possible consequences.” But what if the government had charged solicitation of draft evasion or a conspiracy? Would Holmes’s free speech concerns have simply vanished based solely upon the technicalities of the indictment? First Amendment protection for speech should not turn on the crime alleged rather than on the social value of particular speech activity (in general) and its relevance to facilitating democratic self-governance (in particular). It’s essential to disentangle the advocacy of “bad” ideas, incitement, and other crimes. “Bad” ideas should almost always be fully protected because the dangers associated with government

censorship are at their zenith when government seeks to prohibit any discussion of a particular idea or theory. By way of contrast, contra *Brandenburg* and *Williams*, First Amendment protection for calls *to* or *for* unlawful action should not depend solely on the specific crime charged. Instead, the potential relationship of potentially socially harmful speech to democratic self-government should drive the First Amendment analysis.