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Do Constitutional Rights to Freedom of Speech, Press, and Assembly Extend to Students in School?

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ABSTRACT

The First Amendment, as applied to the states through the Fourteenth Amendment, restricts public schools' interference with students' freedom of expression rights, including symbolic expression, freedom of speech and press, and freedom of association and assembly. School authorities must have a compelling justification to curtail students' freedom of expression. The First Amendment also protects the student's right to remain silent regarding the public school's demand for expression, such as mandatory participation in saluting the American flag. Furthermore, the courts have recognized that defamatory, obscene or vulgar, and inflammatory communications are not protected by the First Amendment.

Of all the freedoms guaranteed in this country, none is more protected than the right of freedom of speech and the press and the right to peaceable assembly as set forth in the First Amendment. Specifically, it provides that "Congress shall make no law…abridging the freedom of speech, or of press; or the right of the people peaceably to assemble…." The gamut of protected expression litigated in state and federal courts includes symbolic expression, freedom of speech and press, and freedom of association and assembly. These categories of expression have received differential treatment in the courts.

Symbolic Expression

Prior to the 1970s, courts generally upheld school authorities' actions governing student conduct that simply satisfied the *reasonableness* standard. Public schools were perceived as possessing *in loco parentis* (in place of the parent) prerogatives (*State ex. rel. Burpee v. Burton* (1878), and it was uncertain whether constitutional rights extended to students in school. However, in *Tinker v. Des Moines Independent Community School District* (1969), the United States Supreme Court stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Freedom of expression is derived from the First amendment to the United States

Constitution. The *Tinker* case confirmed that students are entitled to all First Amendment rights, subject only to the provision in which the exercise of these rights creates material and substantial disruption in the school. An excerpt from *Tinker* will help clarify the legal principles of the Court:

> School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They possess fundamental rights which the State must respect. . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. (*Tinker v. Des Moines Independent School District*, 1969)

The case arose when students wore black arm bands in school as a protest against the Vietnam War. The students were subsequently suspended from school and later brought suit on First Amendment and Fourteenth Amendment grounds. The Court stated that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Furthermore, the Court declared that the prohibition of the wearing of symbols can be sustained only if such activity would "materially and substantially disrupt the work and discipline of the school."

Thus, the *Tinker* test of "material and substantial disruption" emerged as a determinant in subsequent student expression litigation. The Court made it clear that school authorities would not be permitted to deny a student her fundamental First Amendment rights simply because of a "mere desire to avoid discomfort and unpleasantness that always accompany an unpopular viewpoint." The Court's decision in *Tinker* sent a clear message to the public school community that a student has the constitutional right of freedom of expression in school.

Freedom of Speech and Press

By the mid-1980s, there was a noticeable shift in courts' tendency to uphold students' challenges. Two significant landmark Supreme Court decisions increased the authority of public school authorities pertaining to students' freedom of expression and other issues concerning regulations governing student conduct. In *Bethel School District No. 403 v. Fraser* (1986), the supreme court stated that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," and may be limited by reasonable policies designed to take into account the special circumstances of the educational environment. The Court further noted that school authorities have broad discretion to curtail lewd and vulgar student expression in school.

The case arose when Matthew Fraser delivered a speech at a required assembly of about 600 high school students that featured sexual innuendo. He was subsequently suspended from school and later brought suit on First and Fourteenth Amendment grounds. The U.S. Supreme Court ruled that no constitutional rights had been abrogated. In its decision the Court made a distinction between the silent political speech in *Tinker*

and the lewd, vulgar, and offensive speech of Fraser. The Court said that "…the determination of what manner of speech in the classroom or in a school assembly is appropriate properly rests with the school board." The Court added that while students have the right to advocate controversial rules in school, "…that right must be balanced against the school's interest in teaching appropriate behavior" (*Bethel School District No. 403 v. Fraser*, 1986).

In *Hazelwood School District v. Kuhlmeier* (1988), the Supreme Court held that school principals can censor student expression in school newspapers and other school-related activities as long as the censorship decisions are based on legitimate pedagogical concerns. The case arose when a principal deleted certain stories that had been scheduled for release in the school newspaper. One story recounted personal experiences of three pregnant girls in the school. The other related personal accounts of siblings whose parents were going through a divorce proceeding and was strongly accusative of the father. The Court differentiated the case from *Tinker* in that here the issue was not personal speech, which is still protected by strict scrutiny under the "material and substantial disruption" standard, but rather the right of school authorities not to promote particular speech. In other words, the Supreme Court drew a distinction between speech occurring in school-sponsored (curriculum-related) and non-school-sponsored contexts. The Court reasoned that school authorities have much greater leeway in regulating speech that has the imprimatur of the school, provided that restrictions are based on "legitimate pedagogical concerns."

Based on the *Bethel* and *Hazelwood* decisions, the school's authority to prohibit "lewd, vulgar, and offensive" speech in the context of school-sponsored activities is well established. Recent courts have followed these precedents by allowing censorship of student speeches at school assemblies provided that the decision was based on "legitimate pedagogical concerns" (*Poling v. Murthy*, 1990).

Freedom of Association and Assembly

Students have challenged local school policies or state statutes requiring their participation in patriotic exercises. In *Sherman v. Community School District* (1993), the court upheld a student's position not to participate in the Pledge of Allegiance to the American Flag. The Seventh Circuit Court's decision follows the rationale of other courts that have litigated this issue (*West Virginia State Board of Education v. Barnette*, 1943). Sensitive constitutional issues are being raised, following terrorist attacks on September 11, 2001, pertaining to reciting the Pledge of Allegiance and other patriotic exercises, such as displaying banners in schools with "God Bless America" and "In God We Trust." These school activities will likely result in new challenges to First Amendment rights to refrain from participation in patriotic exercises, to criticize school policies, or to raise church/state relations questions in connection with these patriotic observances and displays in public schools.

Unprotected Expression

Courts have recognized that defamatory, obscene or vulgar, and inflammatory communications are not protected by the First Amendment. Nor are these forms of expression protected in the public school setting.

Defamatory Expression

Defamation includes slander (verbal) and libel (written) statements that are false, expose another to ridicule, and are communicated to others. Courts have upheld school authorities in banning libelous content from school publications and in sanctioning students for slanderous speech.

Unlike defamatory expression, comments about the actions of public figures that are neither false nor malicious are constitutionally protected. One example of the constitutionally protected speech of a public figure, that received much media attention in the mid-1980s, was litigated by the U.S. Supreme Court in *Hustler Magazine v. Falwell*, (1988). In the public school setting, school board members and superintendents are generally considered public figures for defamation purposes.

Obscene or Vulgar Expression

Courts have held that individuals are not protected by First Amendment rights for speaking or publishing obscene or vulgar language. This was confirmed in *Bethel School District v. Fraser* (1986), in which the Supreme Court granted the school principal considerable latitude in censoring obscene and vulgar student expression. The Supreme Court declared that speech protected by the First Amendment for adults is not necessarily protected for children, reasoning that the sexual innuendos used in a student's speech during a student government assembly were offensive to students and inappropriate in the public school context. Other courts have struck down similar cases involving student expressions of obscene and vulgar language in the public schools.

Inflammatory Expression

Threats and fighting words made by students toward classmates or school personnel are not protected by the First Amendment. In determining whether a legitimate threat has been made, courts generally use a four-part test (a) reaction of the recipient of the threat and other witnesses, (b) whether the person making the threat had made similar statements to the recipient in the past, (c) if the statement was conditional or communicated directly to the recipient, and (d) whether the recipient had reason to believe that the person making the threat would actually engage in violence (*Shoemaker v. State of Arkansas*, 2001; *United States v. Dinwiddie,* 1996). The courts as well as school authorities are taking all threats seriously since the terrorist attacks on September 11, 2001.

Conclusion

The First Amendment, as applied to the states through the Fourteenth Amendment, restricts public schools' interference with students' freedom of expression rights, including symbolic expression, freedom of speech and press, and freedom of association and assembly. School authorities must have a compelling justification to curtail students' freedom of expression. The First Amendment also protects the student's right to remain silent regarding the public school's demand for expression, such as mandatory participation in saluting the American flag. Furthermore, the courts have recognized that defamatory, obscene or vulgar, and inflammatory communications are not protected by the First Amendment.

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