

Constitutional Law: Academic Freedom: Some Tentative Guidelines

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RECENT DECISIONS

Constitutional Law: Academic Freedom: Some Tentative Guidelines—The extent to which a teacher's choice of subject matter and method of instruction are protected as elements of free speech under the first and fourteenth amendments has been a subject of recent judicial concern. How free is a teacher to choose the method and the subject matter of his classes? Under what conditions may a teacher be dismissed for his choices? What are the due process requirements for such a dismissal? These are the kinds of questions with which the courts have had to deal.

The traditional view had been that the teacher was a mere employee of the state, and, as such, was subject to arbitrary restriction of subject matter and method under penalty of summary dismissal. This view is exemplified by the position of the Tennessee Supreme Court in its review of the famous Scopes Monkey Trial:¹

[Scopes] was a teacher in the public schools of Rhea County. He was an employee of the state of Tennessee or of a municipal agency of the state. . . . He had no right or privilege to serve the state except upon such terms as the state prescribed. . . .

. . . .
In dealing with its own employees engaged upon its own work, the state is not hampered by the limitations of . . . the Fourteenth Amendment to the Constitution of the United States.²

This traditional view was specifically overruled in a case concerning a more general anti-evolution statute. In *Epperson v. Arkansas*³ the United States Supreme Court held that:

The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment. It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees.⁴

1. *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927).

2. *Id.* at 111, 289 S.W. at 364. The court reversed on other grounds.

3. 393 U.S. 97 (1968).

4. *Id.* at 107.

In 1969 the Supreme Court further emphasized its break with the traditional view, when it stated that the issue of first amendment rights for teachers was no longer in dispute, and that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school-house gate."⁵ But while the issue of the applicability of constitutional rights was no longer in dispute, the question of the extent of those rights was still unresolved.

There are few cases that deal with the extent of academic freedom, and fewer still that discuss academic freedom as applied to the teacher. A recent United States district court case, *Mailloux v. Kiley*,⁶ has set forth procedural guidelines and has discussed the limits of the academic freedom of a teacher. Relying primarily on a federal court of appeals case, *Keefe v. Geanakos*,⁷ and another district court case, *Parducci v. Rutland*,⁸ *Mailloux* delineates a very narrow procedural protection for a teacher, coupled with very limited constitutional right.

The three cases have similar fact situations, in that they all concern the discussion or assignment of shocking or offensive subject matter. *Keefe* involved the discussion of an article in the *Atlantic Monthly*⁹ assigned to twelfth grade students by their English teacher, who was also the head of the high school English department. During the discussion, the teacher mentioned a particular word, a vulgar term for an incestuous son, which appeared in the article. He explained the word's origin, its context, and the reasons the author used the word in the article. The next evening the teacher was called to a meeting of the school committee and was asked to defend his discussion of the offending word. He also was asked to refrain from using the word in his classroom. He replied that he could not, in good conscience, agree to refrain, although in point of fact he did not use it again. Later he was suspended and it was proposed that he be discharged. The court of appeals upheld his substantive first amendment right as a teacher to be free to choose subject matter which, in the court's view, served a demonstrated educational purpose. The court con-

5. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969).

6. 323 F. Supp. 1387 (D. Mass. 1971).

7. 418 F.2d 359 (1st Cir. 1969).

8. 316 F. Supp. 352 (M.D. Ala. 1970).

9. Lifton, *The Young and the Old*, ATLANTIC MONTHLY, Sept., 1969.

cluded that:

[T]he question in this case is whether a teacher may, for demonstrated educational purposes, quote a "dirty" word currently used in order to give special offense, or whether the shock is too great for high school seniors to stand. If the answer were that the students must be protected from such exposure we would fear for their future. We do not question the good faith of the defendants [the school committee] in believing that some parents have been offended. With the greatest of respect to such parents, their sensibilities are not the full measure of what is proper education.¹⁰

While *Keefe* upheld a teacher's substantive right to choose his own subject matter, *Parducci* looked to both procedural and substantive rights of a teacher. The case concerned a high school teacher who assigned as outside reading a short story entitled "Welcome to the Monkey House," by Kurt Vonnegut, Jr., to her eleventh grade English class. The following morning she was called into the principal's office and admonished for assigning the story and was ordered not to assign it again. The teacher replied that she considered the story suitable and had a professional obligation to use the story, and then tendered her resignation. Later a hearing was held, and two weeks after the incident the teacher was notified that she had been dismissed. It was made clear at the time of notification that her teaching ability was not in question, but that it was her refusal to agree to stop assigning the short story that led to her dismissal. In response to the teacher's request for injunctive relief, a United States district court found that her dismissal violated due process requirements because of the lack of notice as to the standards to be used in determining whether a story was suitable or not. The court stated:

In the case now before the Court, we are concerned not merely with vague standards, but with the total absence of standards. When a teacher is forced to speculate as to what conduct is proscribed, he is apt to be overly cautious and reserved in the classroom. Such a reluctance on the part of the teacher to investigate and experiment with new and different ideas is anathema to the entire concept of academic freedom.¹¹

Going beyond the purely procedural requirements, the court

10. 418 F.2d at 361.

11. 316 F. Supp. at 357.

sought to specify a standard that would distinguish what was an appropriate subject or teaching method from one that was inappropriate. The district court looked to the Supreme Court decision in *Tinker v. Des Moines Independent Community School District*.¹² In that case the Supreme Court set guidelines for determining what constituted protected student behavior. The Court said that in order for the state to restrict the first amendment rights of a student, it must first demonstrate that "the forbidden conduct 'would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"¹³ This district court took this standard of student behavior and applied it to the teacher. Thus, the court held that in order to restrict a teacher's first amendment rights the state must show that the teacher's choice of subject matter or method of instruction "materially and substantially" disrupts classwork or involves disorder or the invasion of the rights of others. When the court applied this standard to the facts in *Parducci* it concluded that the teacher's choice of a Vonnegut short story did not violate the standard and was protected behavior.

Mailloux v. Kiley, the most recent lower court case on the academic freedom of a teacher, concerned a high school teacher who was suspended, and later discharged, for writing a slang word for sexual intercourse on the blackboard and then discussing it as an example of a taboo word during the course of a class discussion of an assigned book. After the incident the teacher was given a hearing by the school committee and a day later was dismissed on a general charge of "conduct unbecoming a teacher." Following his discharge, the teacher successfully sought a temporary injunction ordering the school committee to restore him to his employment. The school committee appealed and asked for a stay pending appeal. The court of appeals denied the stay and dismissed the appeal.¹⁴ On rehearing, the district court found for the teacher and entered a judgment directing: that the teacher be employed until the end of the academic year, that his employment records be purged of all references to suspension and discharge, that he be compensated for his loss of salary with interest from the date of the complaint, and that the school committee pay costs.

12. 393 U.S. 503 (1969).

13. *Id.* at 509, quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966).

14. *Mailloux v. Kiley*, 436 F.2d 565 (1st Cir. 1971).

In its reasoning, the district court differentiated the *Mailloux* case and previous academic freedom cases. *Mailloux* was distinguished from *Epperson* by the fact that the

teaching methods plaintiff [Mailloux] used were obviously not 'necessary' to the proper teaching of the subject and the students assigned to him in the sense that a reference to Darwinian evolution might be thought necessary to the teaching of biology.¹⁵

The Court indicated that the determination of whether a method is "necessary" is dependent upon the unanimity of professional opinion. The teaching of Darwinian evolution was thought necessary because the experts agree as to its merits. Where the experts are divided, however, the court felt that no necessity could be found. With reference to the offensive word used in *Mailloux*, the court said:

There is substantial support from expert witnesses of undoubted competence that the discussion of taboo words was relevant to an assigned book, and whether or not so relevant, was at least relevant to the subject of eleventh grade English Yet there was also substantial evidence, chiefly from persons with experience as principals but also from the head of the English department at the plaintiff's school, that it was inappropriate to use the particular word under the circumstances of this case.¹⁶

Thus, the district court would not rule on the necessity of the discussion of taboo words in a high school English class because of the differing views of the expert witnesses.

The court also distinguished *Mailloux* from both *Keefe* and *Parducci* on substantive grounds:

Nor is this case . . . one where the court, from its own evaluation of the teaching method used, may conclude that, even if the court would not use the method, it is plainly permissible . . . at least in the absence of an express proscription.¹⁷

In those cases the teachers gave reading assignments which contained offensive material but which were in no sense obscene, and were, in fact, from noted authors. In *Mailloux* the teacher was not discussing a word on a printed page but chose his own example of a taboo word. In addition, his asking the class to define the word

15. 323 F. Supp. at 1390.

16. *Id.* at 1390.

17. *Id.* at 1390.

created an area of possible abuse. The court said:

When a male teacher asks a class of adolescent boys and girls to define a taboo sexual word the question must not go beyond asking for verbal knowledge and become a titillating probe of privacy. . . . Here . . . there is no evidence that this plaintiff transcended legitimate professional purposes. Indeed, the court has specifically found he acted in good faith. But the risk of abuse involved in the technique of questioning students precludes this court from concluding that the method was *plainly* permissible. Too much depends on the context and the teacher's good faith.¹⁸

Thus the court distinguished *Mailloux* from all the previous cases as one where the subject matter and method were neither 'necessary,' in the *Epperson* sense, nor plainly permissible, as the court found them to be in *Keefe* and *Parducci*, but merely relevant to the subject being taught.

The court recognized a further distinction, one which had not been expressly stated in previous cases. It introduced as a guideline the proposition that the extent of a teacher's academic freedom may be dependent upon the educational level at which he teaches. The court indicated that the secondary school situation was clearly distinguishable from higher levels of education on several grounds: 1) that the secondary school acts more clearly *in loco parentis* with respect to its minor pupils; 2) that the faculty does not have independent traditions, the broad discretion, nor the intellectual qualifications of university professors; 3) that the students have limited intellectual and emotional maturity; 4) that the secondary school concentrates on the transmission of basic information and the *mores* of the surrounding society; and 5) that the secondary school student is required to attend classes and may have no choice as to his teacher. On these grounds the court concluded that the academic freedom, the freedom to choose both method and subject matter, of the secondary school teacher should be more limited than that of a college or university instructor.

By way of dicta the court stated that the secondary school teacher's substantive rights might be limited to the right to be free from discriminating religious, racial, and political measures and from state action which is unreasonable, or perhaps only those state actions that are without a plausible rational basis.¹⁹ In a

18. *Id.* at 1391.

19. *Id.* at 1392.

footnote to the case the court, citing *Epperson* and the dissent in *Tinker*, commented:

It may be that it will be held by the Supreme Court that the teacher's academic right to liberty in teaching methods in the classroom (unlike his civic right to freedom of speech) is subject to state regulatory control which is not actuated by compelling public interests but which, in the judiciary's opinion, is merely 'reasonable.' . . . Indeed it has been suggested that state regulatory control of the classroom is entitled to prevail unless the teacher bears the heavy burden of proving that it has no rational justification.²⁰

While these comments were merely dicta, they still represent a drastic change from the guideline in *Parducci* that the constitutional rights of the teacher could be restricted only where the choice of subject matter or method "would materially and substantially interfere with" the requirements of appropriate discipline.²¹ It was the supposition as to what the Supreme Court might decide that controlled the remainder of the decision, at least in terms of its practical effect.

The court, relying on the procedural ruling in *Parducci*, extended an exclusively procedural protection to a teacher whose choice of subject matter and method is merely relevant. The court held that a teacher must have had notice of the fact that his choice was proscribed before he can be disciplined for using it. But in a very narrowly worded ruling the court said:

[W]hen a secondary school teacher uses a teaching method which he does not prove has the support of the preponderant opinion of the teaching profession or of the part of it to which he belongs, but which he merely proves is relevant to his subject and students, is regarded by experts of significant standing as serving a serious educational purpose, and was used by him in good faith the state may suspend or discharge a teacher for using that method but it may not resort to such drastic sanctions unless the state proves he was put on notice either by regulation or otherwise that he should not use that method.²²

While this ruling did expand the due process requirement of notice to a teacher choosing subject matter or a method that is merely

20. *Id.* at 1391 n.4.

21. 316 F. Supp. at 356.

relevant, it also sanctioned the suspension or discharge of a teacher who has notice of a prohibition but refuses to stop. This means that unless a secondary school teacher could prove not only that his choice was relevant, but also that the preponderant opinion of the teaching profession supported his choice as both relevant and appropriate, he could be suspended or discharged for continuing to use it once he had been given notice of its prohibition.

In a practical sense, this ruling may have a chilling effect on any classroom experimentation, no matter how relevant and appropriate. Once a teacher has had notice that a particular method is not approved, it would be unrealistic to assume that he would risk suspension and dismissal on the probability that the preponderant opinion of the teaching profession would support his choice. Assuming, *arguendo*, that a teacher was certain that the preponderant opinion of at least that part of the teaching profession to which he belonged would support him, he still could be suspended or dismissed if he continued to use the method, and all he could gain after costly and lengthy litigation would be reinstatement, back pay with interest, and the vindication of his right to use the prohibited method. A teacher would for all practical purposes be deterred by *Mailloux* from challenging any restriction on his choice of subject matter or method of instruction. The effect of the decision is in conformity with what the district court saw as the probable position that the Supreme Court would take on a like case.

The court did rule that the dismissal of the teacher was a violation of due process, since the teacher had had no notice that the method he used was prohibited. The court held that:

Inasmuch as at the time he acted plaintiff did not know, and there was no reason that he should have known, that his conduct was proscribed, it was a violation of due process for the defendants to suspend or discharge him on that account.²³

Mailloux indicates with some degree of clarity the procedural protection afforded to a secondary school teacher. The same procedural requirements for due process must be observed with regard to a college or university instructor. Assuming good faith on the part of the educator and the relevance of the subject matter or

22. 323 F. Supp. at 1392.

23. *Id.* at 1393.

method, neither a secondary school teacher, nor a college instructor can be suspended or discharged for his choice of subject matter or his use of a particular method without prior notice of its proscription.

With regard to the substantive aspect of academic freedom as applied to higher education, *Mailloux* is less clear. The very fact that the court distinguished between secondary and higher education lends support for a broader substantive freedom at the college or university level. But the substantive freedom at the college or university level is not without restriction. Whether, as the court suggested, the instructor's freedom is to be limited to choosing "among options for which there is any substantial support"²⁴ or whether some other standard may be more appropriate is a question that was beyond the scope of *Mailloux*, and remains unanswered.

BRADLEY J. KEITH

Secured Transactions: Address as a Formal Requisite of the Financing Statement—The Uniform Commercial Code adopted the notice filing system, calling simply for a notice indicating that the secured party who has filed may have a security interest.¹ The document filed, however, must satisfy the information requisites of section 9-402(1).² But how strictly are its provisions construed?

In *Burlington National Bank v. Strauss*,³ the Wisconsin Supreme Court was asked to determine whether a purchase money lender, Strauss, had perfected his security interest so as to enable his interest to take priority over the bank's standard form security

24. *Id.* at 1391.

1. UNIFORM COMMERCIAL CODE § 9-402, Comment 2.

2. UNIFORM COMMERCIAL CODE § 9-402(1):

A financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. . . . A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by both parties.

3. 50 Wis. 2d 270, 184 N.W.2d 122 (1971).