Substantial Disruption

Bong Hits 4 Adolph

By Mike Tully

A prom picture from a Wisconsin high school illustrates the failure of the American legal system to navigate the choppy waters of student freedom of speech. While student speech is legally protected, the extent and nature of the protection is obscured by colliding court cases, subjectivity disguised as analysis, and subordination of student speech to adult fear and prejudice. It's a mess and educators have to make sense of it.

Baraboo High School, a couple of hours west of Milwaukee in central Wisconsin, held its Junior Prom last May and hired a photographer to record the event. The photographer, Peter Gust, posed several dozen boys, most or all from the class of 2019, on the courthouse steps. They were dressed in suits and ties and all but one, an African-American, were white. Gust told the students to wave goodbye to their parents and took a photograph. Some of the boys are waving, but at least half are making the Nazi salute. The photo became public in November, triggering the question: should the school discipline the boys who made the ugly gesture?

The question was answered in mid-November by Baraboo Superintendent Lori Mueller. "(B)ecause of students' First Amendment rights," she wrote, "the district is not in a position to punish the students for their actions." In other words, the Baraboo School District believes a Nazi salute, despite its reputation as the "world's most offensive gesture," is protected in America. "Use of this salute is outlawed in modern Germany," states Wikipedia, "and is also considered a criminal offense in modern Poland, Slovakia, and Austria." Did the Baraboo District get it right?

The District may be confused about student speech – but so are federal judges. The Supreme Court ruled in 1969 that students enjoy freedom of speech in *Tinker* vs. *Des Moines Independent Community School District*. Students were disciplined for wearing black arm bands to protest the Vietnam War. The Court sided with the students, noting, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court noted circumstances when speech is not protected: when the speech (or speech activity) causes a *substantial disruption* of or material interference with school activities, or when it *impinges upon the rights of other students* including the right to be secure and to be let alone. The Court carved out no further exceptions.

That changed in subsequent opinions. The Court ruled in *Hazelwood* vs. *Kuhlmeier* that articles written for a school newspaper sponsored by the school and produced by journalism students were not protected. Justice White wrote that *Tinker* "need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination." The Court held the principal was within his rights to remove two articles from publication in the school newspaper.

In *Bethel School District No. 403* vs. *Fraser* the Court established another exception: vulgar and lewd expression. A student who included vulgar comments in a speech was disciplined. "The First Amendment," wrote Chief Justice Burger, "does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students."

That seems clear enough. The First Amendment protects student speech except when it substantially disrupts the school or interferes with the rights of other students, when it's in a school-sponsored newspaper, or when it's vulgar and lewd. Whether one agrees with the opinions, they chart a reasonably clear path for educators. Then along came *Morse* vs. *Frederick* and "bong hits 4 Jesus."

January 24, 2002, was an exciting day at Juneau-Douglas High School. The Olympic torch was passing through town, directly in front of the school, on its way to the Salt Lake City Winter Olympics. Everybody gathered outside to greet the famous torch. Everybody, save Joseph Frederick, a senior who slept in. He woke up in time to join his friends across from the school. Frederick carried a large banner that read, "BONG HiTS 4 JESUS." When the torch passed by, he unfurled the banner in full view of the torch runners, amused members of the media, and the apoplectic Principal, Deborah Morse. Frederick was suspended and sued Morse, alleging a violation of his freedom of speech. The trial court and Ninth Circuit agreed with him. As far as they were concerned, "Bong Hits 4 Jesus" – whatever the hell it meant – was protected speech. Morse appealed to the Supreme Court.

Chief Justice Roberts, in possibly his most incoherent opinion, decided that "Bong Hits 4 Jesus" was not protected by the First Amendment and *Tinker*. But it didn't fit either of the *Tinker* exceptions: there was no evidence of substantial disruption or impact on other students. The speech was not intended for the school newspaper. The closest fit was the *Bethel* v. *Fraser* exception, but Roberts said "We think this stretches Fraser too far."

Frederick, who just wanted to get on TV, considered the banner "meaningless and funny." The four dissenting Justices described it as "curious," "ambiguous," "nonsense," "ridiculous," "obscure," "silly," "quixotic," and "stupid." Roberts agreed the banner was gibberish, then made this remarkable statement: "Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs." He was citing Morse, who "told Frederick to take the banner down because she thought it encouraged illegal drug use, in violation of established school policy." Here is what the case says: gibberish is protected speech unless a school authority decides it could mean something and might not be protected. Got that?

Roberts is not the only judge who seems unclear about student speech. Consider the Sixth Circuit Court of Appeals. In the year 2000, the Court ruled that wearing a "Marilyn Manson" t-shirt was not protected speech because Manson is "ghoulish and creepy." The Court noted the school banned the t-shirt "because this particular rock group promotes disruptive and demoralizing values which are inconsistent with and counter-productive to education" and "promotes

destructive conduct and demoralizing values that are contrary to the educational mission of the school." Manson scares the hell out of school administrators and judges.

Manson is a performer who appeals to teenagers because he annoys their parents. That's why I once wrote an opinion for the Tucson Unified School District recommending that a middle school girl not be disciplined for wearing a Marilyn Manson t-shirt. I didn't find any of the exceptions to apply. The school official who made the girl turn the t-shirt inside out claimed there was a policy banning Manson t-shirts. There wasn't.

Then there's the Confederate Battle Flag. There was a dust-up over it at Marana High School a couple of years ago. The Sixth Circuit – the same Court that banned the Manson t-shirt – upheld the right of students to wear a Confederate Battle Flag t-shirt just six months later. Apparently, Manson's message is more dangerous than the Confederacy's. In 2010, however, the Sixth Circuit changed its mind and decided it was okay to ban a Confederate t-shirt. The difference? *Morse* vs. *Frederick*. Thanks to Bong Hits, analysis of student speech has become a pseudo-intellectual free-for-all where scary utterances become exceptions unto themselves. There's no need to prove substantial disruption of the educational environment, or interference with the rights of other students. The newspaper exception doesn't apply and speech need not be lewd and vulgar. Unprotected speech seems to be falling into the definition Justice Potter Stewart famously applied to obscenity: *I know it when I see it.*

Which brings us back to Baraboo. The Nazi salute is arguably as inappropriate as a Marilyn Manson t-shirt, or a Confederate t-shirt, or a banner displaying gibberish that might have another meaning. But the Baraboo School District found it to be protected speech. Maybe, unlike Stewart, they don't know it when they see it. Or maybe they just don't want to see it.