

The First Amendment: Cases & Theory
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Website Updates (Chapters 3, 4 and 5)

Chapter 3

Insert after the extended note on Chaplinsky on page 93:

In June 2009 a Nebraska state appellate court upheld a breach of peace conviction against Darren Drahota for sending abusive emails to one of his professors. See *State of Nebraska v. Drahota*, 17 Neb. App. 678 (2009). The emails are detailed in the opinion which is posted on the website (it's pretty short). The case provides a useful vehicle for exploring application of the fighting words standards announced in *Cohen* and subsequent cases. Do Drahota's words amount to fighting words? Are they threats (good review of that too)? If not, do they amount to something like harassment? Why? Does the form of the communication – email – have any effect on one's conclusion? Does the fact that the final communications were allegedly anonymous (although it's not clear) affect one's conclusion? The book takes up anonymity in Chapter 6 but this is a good way of easing into some of those issues.

Chapter 4:

Insert after note 2 on page 199:

For those authors who would like to explore the issues surrounding the public forum doctrine in the context of a continuing contemporary problem, excerpted versions of *Arizona Life Coalition v. Stanton*, 515 F.3d 956 (9th Cir. 2008) and *Choose Life Illinois, Inc. v. White*, 547 F.3d 853 (7th Cir. 2008) are posted on the website. These cases deal with whether a state's denial of a specialty license plate with the message "Choose Life" violate the First Amendment. The 9th Circuit in *Stanton* ruled that the denial violated the First Amendment, finding that the license plates were a limited public forum and ultimately concluding that the exclusion was viewpoint discriminatory. In contrast, the 7th Circuit in *White*, found that the license plates were a non-public forum and that a similar exclusion was viewpoint neutral and reasonable. The two cases present a nice opportunity to discuss how the state creates a forum and whether there are appreciable differences between limited and non-public fora, what kinds of exclusions are acceptable, whether one can easily discern the difference between subject matter and viewpoint restrictions and the difficulty in understanding the parameters of the Court's increasingly messy doctrine in this area.

Also, both cases involved the issue of whether the Court's license plates actually involved government speech – both courts concluded that they did not. The casebook takes that issue up in Chapter 12 but some of us (the authors) also occasionally deal with it in Chapter

4. Increasingly, the Court must decide whether to analyze cases using either government speech or public forum principles (see, e.g., *Pleasant Grove City v. Summum*, 555 U.S. ___ (2009)). The license plates cases present this issue starkly and can be an opportunity to bring the government speech cases from Chapter 12 earlier into the class if one wants to do that. The license plate cases also discuss the lower courts' various standards for distinguishing between government speech and private speech, an issue that the Supreme Court has yet to deal with in any serious manner. Note that *White* and *Stanton* both deal with this issue using slightly different multi-factored tests? Does the test used make a difference or is there so much malleability as to make it easy for the courts to pick and choose? Note that both courts admit that the state has a prominent role in speaking but conclude that the license plates are a forum because private speech is involved. Nevertheless, the state's prominent role makes it a non-public forum. What does this suggest about the distinction between government speech and non-public fora? For an insightful discussion, see Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 New York University Law Review 605 (2008).

Chapter 5:

For those who want to explore with students the issue of "what is (or should be considered) symbolic conduct?" we have added to the website a few problems that can jump start that discussion. The first problem is a variation on "saggy pants" ordinances that have been enacted or proposed around the country in the last few years. The problem itself has been changed somewhat from the original context (which involved an attempt to rein in gang activity) in order to broaden the discussion. Some possible questions regarding the problem include:

What does it mean for a person to say they are expressing themselves through the wearing of clothing? Does it matter that such expression rarely has a particularized message? It actually might have a particularized message here ("support State U") but it often does not – should that matter? Should we treat people differently if their clothing has a particularized message versus if it does not? Is the latter any less personally expressive? But does that constitutionalize clothing choices? Is that a good thing? Are we so much concerned with protecting people's clothing choices or the government's reasons for wanting to regulate them? (This latter question may get into the futility of trying to determine when something is expressive versus looking at the regulation to see why the government is regulating).

For history and background regarding "saggy pants" ordinances, see Angelica M. Sinopole, "*No Saggy Pants:*" A Review of the First Amendment Issues Presented By the State's Regulation of Fashion in the Public Streets, 113 Penn. St. L. Rev. 329 (2008).

The second problem involves whether computer code amounts to expression for First Amendment purposes. Thus, it posits whether a person who posts a computer program allowing others to circumvent computer code can claim a First Amendment right to such a posting. The problem explores questions regarding issues of what forms expression can take, whether speaker intent/audience understanding is required, and the pressures that new technology put on our understanding of expression. This also provides an opportunity to engage in review of content regulation and standards of review. Questions for discussion are embedded in the problem posted on the website. For a good recent discussion of the computer code issue and the difficulty in determining when conduct should be expressive, see John Greenman, *On Communication*, 106 Mich. L. Rev. 1337 (2008).