**Lecture 9/23 –**

Case: I am a climate change activist with a large following, have become radicalized after observing inaction in this country – give a speech in a park in Manhattan and I tell my crowd “Time we take the law into our own hands” and urge everybody to “blow up some buildings” if necessary. And they should do it in the next week! Crowd is enthusiastic, and they agree, rowdy and pushing, expletives thrown

* Is this protected speech? What case should we turn to immediately?
  + Brandenburg first – Speech advocating for illegal action. This case gives the three-prong test case. “Express advocacy, imminent, likelihood of occurrence”
    - Did Brandenburg mean to show incitement is an explicit part of their test?
    - “Directed to inciting or producing imminent lawless action”, “likely to incite or produce such action”
    - Had this case been delegating actions “you blow this up, she burns this down”
      * One argument that it IS protected – this is not imminent, so Brandenburg’s test is not satisfied here

Other hypothetical – Meet a group of friends in apartment and say “time we commit acts of violence” we will provide a cell of violence on behalf of climate change. “John blows up this building, Sally burns this thing down”

* Is this the same case as the one in the park?
  + Maybe not – if this is in, say, “the next month,” – then the marketplace of ideas could come up with a counterargument to dissuade these people from blowing stuff up
  + **Court – we do not protect counseling to murder**, we do not protect speech that says to an assassin “Assassinate this person within the next month”
    - What happens in the private, out of public sphere is too dangerous because of inability of counter-speech, difficulty to law enforcement, and the lack of contribution to public debate
    - Nonpublic realm has less value according to the standard of “marketplace of ideas”
    - Fraud is also not protected – recall “fire in a crowded theater”

Case: If on Low, say “you should spray-paint something obscene to the administration on these steps.” People are excited and all take out spray cans, Police arrest the speaker and the painters

* Make case that this is STILL protected?
* Brandeis and Whitney – it has to be really serious, we have to protect speech extremely, speech that is about ideas and thought, robust speech allowed until it is just about the illegal action
  + Situation is not grave at all, so speech could be protected

New Case: White Nationalists vs protestors, lots of yelling, police officer tells me to stop and I say “Fuck you”

* Protected or Not?
* Yes:
  + Cohen v California – walked around a courthouse with a jacket saying “Fuck the Draft” – California law prohibited this kind of behavior
  + Fighting words can be prohibited if it was directed at a person, but it requires that there be a reasonable response to violence. We EXPECT restraint from the police
  + Saying “Fuck you” might just be a form of protest against the overreach of the state
  + This confrontation, maybe there is a risk of violence – but the State has to live with that and tolerate that because *we value free speech*
  + State can’t use negative response of speaker’s ideas to claim it is unprotected – if we open up that door, then our free speech rights are dependent upon “people don’t like it”
* No:
  + The crowd was being rowdy and volatile, of course the police had an obligation to stop it
  + Important factors for “no” – crowd’s actual reaction, threat of immediate violence, what crowd is being directed to do, injuries that could result, amount of police present
    - Court has said over and over – it depends on the circumstance
* Skokie Case:
  + Several thousand survivors of Nazi camps live here, now group of Neo-Nazis want to march through it. One argument stated is “we will not be able to prevent the violence”
    - Court – we have to protect the speaker
    - To what extent do we have to protect the speaker?
      * Do we have to spend all of Skokie’s budget just to protect these guys?