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Constitutional Law- Freedom of Speech- Withdrawal of Funds From College Newspaper Advocating Segregationist Policy Deemed Violative of First and Fourteenth Amendment

Constitutional Law—FREEDOM OF SPEECH—WITHDRAWAL OF FUNDS FROM COLLEGE NEWSPAPER ADVOCATING SEGREGATIONALIST POLICY DEEMED VIOLATIVE OF FIRST AND FOURTEENTH AMENDMENTS—*Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973).

Modern courts have consistently held that the rights of free speech and press provided for in the first amendment are fundamental rights protected by the due process clause of the fourteenth amendment from abridgment by the states.[1] Student expression has been the target of much recent litigation and has prompted increased Supreme Court concern over constitutional aspects of public school administration.[2] The central controversy has developed into a question of how much freedom should be given to a generation that delights in exploring the "limits of institutional response."[3] One of the most piercing probes has been the campus newspaper[4] which has recently been afforded a limited degree of first amendment protection.

1. Talley v. California, 362 U.S. 60 (1960); Lovell v. Griffin, 303 U.S. 444 (1938) (extends protection as against impairment by state agency). Prior to *Lovell*, it had been the settled rule that the first amendment limitation on federal abridgement of freedom of speech or press was not applicable to state action. Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922). *See* 16 AM. JUR. 2d *Constitutional Law* § 341 (1965).

2. Epperson v. Arkansas, 393 U.S. 97 (1968) (statute prohibiting teaching of the Darwinian theory of evolution was violative of free speech under the first and fourteenth amendments); Pickering v. Board of Educ., 391 U.S. 563 (1968) (right of teacher to express criticism of administration); Board of Educ. v. Barnette, 319 U.S. 624 (1943) (requiring student to salute flag and pledge allegiance violated first and fourteenth amendment's right of expression); Griffin v. Tatum, 425 F.2d 201 (5th Cir. 1970) (hairstyle regulation held to be partially invalid); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970) (hairstyle regulation upheld); Brooks v. Auburn Univ., 412 F.2d 1171 (5th Cir. 1969) (speaker bans); Barker v. Hardway, 283 F. Supp. 228 (S.D. W.Va. 1968), *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969) (demonstrations).

3. *See* Abbot, *The Student Press: Some First Impressions*, 16 WAYNE L. REV. 1 (1969). A surging interest in this new concept of academic freedom for students can be noted in the case law that has developed over the past decade. The Supreme Court has thrown considerable support behind the student and appears to have afforded him a special privilege which can best be exemplified by the following excerpt from Keyishian v. Board of Regents, 385 U.S. 589 (1967):

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom . . . . 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." *Id.* at 603 (citations omitted).

4. While the student press serves such worthy administrative functions as distributing information, breaking down impersonalities in the academic structure and bringing greater communication between all parties on campus, at the same time it occupies a powerful position in the college hierarchy. Its relatively homogeneous readership enables concentration

In *Joyner v. Whiting*,[5] financial support for *The Campus Echo*, a student publication at North Carolina Central University, was withheld by Whiting, president of the previously all-black university, following circulation of its first issue advocating a strong segregationalist policy. The paper's editor, Joyner, featured an article which urged Blacks to assert themselves as a proud people separate from Caucasians in every way. In addition, he expressed alarm at the increasing number of whites on campus and demanded an end to their admittance and the preservation of the school's all-black status.[6] The court held that Whiting had not sustained the burden[7] of showing justification for his denial of the right of expression and declared the suspension of funding unwarranted.[8]

The fundamental obstacle to constitutional relief in censorship of student expression has been in defining the relationship between the student and the school.[9] Although the unsettled state of this area of the law makes

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on issues of greatest concern and augments its capability to direct the forces in support of those issues. *See* Abbot, *The Student Press: Some First Impressions*, 16 WAYNE L. REV. 1 (1969).

5. 477 F.2d 456 (4th Cir. 1973).

6. The headline of the paper read, "Is NCCU Still a Black School?". In the editorial which occupied front page space, Joyner noted that "until we [the black community] assume the role of a strong, proud people we will continue to be co-opted. Until we chose [sic] to make this clear, by any means necessary, the same thing will continue to happen [referring to the onslaught of white students] . . ." *Id.* at 458. In keeping with this policy, Joyner restricted his staff to black students and limited his advertisers to black merchants, a policy that was later withdrawn following the suspension of funding.

7. It is interesting to note the protection afforded student rights by the courts in light of the recently abandoned privilege concept which sanctioned most types of disciplinary action, *see* note 11 *infra*. Of partifular interest is that Whiting, a school official who heretofore had occupied a position that entitled him to an unlimited array of disciplinary procedures, should have to carry the burden of proof for the reasonableness of his action in this instance. 477 F.2d at 461.

8. The case was remanded to the district court on the question of the discriminatory staffing and advertising policies of the *Echo*. If there were found to be a danger of a reinstatement of this policy, the court was directed to enjoin the practice. 477 F.2d at 463.

9. One of three theories is generally advanced in an analysis of the problem. Some courts accept the *in loco parentis* line of reasoning, but this has proven to be unsatisfactory for two reasons. Commentators argue that while the parent-child relationship cannot be dissolved, the school system must be able to suspend the unruly student who makes the education of others more difficult. *See* Comment, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1379-80 (1963). Likewise, there is inconsistency in interpreting the *in loco parentis* doctrine as granting the school parental powers without the accompanying responsibilities. Other courts have relied on a contract theory finding consideration on both sides. However, the contract theory has proven to be unreasonable in its preference of the institutions. *See* Robinson v. University of Miami, 100 So. 2d 442 (Fla. 1958); Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435 (1928). For a good discussion of these two theories and the third concept of privilege see Comment, *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

the formulation of general rules particularly difficult, there has been a trend away from the older concept of "privilege"[10] which regarded school attendance a matter of grace that could be terminated at the will of administrators for failure to comply with regulations assented to by the student at the time of admittance.[11] Conditions which fostered the privilege ideology gradually disappeared and were replaced by a new set of circumstances[12] that prompted the courts to take a fresh look at student rights. The result was a recognition of the right of academic freedom[13] which conceded that attending a public university might be regarded a privilege, but denied the state the right to condition the granting of such privilege on the

10. The concept was developed in Hamilton v. Regents, 293 U.S. 245, 261-62 (1934). In that case the Supreme Court spoke of school attendance as a matter of grace which might be terminated at the will of administrators for failure to comply with regulations to which the student was presumed to have assented upon admittance.

11. *See, e.g.*, Steier v. State Educ. Comm'r, 271 F.2d 13 (2d Cir. 1959). In this case a student who felt that administrators were exerting excessive control over student organizations voiced strong opposition in letters to the president of Brooklyn College. His resulting suspension led to court action which was to test his constitutional rights. The court held that he was not free to stay on campus in his former capacity as a student, for he had been admitted to the school "not as a matter of right but as a matter of grace after having agreed to conform to its rules and regulations." *Id.* at 20 (Moore, J., concurring). The decision was a correct one in light of the legal environment which at that time embraced the privilege concept. For greater insight into the discarded privilege theory see Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969).

12. The entire nature of the education process has changed since Hamilton v. Regents, 293 U.S. 245 (1934). Today college education has discarded its luxury status and has taken on the characteristics of a necessity for many high school students as an increasing number of employers demand it as a prerequisite for job opportunities. In addition, the trend toward the current situation and away from the aging concept of privilege can be evidenced by the increased state involvement in educational funding as well as increased enrollment.

13. *See* Dickey v. State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967), where the court noted that although there was no legal obligation on the college to operate the newspaper or to have Dickey as its editor, because it did authorize both, it could not, as a branch of the state, suspend Dickey without violating the first and fourteenth amendments. The following excerpt evidences the emphasis given academic freedom in deciding the case:

> We believe that there unquestionably was an invasion of petitioners' liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread.
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> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. *Id.* at 619 *quoting* Sweezy v. State, 354 U.S. 234, 250 (1957).

relinquishment of constitutional rights.[14]

In *Joyner*, the majority felt that a permanent denial of financial support to the college paper because of its editorial policy was a denial of the freedom of speech.[15] The court followed the rationale of those decisions which have recognized and given precedent value to the recent widespread application of student constitutional rights in the area of journalism.[16]

However, the fourth circuit was careful to withdraw its support of the student press before reaching the limits of freedom afforded professional journalists.[17] *Joyner* falls within an emerging graduation of control which varies from the broad freedom granted professionals to more restrictive limitations at the college level and even more narrowly defined liberties in the secondary school.[18] The court felt that there should be some limits placed on the student press, but that such limitations should meet the well established tests of reasonability.[19] School officials have been given the authority to suppress expression in those special cases where they can "reasonably . . . forecast substantial disruption of or material interference with school activities."[20] In *Joyner*, the court noted that Whiting's action

14. *Id.* at 618. Since the time of the *Dickey* decision, there has been no challenge by any state or federal court to the proposition establishing constitutional rights in students at a public institution of higher learning. However, opposition to this principle has been expressed in dictum of Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967). *See* Wright, note 11 *supra*.

15. Whiting argued unsuccessfully that the complete withdrawal of financial support could not constitute censorship since the idea of permanency was not commensurate with the application and withdrawal of funds according to the subjective judgment of a censor. The court cited authority which disproved of prohibitions on freedom of speech calculated "to burn the house to roast the pig." 477 F.2d at 462, *quoting* Butler v. Michigan, 352 U.S. 380, 383 (1957).

16. *See, e.g.*, Scoville v. Board of Educ., 425 F.2d 10 (7th Cir. 1970) (censorship cannot be imposed by suspending student editors); Korn v. Elkins, 317 F. Supp. 138 (D. Md. 1970) (nor by withdrawing financial support for student publications); Sullivan v. Houston Ind. School Dist., 307 F. Supp. 1328 (S.D. Tex. 1969) (nor can it be imposed by suppressing circulation).

17. The *Joyner* court suggested that it was not willing to apply the liberal standards to the college press that the Supreme Court applied in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). 477 F.2d at 462.

18. The logic behind such a progression seems to be based on a belief held by commentators that the degree of moral restraint practiced by publishing journalists diminishes as one passes from the professional ranks into the secondary school press. *See* Comment, *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045, 1128 (1968).

19. The *Joyner* opinion notes authority which places limits on the student press by permitting a somewhat limited exercise of censorship. Essential to the institution of such a policy of literary suppression is the presence of some basis on which the school official might reasonably believe that such restrictions are warranted. This usually includes the likelihood of material and substantial interference with the operation of school rules, classes, or other activities. 477 F.2d at 461.

20. Tinker v. Des Moines Community School Dist., 393 U.S. 503, 514 (1969). The Court

might have been warranted had he satisfied this objective test of foreseeability,[21] but failing to meet this criterion, his withdrawal of funds served as a denial of the constitutionally protected freedom of speech.

Of primary interest in *Joyner* is the fact that the court chose to give decisive weight to the question of student rights even though adoption of that line of reasoning meant rejection of the civil rights argument involved. It would appear that the issue of academic freedom overshadowed the segregationalist policy advocated by the *Echo*, preventing its emergence as a major issue. Such a result is inconsistent with the current national policy against support of segregated education[22]—a policy so compelling that it has overridden the general freedom to dispose of property,[23] and even limited rights granted by the first amendment.[24] The court sidestepped the argument that a continued discriminatory policy by the *Echo* could, if interpreted as "state action" promoting such advocacy, result in suspension of federal funding as provided by the Civil Rights Act of 1964.[25] The majority disposed of this question by labeling the newspaper's function one of state "advocacy" rather than state "action" which would have called the Civil Rights Act of 1964 into play.[26] This decision was reached despite authority that has regarded the student press as an arm of the state.[27]

An argument might be advanced in Whiting's behalf which would qualify his censorship as being reasonable when judged by the standards estab-

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also provided that school officials must show that their "action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509.

21. Joyner v. Whiting, 477 F.2d 456, 461 (4th Cir. 1973). The circuit court felt that no danger of physical violence or harm to the white students was apparent from the record, thereby making the permanent restriction on funding unnecessary.

22. The policy spoken of was formulated in Brown v. Board of Educ., 347 U.S. 483 (1954), and in Green v. County School Bd., 391 U.S. 430 (1968) where the court assigned school administrators the duty "to convert to a unitary school system in which racial discrimination could be eliminated root and branch." *Id.* at 438.

23. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

24. Shelton v. Tucker, 364 U.S. 479 (1960).

25. Strong support for judicial concern with desegregation can be found in sections of the Civil Rights Act of 1964 which authorize suspension of federal assistance to programs and agencies which practice discrimination in their selection of participants. Civil Rights Act of 1964, 42 U.S.C. §§ 2000(d)-(d-1) (1970).

26. Joyner v. Whiting, 477 F.2d 456, 461 (4th Cir. 1973). Circuit Judge Field, in his dissenting opinion, expressed dissatisfaction with the court's resolution of this issue, saying that civil rights considerations outweighed the student rights question and whether the editorial be labelled "advocacy" or "action" it violated the fourteenth amendment and the Civil Rights Act of 1964. 477 F.2d at 466.

27. College newspapers have qualified as governmental activities where, as here, they are published within the framework of a state supported institution utilizing public facilities. *See* Panarella v. Birenbaum, 37 A.D.2d 987, 327 N.Y.S.2d 753, 757 (1971).

lished in those decisions which have countenanced free speech limitations where they were exercised to prevent material disruption of school activities.[28] The success of such an argument depends on the court's willingness to extend the scope of the reasonability tests to include a nonviolent, financially motivated type of disruption rather than limiting their applicability to instances where violence would naturally follow the student advocacy. More specifically, if federal agencies act in accordance with the Civil Rights Act of 1964 and withdraw funds from the university as they have in similar cases of noncompliance,[29] such withdrawal would result in curtailment of activities that depend on federal aid. The educational process would have been impaired just as effectively as if violence had erupted on campus. It is submitted that such a policy would not be a deviation from precedent but an amplification of the tests to encompass all types of disruption, nonviolent as well as violent. This would not alter the purpose of the reasonableness standard but would focus its concern on the elimination of disorganization in public school systems resulting from an irresponsible student press.[30]

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28. *See* Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971); Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970).

29. State v. Mitchell, 450 F.2d 1317 (D.D.C. 1971). *See also* Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom.*, Coit v. Green, 404 U.S. 997 (1971).

30. The court did not find that Joyner's activity was irresponsible or disruptive. *See* note 21 *supra*. However, it is submitted that this result was reached because it limited its definition of "disruption" to violent interference which was not present in *Joyner*. The argument advanced in the text is predicated upon nonviolent disorganization which was not considered by the court. 477 F.2d 456 (4th Cir. 1973).