FACEBOOK AND THE FIRST AMENDMENT: A CAUTIONARY ANALYSIS AND INDICTMENT OF THE CULT OF UNFLEDGED "MATURITY"

PART 2: UNPROTECTED SPEECH IN PUBLIC EDUCATION GIVES INSIGHT INTO THE "SLIPPERY SLOPE" OF SPEECH REGULATION

A significant amount of legal attention about Facebook surrounds adolescents in high school. Admittedly, accusing an entire generation (my own) of unremittingly proving their adulthood is overly simple. Indeed, my opinion is intentionally satirical and based on my own limited observation. Granted, the fact remains that there are twenty-somethings who fit the mold surely have a reason. From a societal point of view, one cause is the wearing away of satirical and offensive humor, which stems from the political correctness fad. Second, and perhaps more accurate, is that publicized court cases most oftentimes involve students: those who want to voice their opinion but lack the tact that (sometimes) come with adulthood.

Currently, public education is the legal battleground in the great social media debate. On one side, there are advocates for greater First Amendment protection, and on the other side, there are those advocating that pragmatism and protection come at the cost of tempering students' free expression in certain instances. Each position includes valid concerns that are not easily dismissible. A public high school is the ideal place to test the limits of speech regulation because adolescents do not fit squarely within the boxes of adult or child.

Where do you stand?

A new interpretation of Political Speech: Satire is political only when harmless, toothless and innocuously banal

If a network aired "All in the Family" during prime time today, the show would be lambasted for promoting unacceptable hate speech. It is fair to say that only the most cognizant could see that Archie Bunker reflected social ills at the time. Carol O'Conner, hardly a racist and Norman Lear understood this. Likewise, the founders considered Freedom of Expression paramount for fear that, if left unchecked, a state would restrict an individual's speech under threat of punishment.

Rather freedom of expression is one of the most important liberty interests. In short, free expression supplies the means for a state/society/culture/group etc. to meet a semi-attainable utilitarian goal, individual freedom.[1] In theory, and only in theory, I subscribe to the marketplace of ideas. Practically, exceptions must exist on some forms of expression predicated upon past mistakes.

Nonetheless, assuming that political speech is the *only* protected form of free expression is false. What would that mean for satire? Satire is an effective avenue to express your political opinion. Who is the arbiter of what is "juvenile", "unacceptable" or offensive *if* that speech is non-defamatory? A pervasive and choking P.C. Gestapo chills free expression.[2] Comedy and satire are safe only when a network considers a program's content sterile enough to air. This is why shows like "How I Met Your Mother", "Two and a Half Men" and, the admirably bland "The Soup" offend anyone with a sense of humor. Insipid irony and deliberate puns are "acceptable" (acceptable to whom? Nobody knows. Nobody ever will) forms of humor.[3]

Because we are predisposed to regulating our thoughts by measuring their offensiveness, examining the legal limitations cyber speech in high school illuminates the possible limitations that we "grown-ups" face.

A. Free speech in public school

The Supreme Court held in the prominent case of *Tinker v. Des Moines Independent School District* that, "students do not leave their constitutional right to freedom of expression at the school-house gate."[4] Granted, in the same opinion, the Court invented a caveat, or test, which eroded unbridled expression; a school may restrict speech causing a "material disruption."[5] Such an opaque test further blurs boundaries about limitations on student expression. Similarly, if speech causing a "material disruption" served as a basis for a lawsuit for the rest of us then court dockets across the country would be flooded with plaintiffs who endure those lovely people on the commute home from work. Sarcasm aside, the "material disruption" standard applies to actions that are the result of a student's speech, and more than merely discussion.

Indeed, in the spirit of ambiguity, the Supreme Court created two other significant exceptions to the *Tinker* rule. One exception is lewd and obscene speech.[6] Second, First Amendment protection does not extend to speech promoting illegal drug use.[7] Regardless of my opinion, these exceptions are well-established precedent in the classroom. Nevertheless, do these exceptions extend beyond the classroom? If so, then Facebook greases the wheels for what surely will become an onslaught of litigation.

B. Speech outside of the classroom:

Unlike the Court's explicit exceptions about speech on school property, there is a lack of uniformity in the courts about off school grounds. There is case-law advocating both sides of the issue depending on what jurisdiction you live. Further, the different Circuit court decisions are logically irreconcilable.

Hypothetically, assume that a school could discipline a student for statements made at home on the computer. And, in this same scenario the student's statement is punishable if: 1) it creates or will create a "material disruption" on school grounds, 2) that the statements are lewd/obscene or 3) promote illegal drug use.[8] All three exceptions expand restrictions to the point where the exceptions swallow the rule.

(1). *Material Disruption:*

The language in *Tinker* is problematic for two reasons. First, material disruption is vague. Is a material disruption a fight that occurs on school grounds because of an argument that occurred off school grounds? Yes. Accordingly, school officials can and should punish those students involved for his or her actions. On the other hand, can school officials punish the instigator for his or her words because it resulted in a fight? That scenario should frighten you. To better see the consequences of suppression all one need do is look at Russia. Currently, Russian journalists bold enough to criticize the government end up missing[9]. When and if, you come back I am confident your opinion will contain a great deal more nuance.

Returning to the hypothetical, who is to say that a single instigator led to a material disruption? And, how about if the speech was benign but taken out of context by the aggressor. At the extreme, you could physically assault anyone and claim the fight began because of another's insults.

Second, the crucial verb in the *Tinker* exception is "causes." If the Court intended to include foreseeable disruptions it would have conjugated the verb differently, and wrote "causes or *likely to cause*." Case-law exists upholding schools to discipline students if their statements create foreseeable material disruption. For instance, in *Wisniewski v. Board of Education,* an 8th grade student created an image of his teacher being shot. He made that image his icon for an online chat network. The school suspended the student for five days. After the first suspension, the incident a further superintendent's hearing was held, and the Board increased the suspension to include the rest of the semester. The Court of Appeals for the Second Circuit held in favor of the school's decision, stating that the student's actions created a foreseeable risk that school authorities eventually would discover. Furthermore, it materially and substantially disrupted the school.

Naturally, in this case the student's decision was imprudent at best and mind-numbingly quixotic at worst. Of course, the most appalling came from the bench; The Court determined that even though the student never intended to cause harm, the potential risk of danger and current disruption outweighed his expression.[10]

Whenever a law or Court decision creates mandates including the words "potential" or "foreseeable" one should be wary of the consequences. The student's crime was bad judgment; a crime that any eighth grader is guilty of. Perhaps not to the same extreme, but without intent to harm anyone a proper remedy might be counseling. If the parents refuse cooperation then the onus shifts to them, and the case becomes a matter for the Department of Social Services.

In addition, the teacher has other private legal remedies if she or he fears harm. Leaving the determination to school administrators is highly unjust and subject to impropriety. Administrators concern themselves with bad

press or a tarnished reputation should a student act on the image. Naturally, an administration is free to cast a wide enough net to appear proactive in securing students' well-being at the cost of their civil liberties. In the end, a non-neutral arbiter determines what speech should and should not be suppressed.

(2) *Lewd/obscene speech and promoting illegal drug use:*

If a student makes statements that school officials consider lewd, obscene or promoting illegal drug use the perceptible abuse of power becomes a serious threat to a child's civil liberties. For example, imagine a student-created Facebook site that supports legalizing marijuana, which is a political issue. Are we comfortable with forcing the student to remove the site and impose discipline? If anything, the First Amendment is the edifice that prevents suppressing political speech. Likewise, decisions that consider expression lewd or obscene depend on context, which is entirely subjective. To be sure, it should not matter because while a lewd or obscene comment might be puerile, suppression with the looming threat of punishment is not a corrective remedy. The only consequences of these restrictions are an increasingly budding resentment on behalf of the students. If anything, it breeds hate and anger not security and protection.

It is deplorable an over broad legal precedent governs a student's freedom of expression, placing power in the hands of school administrators. What is more, legal remedies exist for those on the receiving end of offensive speech: defamation actions, filing for an order of protection, harassment, stalking, menacing, child neglect, Persons in Need of Supervision (PINS) cases etc.

A prelude to Part 3:

This leads to the next question, which is if private expression is unprotected when it creates a potential disruption, then what argument exists that distinguishes school suppression vs. state suppression, or a company's suppression? Moreover, do you consider Facebook a public forum or a privately restricted site?

If harsher restrictions on speech are placed on those who are not adults, then what rationale prevents the same restrictions for adults, those assumed to act more prudently?

Update

On November 8, 2010, The New York Times published an article involving the firing of an employee because of disparaging remarks made about her supervisor.[11] In what the Times called a "landmark" case, the

National Labor Relations Board (NLRB) filed a formal complaint against the fired worker's employer, American Medical Response of Connecticut. The NLRB's complaint contends that an employee's criticism of his or her employer on social networking sites is generally protected speech. Additionally, the NLRB's acting general counsel states in the article that there is no difference between criticism between employees around the water cooler or on a social networking website.[12]

The company's policy restricted employees from condemning working conditions on social media websites. Moreover, American Medical Response forbade employees from making disparaging or discriminatory comments about an employee's supervisor or another co-worker. The NLRB's position is that the policy restricting discussion of working conditions is a clear violation of the National Labor Relations Act (NLRA), and that applies to union and non-union workers alike. Coupled with the blatant violation of the NLRA, the Board alleges that a policy regulating "disparaging" comments among workers is overbroad and likewise a restriction of free expression.

As predicted, social media has spilled from the "juvenile" sphere and into the adult. Of course, to anyone not blessed with a complete lack of foresight, the threat to free expression never existed solely in high schools. Perhaps in time more cases like this will follow and shake the twenty-somethings from their collective Neverland and into adulthood. The irony is once they stop trying to act adult they will become adult.

On an aside, I have been writing this short piece on and off for the past week when I had free time (usually late at night into the early morning) and wish I had posted it before the 8th. Nonetheless, putting my ego aside, I am in complete agreement with the NLRB. Hopefully, such egregious speech limitations are quashed within the workplace and a precedent set; a precedent that would allow employees to vent their frustrations and prevent them from looking over their shoulders to see if the KGB (colloquially referred to as H.R.) is monitoring their speech. Hats off to them.

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[1] The word "freedom" developed a hokey connotation beginning in 2000 thanks to a wonderfully obtuse president. Yet, the word in its essence describes the means to fulfillment on a grand scale. By contrast, it does not mean deep fried taters made in America… Freedom to make bad decisions spark others to counter with more persuasive and better decisions.
[2] "Gestapo" being an internal restriction – we tend to regulate ourselves rather than have another label us. Intentions, of course, are not part of the equation. Fashionable content is the line we look to for guidance.
[3]This is no to say that puns and irony are bad forms of humor. Rather, it is the context surrounding them which determines their effectiveness.
[4] *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, (1969)
[5] *Tinker.,* 393 U.S. 503, 506 (1969)
[6] *Bethel School District v. Fraser*, 478 U.S. 675 (1986),
[7] *Morse v. Frederick*, 551 U.S. 393 (2007)

[9] As I write this, around 20 Russian journalists are missing and 19 of those instances remain unsolved. In addition, if you are thinking "this guy is a fear monger. Comparing Russia to schools in the United States discredits anything he says." First, I would recommend reading the section about hyperbole and satire again and second we are dealing with the same modus operandi. The differences are in the facts, which is a debate over scope and not similarity.
[10] This balancing was not part of the holding. The balance is my own implication.
[11] Read the story here
[12] Opinions and statements around "water cooler" are protected speech. Consequently, a person's non-defamatory opinion made through electronic communication logically deserves the same, if not more, protection. This would substantially limit Facebook's ability to remove a post or a page since it is a third party. The line of reasoning the Court uses to maintain the "Material Disruption" standard stems from non-public and public forum distinction in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (U.S. 1983)