DOCUMENT RESUME

ED 323 838 HE 023 830

AUTHOR Tatel, David S.; And Others
TITLE How the First Amendment Applies to Offensive Expression on the Campuses of Public Colleges and Universities.
INSTITUTION American Association of State Colleges and Universities, Washington, D.C.
PUB DATE Jul 90
NOTE 13p.
AVAILABLE FROM American Association of State Colleges and Universities, One Dupont Circle/Suite 700, Washington, DC 20036-1192 ($3.00 members, $4.00 nonmembers, postpaid).
PUB TYPE Viewpoints (120)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Academic Freedom; *Civil Liberties; Civil Rights; *Constitutional Law; Court Litigation; *Freedom of Speech; Higher Education; Political Issues; *Public Colleges; School Security; Social Problems; State Universities; *Student Rights
IDENTIFIERS *First Amendment

ABSTRACT

The pamphlet addresses the application of the United States Constitution's First Amendment to offensive expression and expressive conduct, particularly by students, at public colleges and universities. Sections 1 through 4 summarize applicable First Amendment principles including the breadth of the First Amendment; exceptions to content-based speech restrictions (e.g., incitement to imminent lawlessness, "fighting words," defamation, obscenity, intentional infliction of emotional distress); academic freedom; and other legal considerations (e.g., content-neutral regulation of expressive activity, state constitutional law, federal and state civil rights laws). Section 5 applies these principles to seven hypothetical examples. A brief discussion of each example is provided to illustrate federal constitutional issues. Specific court cases are referenced. (DB)

How the First Amendment Applies to Offensive Expression on the Campuses of Public Colleges and Universities

By
David S. Tatel
Martin Michaelson
Daniel B. Kohrman
Hogan & Hartson
Washington, DC

During the past several years, college and university administrators have been spending more and more time responding to incidents of offensive and demeaning expression on campus. This pamphlet addresses the application of the First Amendment to the United States Constitution to offensive expression and expressive conduct, particularly by students, at public colleges and universities.

Sections 1 through 4 summarize applicable First Amendment principles. Section 5 applies the principles to hypothetical situations. Together, these sections should give college and university administrators a better feeling for First Amendment principles and how they apply to offensive expressive activity.

This booklet is not a substitute for consulting counsel. Issues pertaining to offensive expression on campus involve an area of the law that is both unsettled and ambiguous. Therefore, university administrators will want to consult their institution's counsel as they confront specific situations at their own schools.

This pamphlet is also not meant to encourage colleges and universities to adopt policies and procedures to punish offensive and demeaning speech. Despite the considerable pressure university administrators face on this problem, they should not institute disciplinary policies for offensive speech without first addressing carefully the legal risks and the threat to important academic values that such disciplinary policies can entail. Major efforts to improve communication and lessen tensions on campus are often likely to be preferable to disciplinary policies concerning offensive speech.

The causes of offensive and demeaning speech, particularly when racially, ethnically, or religiously motivated, are complex and deep. They reflect serious divisions in society. On campus, they should be viewed, at least initially, as an educational problem that requires an educational solution.

The First Amendment lies at the heart of academic freedom. Universities ought to be the last institutions in society to impose unwarranted limits on the freedom of speech, even speech that is offensive and demeaning. As Justice Brandeis has said, "The remedy to be applied is more speech, not enforced silence." This is particularly true on the university campus.

1 *The Breadth of the First Amendment*

The First Amendment to the United States Constitution establishes a sweeping commitment to a system of free communication and expression: "Congress shall make no law ... abridging the freedom of speech ...." Protection is afforded in such broad terms because freedom to speak one's mind is a fundamental aspect of individual liberty and thus "is essential to the ... vitality of society as a whole." Moreover, freedom of speech is indispensable to democratic government, for "it is only through free debate and free exchange of ideas that government remains responsive to the will of the people." Public institutions such as state universities are subject to the free speech guarantee of the First Amendment by virtue of the due process clause of the Fourteenth Amendment.

Government regulation of speech on the basis of its content [illegible] upheld [illegible] by the courts. Such restrictions are valid only [illegible] serve a compelling state interest [illegible] end. [illegible] recent [illegible] Supreme Court [illegible] bedrock principle underlying the First Amendment [illegible] that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

[illegible]

2 Exceptions to Content-Based Speech Restrictions

[illegible]

a Incitement to Imminent Lawlessness

The government [illegible] speech [illegible] careful consideration of the actual circumstances surrounding such expression [illegible] appear that such provocation raises an immediate likelihood [illegible] of illegal acts. This principle derives from the Supreme Court's ruling in *Brandenburg v. Ohio*, which distinguishes between mere advocacy of lawlessness and speech directed to inciting or producing imminent lawless action and likely to incite or produce such action. An earlier formulation of the same rule is the requirement of a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

The federal courts have limited the reach of the imminent lawlessness / clear and present danger exception because some provocative speech is beneficial and also because censorship is usually unnecessary. The Supreme Court has written that a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Furthermore, the First Amendment permits censorship [illegible] because potential [illegible] may seem to justify suppression [illegible] averted through [illegible]. If there be time to expose through [illegible] the falsehood and fallacies, [illegible] the evil by the processes of [illegible], the remedy to be applied is more speech, not enforced silence.

b "Fighting Words"

The Supreme Court recognizes a [illegible] limited First Amendment exception for speech amounting to incitement to imminent lawlessness on a personal scale. The government may regulate that small class of fighting words that are likely to provoke the average person to retaliation, and thereby cause a breach of the peace. However, no restrictions on particular fighting words have been upheld since the Court's 1942 decision in *Chaplinsky v. New Hampshire*, in which a Jehovah's Witness was punished for calling a police officer a damned rack

eteer and a damned fascist. Since then the Court has reversed several convictions based on the use of epithets far more offensive than those at issue in *Chaplinsky*. In one such case the Court held that the fighting words doctrine did not apply to a black man who, upon being arrested, used language including "white son of a bitch, I'll kill you." Moreover, in the more recent of its two flag burning cases, the Court in rejecting the argument that desecration of the flag could be forbidden by the government because offensive, stated that the same argument could be made with respect to virulent ethnic and religious epithets.

The narrowness of the fighting words exception stems from various factors. Courts have been sensitive to the difficulty of determining what words will drive an average citizen to violence because one man's vulgarity is another's lyric. Due to the instance to identify fighting words also reflects a recognition that some offensive speech is inevitable in a system of free expression.

c. Defamation

The First Amendment permits the awarding of damages for libelous or slanderous speech – that is, the publication or utterance of false statements causing injury to another. The Supreme Court has reasoned that such "[f]alse statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counter-speech." Although the First Amendment does not shield private individuals from libel suits, it guarantees that individual expressions of ideas remain free from government sanctions. In other words, it recognizes no such thing as a "false idea."

•Public Figures. In its decision in *New York Times Co. v. Sullivan*, the Supreme Court approved some protection for defamation of public figures regarding matters of public concern. Such persons may not recover for false statements about them unless they can prove that the statements were made intentionally or with reckless disregard for the truth. This rule is designed to counteract a possible chilling effect on public debate that could arise from fear of libel laws. It recognized that "freedoms of expression [require] breathing space."

•Group Libel. Whether defamation of groups of individuals may be regulated is an open question. The Supreme Court long ago suggested that it would uphold, even in the absence of a clear and present danger, a statute punishing statements "portray[ing] depravity . . . or lack of virtue of a class of citizens of any race, color, creed or religion." However, that view was premised on the assumption that the First Amendment imposes no limits on libel laws, a proposition the Supreme Court has discarded for public figures. The Court has never revisited the issue.

Several recent decisions by lower federal courts suggest that group libel laws are inconsistent with prevailing First Amendment doctrine. For instance, the Seventh Circuit Court of Appeals has declined to uphold a local ordinance "prohibiting the dissemination of materials which would promote hatred towards persons on the basis of their heritage," premised on the supposed existence of a group libel exception to the First Amendment. Instead, the court required evidence that such expressive conduct posed the threat of imminent violence and disorder.

d. Obscenity

In determining what constitutes

obscene material subject to regulation by the government. A three part test applies. First Amendment protection are unavailable if the average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest, if the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law, and if the work taken as a whole lacks serious literary, artistic, political, or scientific value.

e. Intentional Infliction of Emotional Distress

The First Amendment imposes similar limits on civil liability for speech intended to inflict emotional distress, but there are few judicial decisions on point and the precise extent of such limits is unclear. It would appear that a public figure charging another with behavior designed to cause emotional injury is constrained by constitutional free speech guarantees just as he or she would be in bringing a libel action. However, the Supreme Court has yet to say whether government has any greater leeway to regulate speech intended to shock and cause harm but falling short of inciting words. In the *Chaplinsky* case, the Supreme Court observed, without actually deciding, the issue, that it may be lawful to punish words which by their very utterance inflict injury. However, in the five decades since, the Court has not had occasion to address the question.

3 The First Amendment and Academic Freedom

In many contexts, public educational institutions have been singled out for special treatment in First Amendment cases. To some degree, the public university community is considered a haven of free speech, and its members receive some extra protection as a result. The Supreme Court has declared a "national commitment" to safeguarding academic freedom as a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. Moreover, public academic institutions receive protection because they provide a setting for operation of the marketplace of ideas.

On the other hand, the Court has acknowledged that First Amendment rights on campus must be analyzed in light of the special characteristics of the school environment. As a result, public universities may exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education. Public universities have still other characteristics that may discourage application of First Amendment principles. These include the presence on campus of private residence areas where offensive speech would intrude on important privacy interests. In classrooms and libraries, students and university staff may become a captive audience to unwanted expression.

Two recent cases have narrowed First Amendment protections for public elementary and secondary school students. In one, the Supreme Court ruled that a public school may refuse to lend its name and resources to the dissemination of controversial student expression by censoring articles in a school sponsored student newspaper. In the other, the Court held that public schools may sanction student speech communicated in a school sponsored forum deemed to be offensive or otherwise inconsistent with their

basic educational mission. These cases may have little relevance for free speech at public universities. However, even in light of these cases, [illegible] that the rights of elementary and secondary students are not automatically coextensive with the rights of adults in other settings.

Private schools, colleges and universities are not generally covered by the First Amendment because they are not organs of government. Nevertheless, expressive activity in private schools may be subject to regulation by federal and state statutes, as discussed below. Moreover, private school administrators may gain valuable guidance from First Amendment legal doctrine in designing policies to deal with abusive speech on their campuses.

4 Other Legal Considerations

a. Content Neutral Regulation of Expressive Activity

Less rigorous scrutiny is applied to government restrictions on speech that are neutral as to content and aimed at harms unrelated to speech. Such provisions, including limits on the time, place and manner of expression, may stand if they are narrowly tailored to serve a significant government interest and leave open ample alternative channels for communication. Even rules that on their face are content neutral will be subjected to the strictest scrutiny, however, if they are merely a facade for viewpoint-based discrimination.

b. State Constitutional Law

The courts of several states have gone further than the U.S. Supreme Court in defining limits on constitutional protection of abusive speech. For example, an intermediate state court in Oregon has held that state constitutional law affords speech more protection in this area than is provided by the First Amendment. Thus even fighting words may not be prohibited. By contrast, the highest court of the State of New York has suggested that words which by themselves inflict substantial personal injury may be proscribed even if they do not pose an imminent danger of inciting violence.

The courts of several states have permitted civil penalties for racially abusive expression without imposing any limitations related to federal or state constitutional free speech provisions. These decisions are based on claims of intentional infliction of emotional distress.

c. Federal and State Civil Rights Laws

Federal civil rights statutes and civil liberties laws in most states are effective in punishing racially abusive or otherwise discriminatory conduct but they have limited value in dealing with abusive speech. By and large, these statutes, both criminal and civil, address racially and religiously motivated violence and do not directly punish expression.

A number of federal appellate courts have declined to find unlawful employment discrimination in instances when employees are subjected to abuse such as racial epithets. Such decisions hold that incidents of racial [and other abusive] slurs must be more than sporadic. However, courts have sometimes approved civil penalties for discrimination on the job consisting of serious verbal abuse directed at a lone individual in an isolated incident.

5 *Expressive and Demonstrative Activity on Campus that Gives Offense. Hypothetical Examples with First Amendment Considerations*

The following hypothetical examples of expressive and demonstrative activity on campus that gives offense and the related discussion highlight some of the legal considerations arising under the First Amendment that bear on regulation of such activity by a state college or university. The discussion is not exhaustive but is intended to illustrate federal constitutional issues. It does not, for example, address germane state constitutional, statutory or common law doctrines which vary among the states. Counsel should be consulted as problems in these areas arise.

♥

A student group, the Graduate Students for Anti-Supremacy (GSAS), has as its stated purpose to heighten awareness of the asserted risks to the university and society presented by increased minority enrollment and university affirmative action policies. The group petitions the dean of students for permission to sponsor a faculty speech, March to Restore Permission.

One issue this problem raises relates to the dean's asserted basis for denial of permission. If the dean objects to the message or messages likely to be presented at the rally, he or she would be required to identify a First Amendment exception justifying such content based regulation. None is posed by the statements in the group's petition. Although GSAS views may be controversial and offensive to many, there is no evidence they amount to "fighting words," incitement to imminent lawlessness, defamation or obscenity. Moreover, because the issue of freedom of expression arises in advance of the expressive acts in question, the dean should be concerned about the First Amendment policy disfavoring prior restraints on expression because of their chilling effect on legitimate speech. An important authority to consider in the context of the rights of student groups on campus is *Healy v. James*, 408 U.S. 169, 194 (1972), in which the Supreme Court upheld the claims of students challenging a university's decision to deny recognition to a proposed chapter of the Students for a Democratic Society, in light of the absence of evidence the students were not willing to abide by reasonable campus rules and regulations.

If the dean is inclined to deny permission to GSAS for content neutral reasons, he or she will have considerable leeway to do so. For instance, the dean may rely on rules limiting the time, place and manner in which demonstrations are conducted, as long as such rules are rationally related to the legitimate goals of the school. The dean's decision to forbid a demonstration also likely would be upheld if there is evidence that such a rally would violate reasonable campus rules and substantially interfere with the opportunity of other students to obtain an education. Consequently, the answer to the dean's dilemma will depend on when, where, and how GSAS wishes to carry out its rally (e.g., during the weekend or during class hours, in front of the dean's office or on the steps of the library). In addition, the wording of university rules likely will be important. A court reviewing a lawsuit challenging denial of a request to hold a campus rally about admissions policy

would not look favorably on a dean's decision based on guidelines that are vague or that afford administrators unfettered discretion to grant or deny permission on a whim.

♥

An advertisement placed by students in the campus newspaper states that if LAS is permitted to use campus facilities for its rally, then other students will picket and block access to the rally. The advertisement implies that force will be used if the students believe force is necessary to prevent persons from attending the rally. May the university discipline the students for (a) placing the advertisement, (b) picketing the rally site, or (c) blocking access to the rally site?

Because the advertisement only implies force may be used, it is unlikely to be considered an incitement to imminent lawlessness. On the other hand, the students' commitment to block access to a rally approved by the school administration openly threatens to interfere with the rights of other students and, in particular, with the university's role as a forum for expression. The university almost surely may discipline the students placing the ad if they actually block access to the rally site, unless perhaps university rules protecting free speech are virtually absolute. A counter-demonstration by the same students likely would be unobjectionable, unless the university has reasonable rules requiring approval of all demonstrations and the students fail to seek such approval. It is doubtful that the advertisement itself is grounds for punishment, given the constitutional latitude afforded such expression. The question likely would depend on such factors as whether the threat of disruption deterred many students from attending the LAS rally and thus chilled their rights of association and expression.

♥

While walking across the quadrangle, Jones, a white student, sees Smith, a black student. Jones approaches within six inches of Smith's face and says (a) "Your mother is a stupid b!#!," or (b) "Blacks are dumb, and so are you," or (c) (two feet away from Smith's face) "There are too many blacks on this campus!" May the college discipline Jones in any of these instances?*

This case presents some of the issues raised by the "fighting words" exception to the First Amendment. According to some recent judicial decisions, none of the language described above likely would fall within the doctrine and thus justify disciplinary action against Jones. In general, however, one on one epithets referring to race, religion or other similar subjects may in a proper factual setting be the subject of proper discipline without infringing upon the First Amendment, under the authority of tort theories, particularly intentional infliction of emotional distress. A thorough review of the facts in context will be required to determine whether discipline can be grounded on a claim by Smith against Jones for intentional infliction of emotional distress. Such a claim would raise issues about the likely impact on Smith of Jones' words under all the circumstances.

♥

The state's governor, who recently vetoed gay rights legislation, is in the middle of a speech to a large number of students and faculty in the main college auditorium when several students in the first row, to protest the veto, rise and make an offensive hand gesture toward him. The speech continues without further incident. May the college discipline the students?

Same facts and same questions as for (a), except that the protesting students

also heckle the governor [illegible] tration [illegible] the podium?

There is little direct [illegible] precedent that illuminates the circumstances in which a public university may discipline hecklers without violating the First Amendment. Although a clearly correct answer to this problem cannot be stated, strong arguments can be made that a university is entitled to discipline students under such circumstances, particularly when the students' heckling thwarts the exercise of free speech by another.

•

A male student [illegible] dining hall [illegible] copies of a paper [illegible] "Unequal Rights." The [illegible] contends that women [illegible] The pamphlet [illegible] depicts [illegible] captioned "Trapped [illegible]" [illegible] several women students [illegible] the [illegible] room. [illegible] What part [illegible] of the [illegible] Amendment [illegible]

This [illegible] matter [illegible] open [illegible] possibility that the [illegible] men [illegible] present [illegible] speech [illegible] merely verbal [illegible] speech [illegible] would not substantially interfere with the education process unless it were part of a sustained effort to harass [illegible]. On the other hand, because students often pay for a year or a term's dining hall food service and do not have their own private eating and dining facilities, they may be considered to have strong privacy interests when dining [illegible] to be a captive audience in a dining hall. Thus the distribution of offensive materials there arguably infringes privacy interests to a degree justifying a ban on such activity. The effort to limit the proponent of the "Unequal Rights" pamphlet in conveying his views is contrary to First Amendment principles. However, the hypothetical details do not suggest he was barred from returning later to continue distribution, nor do they indicate that the women imposed any significant hardship on him. Moreover, their reaction was, at least in part, an expression of their own views and might even be termed a natural reaction to fighting words. More facts are required to determine whether the male student's treatment by the women students was disproportionate under the circumstances and if so properly subject to discipline.

•

[illegible] the university president's support of an abortion counseling program, 100 students [illegible] on the sidewalk in front of his campus home, culminating [illegible] the president [illegible] the American flag and [illegible] When the president comes out [illegible] the students, their leader [illegible] placard stating "This school [illegible] too many and you are it." Another student holds a placard falsely [illegible] that the president is corrupt and on the take. Does the First Amendment guarantee the students' rights to [illegible] of these things?

The placard falsely accusing the president of being corrupt and on the take probably is libelous, even if the president is considered a public figure, as long as the student or students responsible acted with actual malice, that is, if they knew the ac-

Notes


ERIC
Full Text Provided by ERIC

END

U.S. Dept. of Education

Office of Education
Research and
Improvement (OERI)

ERIC

Date Filmed

March 21,1991