Speech, Free Speech, School Speech[1]
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Introduction

We are here today to talk about free speech in public schools. Perhaps you already knew that the Constitution guaranteed you a measure of free speech in your school. The First Amendment to our Constitution, part of the Bill of Rights, states, "Congress shall make no law . . . abridging the freedom of speech." Although it says "Congress," the amendment also governs the other branches of the national government, as well as state governments and the public schools they have created.

Earlier we heard from Mary Beth Tinker, plaintiff and then petitioner in Tinker v. Des Moines, a case in which the Supreme Court applied the First Amendment to student speech. The *Tinker* case is significant for a number of reasons, but principally because it set forth the current legal rule governing student speech. The rule announced by the Court in *Tinker* is relatively straightforward. It is this: a school may not suppress or punish student speech unless school officials have reason to believe that the speech will materially and substantially disrupt the work of the school.

But if the rule is straightforward, its application is not. We have to ask ourselves: What does it mean to "materially and substantially disrupt"? What is included in material disruption? What excluded? Here things get messy. If what you say causes others to comment, or to object, or even to warn you, it would not seem to count as a material and substantial disruption. These things apparently occurred in *Tinker*, but the Court held the speech protected anyway. For the same reason, if what you say distracts other students from their work, that alone is not a material and substantial disruption. What *does* count, then?

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[1] This essay was given to the Buffalo Chapter of the American Board of Trial Advocates and guests as the Third Annual James Otis Lecture.

According to a case decided after *Tinker*, called Papish v. University of Missouri, if you use a swear-word in a student newspaper, it would, again, not seem to count—at least at a university. But in a case after *Papish*, called Bethel School District v. Fraser, the Supreme Court refused even to apply *Tinker* to a speech given at a school assembly in which the student made some pretty gross and embarrassing references to sex. Be sure to understand what I am saying: the Court did not conclude that talking about sex in an assembly was a material disruption under *Tinker*; it refused even to apply *Tinker*, basically treating the language as unprotected by the First Amendment. And in a recent case, Morse v. Fredrick, the Court again refused even to apply *Tinker* to a student banner that read, bizarrely, "BONG HiTS 4 JESUS." Again, this seems to imply that advocating illegal drug use at a school event is unprotected by the First Amendment.

So where does that leave the law? If you're confused, you're not alone. Let's review. We have a general rule—*Tinker*—and we have a series of exceptions to that rule. The *Tinker* rule, which says that your speech is protected unless school officials have reason to believe it will cause a material and substantial disruption, doesn't even apply if you use sexually indecent speech at an assembly or advocate illegal drug use at a school event. But why not? Are there other exceptions? What if you advocate in a class discussion that marijuana should be legalized? Does that fall into the illegal drug exception? What if you advocate resisting the police? *That* can definitely get you arrested, and it can be *illegal*--so should it be treated the same way? What if you advocate nonviolent civil disobedience? That is illegal by definition. Or what if you advocate *violent* disobedience—like the revolution our forefathers fought? Your banner says, "FiGHT 4 JESUS." Protected speech, or not?

In the next fifteen minutes I am going to tell you a story that will help you answer some of these questions. It is a story about the evolution of our law. The story I am going to tell doesn't begin with *Tinker*; it ends there. My hope is telling you this story will help you better understand the reasons for the *Tinker* decision, and thus its limits. The story I am going to tell has three sections, or chapters, corresponding to the parts of the title of my talk. Chapter 1 is about "speech"—about how state and national governments treated speech around the time the Constitution was written, nearly 250 years ago. Chapter 2 is

about “free speech,” about the origin of our modern-day legal rules protecting subversive political speech. And Chapter 3 is about the application of these principles to “school speech.”

Chapter 1: Speech

Chapter 1, I said, is about speech, and in particular, about the government regulation of speech around the time of the adoption of our Constitution. I’ve already mentioned, and you already know, about the First Amendment to that Constitution, which states that “Congress shall make no law . . . abridging the freedom of speech.” But what was “the freedom of speech”?

For the men who adopted that amendment, the “freedom of speech” did not mean the freedom to speak and write as you wanted without consequence. There was no such tradition in England or in the American colonies. The weight of the evidence suggests, instead, that leading Americans believed speech could be harmful, even dangerous; and that the state had a duty to protect itself against dangerous speech by punishing the speaker. Let me give you several examples.

Some of you may know that our state, the state of New York, was the site of some of the most brutal and sustained conflict in the Revolutionary War. New York City was held by the British, from the summer of 1776, following the Battle of Long Island, until evacuation day in November 1783, over six years later. What made the war particularly painful for New Yorkers, however, was the internal division it caused. New York was full of “loyalists,” that is, Americans who chose to remain loyal to the British king; and the revolutionaries, who called themselves “patriots” or “Whigs,” regarded these loyalists with severe distrust. Many were ordered to leave their homes, cross the battle lines and seek the protection of the British. New York loyalists were also stripped of the right to vote, to hold elected office, to sue in a court of law, to practice their professions, and, most importantly for our purposes, they were denied the right to speak their minds on the decisive issue of the day, independence. Friends informed on one another, reporting neighbors who, say, raised a glass of beer and said "Long live the king!" These comments might be reported to a group

called the "Committee for Detecting Conspiracies," headed by the illustrious John Jay, this state's first Chief Justice and its second Governor, who repeatedly had such men arrested and interrogated. Then, on March 30, 1781, the state assembly passed a law titled, An Act "to punish adherence to the king of Great Britain," which made it a crime to "preach[], teach[], speak[], or writ[e]" that the king ought to have authority over New York. The crime was declared a felony and made punishable by *death*. New York was hardly the only state to pass such a law; similar laws could be found in most states.

I don't know about you, but it struck me as surprising to learn about these laws. As I studied the matter more, however, I discovered that they were actually part of a significant English tradition. Although the statutes were given different names, the crime they defined was usually called "sedition" or "seditious libel." The thrust of seditious libel was undermining the state by speech. You might have heard of ordinary libel, which is publishing something false about someone to their injury. Libel can get you sued, but truth is a defense, so you can win that suit if you can show what you published was true. And that makes sense. Truth, however, was not a defense to *seditious* libel. Truth made seditious libel *worse*, since truth enhanced the power of the words to undermine of the government. Truth made speech more dangerous.

But, you might ask, what about the First Amendment? Did it change this? Did it prohibit the punishment of seditious speech? It doesn't seem so. Take, for example, the first major war scare in the history of our country, around the year 1800, when we were drawn into a conflict between Great Britain and revolutionary France. Congress's response to the situation was to pass a series of highly restrictive laws, including one known as the "Sedition Act," which made it a crime to "write, print, utter or publish . . . any false, scandalous and malicious writing . . . against the government of the United States," a crime punishable by imprisonment. Thus, only ten years after the adoption of the First Amendment, Congress had passed a law making criticism of the government a criminal offense.

This concludes Chapter 1, "Speech." My claim in this chapter has been that, at the time the First Amendment was adopted, there was little protection for seditious libel or

other forms of subversive political speech. If you criticized the government, you could find yourself in jail, or worse.

Chapter 2: Free Speech

Chapter 2 is about "free speech." We know that today the First Amendment does protect subversive political speech, at least up to a point. When did this protection arise?

Fast forward now from 1800 to the first World War, which began in 1914. It was again an uncertain time. At home, we faced threats from dissident radical groups. In May 1920, for example, anarchists detonated a bomb on Wall Street, killing thirty people, which stood as the deadliest terrorist attack on American soil until the Oklahoma City bombing in 1995. In May of 1918, while the war was still ongoing, Congress passed an act criminalizing the publication of "disloyal, profane, scurrilous, or abusive language about the form of government of the United States," the Constitution, the military, the military's uniform, or the American flag. You now know the proper legal term for this kind of offense—seditious libel. And, in fact, the act is commonly known as the Sedition Act of 1918.

A series of high-profile cases under the Sedition Act and related statutes made their way to the Supreme Court. At first, the Court upheld the laws, but in 1919, the most prominent member of the Court, Oliver Wendell Holmes, reversed course, dissenting in a case called Abrams v. United States. The core of his dissent was, you might say, a kind of 'theory' of the role of subversive speech in our political system. Holmes began by observing that some people never doubted the truth of their beliefs and naturally sought to make those beliefs into law, so they could "sweep away all opposition." Others, however, had come to recognize that "time has upset many fighting faiths," that what seemed necessary or crucial or true today was not so tomorrow, and that instead of freezing today's beliefs into law, "the ultimate good . . . is better reached by free trade in ideas." That, Holmes wrote, "is the theory of our Constitution. It is an experiment, as all life is an experiment. . . . I think we should be vigilant against attempts to check the expression of opinions that we loathe." As he put it in

another decision, we should only check speech when it posed a "clear and present danger" to the security of the country.

Notice that Holmes called his view the "theory of our Constitution." You now know that it was not the theory of the Constitution as it was originally understood. It was Holmes's theory of the Constitution—but still, it was a brilliant one. He understood that our system of government was not put at risk by subversive political speech. On the contrary, what Holmes called a "free trade in ideas" could strengthen it. How? By challenging those in power to examine their views, exposing error where none had been seen. Notice what the theory assumes. At its core is the free trade in ideas—the *trade* in ideas. To *trade* ideas, you have to express yourself, wait for the response of the other person, and then reply. Holmes point was not that we should allow people to freely criticize the government because there was value in expression alone, in simply allowing people to say what they believed. For Holmes, the value of free speech was in *deliberation.* One had to defend what one said, stand up for it, own it, and take responsibility for it. Doing that would push us towards the truth, or what Holmes called "the ultimate good." And it distinguished valuable political speech from simply trying to hurt someone with words, or incite others to commit a crime.

Chapter 3: School Speech

We have come, finally, to Chapter 3, "School Speech." So when does school enter this story? When did the student's right to free speech in school originate?

Not with Justice Holmes. To my knowledge, the issue didn't actually come before him, but the same Holmes who heroically forged constitutional protections for subversive political speech would almost certainly have *rejected* the suggestion that the same protections applied in public schools. Why?

The short answer is that Holmes probably considered public school what the law called a "privilege," not a right. Privileges were benefits given freely by government, which you simply had to accept as they were given. For example, in the case of McAuliffe v.

City of New Bedford, Holmes rejected a man's request to be reinstated to his job as a policeman after he was fired for engaging in political activity, which was against department rules. The policeman argued he had been punished for exercising his right to free speech. Holmes disagreed. The man, wrote Holmes, "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." His right to be a policeman rested on an implicit agreement to accept limitations on his speech. This was just necessary; a police department could not function if officers were free to speak at any time, on any subject they wanted. Policing required order. The same logic could be applied to public schools. Public school is offered for free by the government on condition that students and teachers accept certain basic rules. The schools simply could not function if students were free to speak on any subject at any time in any way they chose.

We have now come to the part played by the second hero in the story, our own Robert Jackson. Justice Jackson is responsible, at least in part, for challenging this view of public school by transplanting Holmes's theory of a "free trade in ideas" into the public school. Jackson saw public schools as serving to train young men and women for that free trade in ideas. Schools were the petri dish of democracy. Jackson laid out this vision in a famous case, West Virginia v. Barnette, which dealt with whether a state could require students to salute the American flag. In the course of rejecting that position, Jackson explained why it was crucial to protect students' First Amendment rights. The schools, he wrote, "are educating the young for citizenship." If schools did not protect the rights of students, it would "strangle the free mind at its source and teach youth to discount important principles of our government as merely platitudes." By treating school as a mere privilege, which government could provide in a completely authoritarian manner if it so chose, we failed to honor our supposed conviction in the value of disagreement.

This brings us back to *Tinker*. In Tinker v. Des Moines the Court quoted Justice Jackson's language in *Barnette* and endorsed his vision of public school. In a crucial passage explaining why schools must tolerate subversive political speech, Justice Fortas wrote, "Any departure from absolute regimentation may cause trouble. . . . A word spoken, in class, in the lunchroom, or on the campus . . . may start an argument or cause a disturbance. *But our*

Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength." Fortas returned to the point repeatedly. As he put it later, "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection." One hears in his words echoes of Holmes and Jackson.

So that is Chapter 3, "School Speech." You have a right to subversive political speech in public school because public school is a training ground for our democracy, and the best way to train for a free trade in ideas is to permit it. Yet if this is the justification for extending free speech into schools, then it suggests important limits to the student's rights. Speaking freely on whatever topic you wanted, in whatever words you wanted, whenever you wanted, could not serve to prepare you for a free trade in ideas. School cannot function that way. Nor is it a *trade* in ideas if one person dominates, if they use their words simply to injure, or if their aim is to incite crime rather than inspire thought. Those activities do not further the mission of the school; they undermine it.

A worry that speech is abused by students has led members of today's Supreme Court away from Jackson's vision of public school toward an older model of schooling. This older model is based on discipline, order, and imparting civility and respect for authority. The model can claim a significant heritage; one does not have to look very deep in our history to find examples of schools operated on these premises. And there are benefits to elevating discipline, order, and civility above all other educational values. But what Jackson saw, and what Mary Beth Tinker showed, was that one can respect authority while challenging it. One can engage in subversive political speech with the aim of building up and improving our community. Seditious speech does not imply a lack of allegiance; it can be a demonstration of allegiance, of that deepest bond of attachment that one can have to a group of people and to their shared political project.

Conclusion

Where does this leave us with the difficult questions I began with? We can wrestle with some of them in the discussions afterwards. I think the guiding question is: is the speech consistent with the mission of the public schools? Or does it undermine that mission? Take the student in the *Fraser* case, who was punished for giving a speech filled with indecent sexual metaphors. Sexual speech can have a point, but I would say that Fraser's language did not, that it was there just to for laughs, and that it actually humiliated some of the younger people in his audience. He was carelessly victimizing people, and so I'm inclined to think the Court got it right. I'm not so sure the Court got it right in Morse v. Frederick, the "BONG HiTS 4 JESUS" case. There is no question, I think, that drug use and the drug trade threaten our schools. But why can't we make this point in debate? The banner did not present a "clear and present danger" to the school. If one could respond with another banner, or with a class discussion, then I think *Tinker* should have applied and the speech been protected.

I look forward to discussing these issues with you. Thank you.

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