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Freedom of Speech of the Public School Teacher

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COURTS, UNTIL RECENT YEARS, when deciding whether teachers surrender their right of free speech by accepting employment in the public schools, have almost universally held that the rights of teachers as individuals are subordinate to the rights of school boards as public employers. In applying the principle of *stare decisis,* courts had continuously relied upon cases reasoned along the lines of early American decisions in which the courts considered the exemplar responsibility of the teacher as the only material issue. Because of this judicial outlook, teachers have had great difficulty defending against dismissal or other disciplinary action by their employing school boards after having expressed themselves to the displeasure of their superiors.

Although the amount of litigation dealing with this problem has been rather sparse until the last decade, development in this area is rapidly progressing since the courts have begun adopting a more liberal attitude with regard to the rights of the individual.

Early Situation

One reason for the large amount of regulation of teachers' speech has been the almost complete failure of teachers, until recently, to assert their constitutional rights of free speech and due process. During World War II for example, in *State v. Turner,*[1] a science teacher, who was a conscientious objector, made public statements that he was not willing to aid the United States either as a combatant or as a noncombatant. As a result of this statement he was dismissed. He instituted mandamus proceedings against his employer seeking reinstatement. The issue of free speech was never mentioned in the opinion. The Florida Supreme Court merely held that the statutes imposed a duty on the teacher to teach honesty and patriotism, and so his unwillingness to defend his country rendered him incompetent to teach in a public school. In light of recent United States Supreme Court decisions involving First and Fourteenth Amendment guarantees, most certainly free speech would at least be made an issue if such a case were to arise today.

Even on those rare occasions in earlier cases when the free speech issue was raised by a teacher, it was to little avail as the courts gave only a most perfunctory consideration to such claims and based decisions on other grounds. In *Joyce v. Board of Education,*[2] another case from

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1 155 Fla. 270, 19 So. 2d 832 (1944).

2 325 Ill. App. 543, 60 N.E. 2d 431 (1945).

the World War II era, the teacher congratulated one of her former students by letter for his courage and idealism in failing to register for the draft. In contesting her dismissal due to this letter she contended "that being a citizen as well as a teacher she was entitled to freedom of speech." [3] The court in reply held that she was knowingly encouraging violation of the law and "a teacher writing such a letter ought not to be permitted to continue as a teacher in public schools." [4] No constitutional principle was referred to by the court. Even though the country was engulfed in an all-out war at the time, one would expect that the courts would still have given a more substantial consideration to the constitutional rights of the individual.

An Early Principle

Ordinarily, the reason for teachers becoming involved in litigation due to some expression by them is the loss or threatened loss of employment. One general principle concerning teacher job rights was set forth in 1924 in *Goldsmith v. Board of Education*: [5] "No one has a natural or inherent right to teach in a public school." [6]

In 1953 this principle was elaborated upon in another California case, *Board of Education of City of Los Angeles v. Swan*,[7] where a teacher's outspokenness led to her dismissal. Among the principal considerations cited by the court as justifying her dismissal were derogatory remarks about the superintendent of schools and the use of undignified language with reference to the administration and in expressing her attitude toward members of the board. Several other charges had been made by the board, but the teacher claimed that she was really being fired because of her criticism, and hence she was being deprived of her right to free speech. The court ruled against the teacher on this point stating:

> Nor can defendant prevail in her claim that affirmance of her dismissal infringes upon the constitutional guarantee of her freedom of speech, in that she is thereby denied the right to criticise her superiors upon pain of losing her position. . . . One employed in public service does not have a constitutional right to such employment and is subject to reasonable supervision and restriction by the governmental body or officer to the end that proper discipline may be maintained and that activities among employees may not be allowed to disrupt or impair public service.[8]

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[3] *Id.* at 435.

[4] *Ibid.*

[5] 66 Cal. App. 157, 225 P. 783 (1924).

[6] *Id.* at 163; 789.

[7] 41 Cal. 2d 546, 261 P. 2d 261 (1953).

[8] *Id.* at 553; 267-68.

After setting forth this rule, the court did not go further and detail its implementation. No demonstration was offered as to how the teacher's criticism or undignified language impaired service or destroyed discipline. The service involved was the education of the students. The expressions in controversy were not made in the classroom. How could they impair this service? Maintenance of discipline can only be meaningful so long as it relates to the quality of the service. To what degree could criticism outside the classroom reduce or impair the quality of the educational processes? The general rule established is reasonable, but like any general principle it must be tailored to meet the facts of the individual case.

The United States Supreme Court held in *Adler v. Board of Education*[9] that teachers "have no right to work for the state in the school system on their own terms." [10] A declaratory judgment action had been brought seeking to have declared as unconstitutional a New York statute which made anyone who advocated the overthrow of the government ineligible for employment as a public school teacher. The court reasoned that:

> A teacher works in a sensitive area in a schoolroom. There he shapes the attitudes of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and the employees as to their fitness to maintain the integrity of the schools as a part of ordered society cannot be doubted.[11]

The *Swan* rule requires the amount of control allowable in the regulation of teachers to be a reasonable amount, determined by the necessity for maintaining discipline and unimpaired service.[12] Not until the last decade have the cases finally established some workable refinements of this rule.

Due Process and Vagueness

Although teachers do not have an absolute constitutional right to their jobs, their job security has not been altogether left to the arbitrary or capricious whims of their boards of education. The permissible reasons for which a teacher may be dismissed are generally set forth in the statutes dealing with the operation of the particular public school. The difficulty which teachers all too often encounter is that the permissible reasons for which dismissal is allowed usually include certain catch-all

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[9] 342 U.S. 485 (1952).

[10] *Id.* at 492, quoting United Public Workers v. Mitchell, 330 U.S. 75.

[11] *Id.* at 493.

[12] Board of Education of City of Los Angeles v. Swan, *supra* n. 7.

phrases such as "conduct unbecoming a teacher," "unprofessional conduct," "immorality," "insubordination," "other good cause," "evident unfitness for service," and "other sufficient cause." [13] Boards of education use such phrases to justify the termination of a teacher's employment when displeased by some expression of the teacher, especially when this consists of a criticism of the board or the educational system.

Such catch-all phrases have been attacked by teachers on the ground that they violate the due process clause of the Fourteenth Amendment because of vagueness. However, teachers have been unsuccessful in raising this issue as a defense in dismissal cases.

In the *Goldsmith*[14] case, decided in 1924, a teacher advocated before her class the election of a particular candidate in a local election. When the board of education began proceedings to terminate her employment, the teacher sought a court order restraining the board from firing her for "unprofessional conduct," challenging the vagueness of that term. In holding for the school board the court reasoned that:

> . . . the calling is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous, that they are incapable of enumeration in any legislative enactment. . . . teacher is intrusted with the custody of children and their high preparation for useful life. His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his unofficial utterances, his associations are all involved. His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters for major concern in a teacher's selection and retention. How can all these things be provided for and offenses against them be particularly specified in a single statute? [15]

The court stated that in its opinion "the term 'unprofessional conduct' is sufficiently specific as a basis of action leading to the dismissal of a teacher." [16] However, recognizing that it would be a simple matter for a board of education to use such a general term as "unprofessional conduct" to effect an unfair dismissal of a teacher, the court provided that:

> If the board of education should take advantage of the general provisions, if it attempts frivolous charges, or acts arbitrarily or capriciously upon substantial ones, the courts will protect the teacher whose rights have been invaded.[17]

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[13] See Belian v. Board of Education, 357 U.S. 399 (1959), and Symposium: Academic Freedom, 81 Harv. L. Rev. 1071-2 (1968).

[14] Goldsmith v. Board of Education, *supra* n. 5.

[15] *Id.* at 787.

[16] *Id.* at 789.

[17] *Ibid.*

Almost thirty years later the California Supreme Court in *Swan*,[18] relying on *Goldsmith*,[19] continued to maintain that the term "unprofessional conduct" was not void because of vagueness.

More recently the Alaska Supreme Court, in *Watts v. Seward School Board*,[20] held that "immorality," defined as "conduct tending to bring disgrace or disrespect upon the teacher or his profession," was not unconstitutional due to vagueness. The teachers involved had written an open letter addressed to the school board containing some false statements about their superintendent and had planned, on school grounds, to instigate his removal. The court cited *Belian v. Board of Education*[21] as the controlling case:

> We find no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors. The Pennsylvania tenure provision specifies several disqualifying grounds, including immorality, intemperance, cruelty, mental derangement and persistent and willful violation of the school laws, as well as "incompetency." [22]

Because of the practical difficulty of structuring a satisfactorily specific statute for protecting students from exposure to an unfit teacher, it would seem unlikely that the courts will ever be receptive to the vagueness aspect of the due process clause as a defense to dismissal.

Teachers' Right to Criticize

Although the vagueness requirement of the due process clause has not proved successful as a defense to dismissal, teachers have had significant success in recent years in attacking their dismissals on the ground that it was a violation of their right to free speech.

In *Board of Trustees of Lassen Union High School District v. Owens*[23] a teacher was fired under the catch-all provision "unprofessional conduct" for having published several letters in the newspaper which were critical of local teaching conditions. However, instead of attacking the use of the term "unprofessional conduct" as a violation of his right of due process because of vagueness, he directly challenged the board action in dismissing him as a violation of his constitutional right of free speech. He argued that he had a "constitutional right to publicly criticise the educational process, including his superiors, with-

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18 Board of Education of City of Los Angeles v. Swan, *supra* n. 7.

19 Goldsmith v. Board of Education, *supra* n. 5.

20 421 P. 2d 586 (Alaska, 1966); *vacated and remanded*, 391 U.S. 592; *rehearing denied*, 421 P. 2d 678 (Alaska, 1967); *judgment reinstated*, 454 P. 2d 732 (Alaska, 1969); U.S. *appeal pending*.

21 Belian v. Board of Education, *supra* n. 13.

22 Watts v. Seward School Board, *supra* note 20, at 608.

23 206 Cal. App. 2d 162, 23 Cal. Rptr. 710 (1962).

out fear of losing his teaching position." [24] The court, citing *Swan*,[25] said that this was "too broad a proposition." [26] In applying the *Swan*[27] rule, however, the court found that the teacher's conduct had not resulted in any significant impairment of the teaching process nor caused disciplinary problems. The court in holding for the teacher went on to say that just because he was a teacher he was not precluded from participating in public debate.

Pickering v. Board of Education[28] arose in much the same manner as the *Owens*[29] case. A high school teacher was fired for sending a letter to a local newspaper which was critical of the board of education and the district superintendent. Some of the statements in the letter were erroneous. He was dismissed because his letter was "detrimental to the efficient operation and administration of the schools of the district." [30] The United States Supreme Court decided the case on the basis of the teacher's right to freedom of speech. The court, recognizing that the teacher's right to free speech was not absolute, stated:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[31]

The court found that there was no evidence that the erroneous statements in the letter were knowingly or recklessly made by the teacher and held for him stating:

> . . . in a case such as this, absent any proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.[32]

This holding still leaves unanswered the question of whether a teacher may be dismissed if it can be shown that his criticism *did* contain some erroneous statements that were either knowingly or recklessly made.

Free speech was also raised as a defense in the *Watts*[33] case. Several teachers had been charged with immorality, defined as "conduct

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[24] *Id.* at 168; 717.

[25] Board of Education of City of Los Angeles v. Swan, *supra* n. 7.

[26] Board of Trustees of Lassen Union High School District v. Owens, *supra* n. 23 at 168; 717.

[27] Board of Education of City of Los Angeles v. Swan, *supra* n. 7.

[28] 391 U.S. 563 (1968).

[29] Board of Trustees of Lassen Union High School District v. Owens, *supra* n. 23.

[30] Pickering v. Board of Education, *supra* n. 28 at 563.

[31] *Id.* at 568.

[32] *Id.* at 574.

[33] Watts v. Seward School Board, *supra* n. 20.

tending to bring disgrace or disrespect upon the teacher or his profession." [34] One reason for the charge was the writing of an open letter to the school board containing false statements about the superintendent, in violation of a board regulation that grievances and complaints were to be submitted to the board through the superintendent. In regard to this charge by the school board the court held:

> There is no question but that the appellants had a constitutional right to compile, reproduce and distribute the Open Letter, even though it did contain false statements concerning the Superintendent. But this does not mean that they cannot be held appropriately accountable where their acts wrongfully damage their own and another's professional prestige, reflect detrimentally on the teaching profession as a whole and result in a loss of respect by the public for appellants and the local school system. . . . Under these facts we must hold that, considering the nature of their employment, appellants exceeded the limits of the exercise of their right of freedom of speech to the extent that they were not entitled to require the Seward School Board to renew their teaching contracts under the tenure law.[35]

Another reason for the immorality charge by the board was that one of the teachers, Watts, had instituted a discussion during school hours and in a classroom with two other teachers concerning means of getting rid of the superintendent. Again the court recognized the right to free speech, on school grounds or off, but held:

> Appellant Watts had a constitutional right to freedom of discussion with other teachers, but he did not have a constitutional right to have his teaching contract renewed after soliciting teachers on school premises, during school hours, to support a private move to oust the Superintendent, where the effect of these acts was to bring down public disgrace and disrespect on him and his profession and to undermine the morale and discipline of the local school system.[36]

The *Watts*[37] decision was handed down prior to the *Pickering*[38] case and is now on appeal to the United States Supreme Court. It would seem that in light of *Pickering*[39] a reversal might be expected unless the court could be persuaded that the false statements contained in the open letter written by the teachers were knowingly or recklessly made, or that the particular exercise of free speech did in fact undermine discipline or interfere with the educational processes to a significant degree.

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[34] *Id.* at 590.

[35] *Id.* at 606-7.

[36] *Id.* at 607.

[37] Watts v. Seward School Board, *supra* n. 20.

[38] Pickering v. Board of Education, *supra* n. 28.

[39] *Ibid.*

Speech Related Activities

Finot v. Pasadena City Board of Education[40] is an example of a rare situation in which a teacher's employment was not terminated, but yet the teacher felt that his right to freedom of speech had been infringed by his employer. In this instance the teacher was transferred to home teaching instead of being dismissed. This came about because he insisted on wearing a beard while teaching. Prior to the home teaching assignment he had been teaching government to high school seniors for seven years and had been found to be a challenging and effective classroom teacher. The wearing of the beard was considered by his principal to be a violation of a regulation in the teacher's handbook which required teachers to be "appropriately attired on all occasions and that they set an example of cleanliness, neatness, and good taste." [41] The court held that the government of California through its agent, the school board, was depriving the teacher of his liberty without due process of law. In discussing this liberty, the court said:

> . . . It seems to us that the wearing of a beard is a form of expression of an individual's personality and that such a right of expression, although probably not within the literal scope of the First Amendment itself, is as much entitled to its peripheral protection as the personal rights established by Pierce and Meyer with respect to the right of parents to educate their children as they see fit.[42]

Pierce v. Society of Sisters[43] established the right of parents to send their children to private schools. In *Meyer v. Nebraska*[44] it was determined that parents could not be prohibited from having particular subjects (the German language in this case) included in a school's curriculum.

In reaching its decision, the court in *Finot*[45] applied the three tests found in *Bagley v. Washington Township Hospital District*: [46]

> We hold that a government agency which would require a waiver of constitutional rights as a condition of public employment must demonstrate: 1. that the political restraints rationally relate to the enhancement of the public service, 2. that the benefits which the public gains by the restraint outweigh the resulting impairment of constitutional rights, and 3. that no alternatives less than subversion of constitutional rights are available.[47]

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[40] 250 Cal. App. 189, 58 Cal. Rptr. 520 (1967).

[41] *Id.* at 191; 522.

[42] *Id.* at 196; 527.

[43] 268 U.S. 510 (1925).

[44] 262 U.S. 390 (1923).

[45] Finot v. Pasadena City Board of Education, *supra* n. 40.

[46] 65 Cal. 2d 499, 55 Cal. Rptr. 401, 421 P. 2d 409 (1966).

[47] *Id.* at 403, 411.

The court found that the board of education met the first test, but failed to meet the second or third tests. The court, in regard to wearing the beard stated:

> . . . we think that on balance as stated in *Bagley,* his constitutional right to do so outweighs the *a priori* judgment of the principal and the superintendent, however experienced, expert and professional such judgment may have been.[48]

The court, in holding for the teacher wrote its opinion so as to allow only a narrow application of its holding:

> What we hold is simply that, on the record before us (with the complete absence of any actual experience at the high school involved as to what the actual adverse effect of the wearing of a beard by a male teacher would be upon the conduct of the educational processes there), beards as such, on male teachers, without regard to their general appearance, their neatness and their cleanliness, cannot constitutionally be banned from the classroom and from the campus.[49] [*Parenthetical thought added.*]

An important factor in this case is that the court considered the wearing of a beard to be a form of expression relating to the teacher's personality. However, a Federal District Court in *Davis v. Firment,*[50] also decided in 1967, held differently with respect to a student's long hair being a constitutionally protected peripheral right of self expression. In this case a fifteen year old student was suspended because he did not have his hair cut to the satisfaction of the school authorities, in violation of a school dress code. He contended that the hair style was a form of symbolic expression and thus protected by the Constitution. The court, however, felt that a symbol must stand for some specific concept or viewpoint to fall under the constitutional protections. As far as they were concerned, the wearing of long hair really does not *symbolize* anything.[51]

A very obvious distinction between the *Davis* and the *Finot*[52] case is the status of the two individuals asserting constitutional rights, one being a very young student and the other being a teacher. The relevance of this distinction should vary in proportion to the age and educational level of the student. Likewise, a factor in determining the allowable amount of regulation of teachers' speech should be the type of student to which he is exposed. For example, what may be a completely innocuous form of expression for a teacher of ordinary high school students may be unquestionably inappropriate form for a teacher of emotionally

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[48] Finot v. Pasadena City Board of Education, *supra* n. 40 at 196; 529.

[49] *Ibid.*

[50] 269 F. Supp. 524 (E.D. La., 1967).

[51] *Id.* at 527.

[52] Finot v. Pasadena City Board of Education, *supra* n. 40.

disturbed adolescents. A perfectly acceptable standard for a college teacher may be an objectionable standard for a teacher of elementary children. Certainly the teacher of younger children is much more in the position of an exemplar than the teacher of more mature individuals.

The most recent and authoritative case in the area of symbolic expression, *Tinker v. Des Moines Independent Community School District,*[53] did not involve the question of peripheral rights, but was decided solely on the basis of symbolic free speech rights. Although no teacher was a party to this action, the United States Supreme Court indicated that the principles set forth were applicable to teachers as well as students. This case arose because some students were suspended from school for wearing black armbands to class in protest of the Viet Nam War. The question involved was whether the students had a constitutional right to protest the war in this symbolic fashion on school grounds during the school day. The Supreme Court in affirming the availability of free speech to students and teachers continued to recognize that the right was not absolute:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.[54]

The test established by the court for determining any permissible restriction of rights of expression were similar to those found in *Swan,*[55] *Owens,*[56] and *Pickering.*[57] The court stated as the critical test:

> Clearly the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline, is not constitutionally permissible.[58]

As in the *Finot*[59] case, the court placed the burden upon the school authorities to establish that the expression in controversy is sufficiently detrimental to the operation of the school that the teachers' or students' rights must give way to the interests of the public. It is school authorities who assert that an expression is detrimental to the public welfare, therefore it is only reasonable that they should be required to prove this before an individual is deprived of his constitutional rights.

The court also emphasized that the act in controversy was not pure speech, but rather a speech related activity:

> . . . The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says.

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[53] 393 U.S. 503 (1969).

[54] *Id.* at 506.

[55] Board of Education of City of Los Angeles v. Swan, *supra* n. 7.

[56] Board of Trustees of Lassen Union High School District v. Owens, *supra* n. 23.

[57] Pickering v. Board of Education, *supra* n. 28.

[58] Tinker v. Des Moines Independent Community School District, *supra* n. 53 at 511.

[59] Finot v. Pasadena City Board of Education, *supra* n. 40.

> We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances.[60]

Necessary avoidance of significant interference with school work is the established justification for any regulation of teachers' and students' free speech rights. The old maxim that "actions speak louder than words" is generally true. It would make little sense to regulate ordinary speech and still permit another form of expression, which could be even more detrimental to the educational processes, to go unregulated. Therefore it was appropriate and necessary for the court to establish explicitly that symbolic speech is also subject to regulation.

Conclusion

It is fifty years since Justice Holmes made his famous statement that "free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," [61] thus establishing clearly that free speech is not an absolute right. However, it has been only during the last decade that any real progress has been made towards clarifying the degree or the basis of limitation of this right for those employed as public school teachers.

For many years it was held that teachers automatically waived their rights to freely express themselves as a condition of employment. The *Swan*[62] case finally liberalized this outlook, limiting regulation to a reasonable amount of control as determined by its necessity for the orderly operation of the schools.

Later, the *Pickering*[63] case restated the *Swan*[64] rule in terms of balancing the rights of the teacher with the rights of the public. The Supreme Court did establish one specific rule concerning teachers' right to criticize: A teacher may criticize his superiors so long as he does not knowingly or recklessly make false statements.

The United States Supreme Court in *Tinker*[65] established that a teacher's right of free speech does include symbolic speech. This case stated the general rule for regulation of teachers' speech in its most recent form: Regulation is permissible only when necessary to avoid material and substantial interference with school work or discipline.

Reasonable general guidelines have not been established which serve to protect both the rights of the public and the individual. Assertion of rights by teachers and school boards in the future will lead to more specific rules which will leave both sides with a clearer understanding of their rights and responsibilities.

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60 Tinker v. Des Moines Independent Community School District, *supra* n. 53, at 513.
61 Schenck v. United States, 249 U.S. 47, 52 (1919).
62 Board of Education of City of Los Angeles v. Swan, *supra* n. 7.
63 Pickering v. Board of Education, *supra* n. 23.
64 Board of Education of City of Los Angeles v. Swan, *supra* n. 7.
65 Tinker v. Des Moines Independent Community School District, *supra* n. 53.