

Anti-Orthodoxy, Inclusion, and Advocating Violence
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In *Brandenburg v. Ohio* (1969) the U.S. Supreme Court held government may prohibit and punish speech advocating the use of force or crime if the speech is: (1) is directed to inciting or producing imminent lawless action and (2) likely to incite or produce such action. However, speech like Clarence Brandenburg's that advocates the use of violence to achieve some social or political goal (i.e., abstract / mere advocacy) but fails to meet these imminent incitement conditions is constitutionally protected. I propose to discuss the history and justification for the Brandenburg Test in two steps.

The first step addresses reasons for prohibiting abstract / mere advocacy of violence. It was not legally protected for most of U.S. history and fits poorly with the modern "standard" justifications for robust expressive legal rights (essential to healthy democracy, search for truth, balance between social stability and change, and self-realization).

The second step suggests a better justification for protecting abstract / mere advocacy (but not imminent incitement) are the twin values of anti-orthodoxy and inclusion. First, I discuss the crucial role anti-orthodoxy and inclusion played in the development of robust expressive rights. Second, I explain how anti-orthodoxy and inclusion underlie and strengthen the "standard" justifications for robust expressive rights. Finally, I discuss how and why anti-orthodoxy and inclusion support the distinction between mere advocacy and imminent incitement.

Keywords: Brandenburg, incitement, advocacy of violence, free speech justifications, anti-orthodoxy, inclusion

Biography

Shiell is a free speech scholar and activist at the University of Wisconsin-Stout. He is professor of philosophy, founder and director of the civil liberty focused Menard Center for the Study of Institutions and Innovation (MCSII), and founder and former director of the Center for Applied Ethics. His most recent books are *African Americans and the First Amendment* (2019) and *Civil Liberties in Real Life* (2020). He has authored other books, articles, and publications, and done more than a hundred and fifty presentations, workshops, panels. Shiell

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