Dialogues on Freedom 2019

PROMPTS

Presented by the Los Angeles County Bar Association
in partnership with the Constitutional Rights Foundation,
Los Angeles Unified School District, and the Los Angeles Superior Court

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Instructions:

Below are five hypothetical situations that raise Constitutional issue. For each of the situations, answer the discussion questions and the following questions:

- What Constitutional rights are involved?
- What parts of the Constitution does the prompt involve?
- What arguments can be made for each side?
- Which side do you agree with?

Situation #1 – Kneeling for the National Anthem

Colin is a student at Fortnight High School. Colin plays as quarterback for the school's varsity football team and as a pitcher for the school's varsity baseball team. Fortnight High is a public school in California. Two Fridays ago, during a home football game, Colin silently and peacefully kneeled during the National Anthem to express his personal feelings and concern about injustice in the United States. Last Friday, Colin peacefully kneeled during the National Anthem at an away football game, which resulted in a few students from the home team yelling and threatening to force Colin to stand and spraying a water bottle at Colin and the cheerleaders. As a result of this incident, Fortnight's Principal immediately issued a memorandum to all of the school's sports coaches, which was then read to all athletes. The memorandum detailed a new policy requiring all students and coaches to stand and remove their hats/helmets during the National Anthem, and restricting students from kneeling, sitting, or conducting any other form of political protest during the National Anthem at any home or away game.

- Did Colin have a Constitutional right to kneel during the National Anthem? What part of the Constitution does this school's policy implicate?
- Is kneeling a form of speech?
- What if Colin had punched his teammates that saluted the flag instead or if he had burned an American Flag instead? Would a policy restricting those actions be lawful?
- Would it matter if instead of restricting students from kneeling, sitting, or conducting any other form of protest, the policy required students to salute the flag or face detention?
- To avoid future disturbances, should the school stop playing the National Anthem before home games?

Situation #2 – High School "Admission" Test

After class one day Ms. Enriquez walks into the women bathroom near her classroom and notices an empty prescription bottle for oxycodone. Printed on the bottle label is the name of a student who Ms. Enriquez has heard has a tendency to find himself in trouble, Jacob McCay. Ms. Enriquez informs the School Resource Officer, Mr. Cho, who is a local deputy sheriff assigned to the school, and the next day during lunch period they bring Jacob to an office for questioning. Ms. Enriquez questions Jacob about the bottle while Mr. Cho, wearing his deputy uniform and wearing a gun, stands by the door, silent throughout the entire confrontation. In response to Ms. Enriquez's questioning, Jacob admits to selling his prescription his classmate, Miranda, who he believes must have left the bottle in the bathroom. Ms. Enriquez informs Jacob that he will be disciplined for violating school rules and lets him go. Shortly thereafter, Jacob is charged in juvenile court with sale of a controlled substance, a felony.

- Should Jacob have been charged with sale of a controlled substance? Should prosecutors be able to use Jacob's statements to Ms. Enriquez against him at trial?
- Should Jacob have been disciplined for violating school rules? Should school administrators be able to use Jacob's statements at school disciplinary proceedings?
- If you responded differently for the last two questions, why?
- Would your opinion change if Mr. Cho was a janitor instead of a sheriff? Why?
- Does it make a difference if Mr. Cho and Ms. Enriquez told Jacob that he could leave at any time? What if Mr. Cho informed Jacob that he didn't have to answer any of Ms. Enriquez's students?

Situation #3 – Hotel Search on Prom Night

A group of students at Cranston High School rented a suite at a hotel near the site of the prom for an "after the prom" party. School authorities were tipped off to their plans and were concerned because last year a student at such a party got drunk and was in a very serious car accident. They decided to alert the police and suggested that officers go to the hotel at midnight and break up the party. Upon arriving at the hotel, the police spoke with a hotel clerk, who provided the police with the room number where the students were staying and a key to the room. The police then went to the hotel, entered the suite where the party was taking place, and arrested several students for under age consumption of alcoholic beverages. The rest were told to leave. The students at the party feel this was private matter and that they had every right to have the party. They also feel that the police had no right to enter the suite.

- Who is right, the students or the police?
- What rights are involved?
- What parts of the Constitution might be involved?
- What arguments can be made on each side?
- With which side do you agree?
- Would your analysis change if the police chased after a student who they found drinking in the lobby to the hotel room? What if the police had knocked and were given permission to enter into the hotel room?

Situation #4 – Student GPS Tracking

Samantha attends John Jay High School (JJHS) in Naperville. Each year, the Naperville Unified School District loses millions of dollars in state funding because of student truancy. As a result, Naperville Unified instituted the "Student Attendance App." Each student is required to download an app on their cell phone that allows school staff to track the location of students on and off campus. Each school day, the students get an automated notification from the app reminding them they need to get to school on time. If the app does not register the students being on campus when school starts, a truancy officer tracks the student using the app, picks them up, and takes them to school. All students tracked by a truancy officer are given detention and are suspended if picked up by a truancy officer on the third occasion. The school district also asserts the app will improve safety by allowing school staff to know the whereabouts of a student who may be missing or unaccounted for in the event of a fire alarm or other emergency evacuation.

Refusal to download the app results in denial to access common areas of the JJHS campus, such as the cafeteria and library, prevents the students the ability to purchase tickets or attend extracurricular activities, and prohibits the student from participating in school elections. Continued denial to download the app results in suspension or expulsion.

Samantha objected to downloading the app, among other reasons, based on her religious beliefs that the use of technology, including cell phones, may easily break down the familial and community bonds in her church. Although she was never late to any of her classes, she was prohibited from entering the cafeteria or voting for homecoming court. Upon JJHS's continued instance that Samantha use a cell phone and download the app, she refused and was ultimately expelled. Samantha argues she should not be required to use a cell phone and download the app as it violates her Constitutional rights.

- Who is right, JJHS or Samantha?
- What parts of the Constitution are involved?
- Does it matter that Samantha was never late to class?
- What arguments can be made on each side?
- With which side do you agree and what are the reasons for your beliefs?

Situation #5 – Hate Speech in the Theater

Jason is a student at Midway High School. He was a devoted fan of the school's glee club, but has recently turned against the glee club because of, what he considers, their poor performance. He has been so frustrated at the team that at a recent performance, when the glee club's lead singer began her number, he yelled, "you sound like a horse and walk like a man." The singer, who is openly lesbian, was offended by the mark, as were several students sitting in the audience and backstage. The assistant principal heard the remark and told Jason to leave the theater. The following Monday he was called into the vice-principal's office and told that he violated the school rules against remarks that showed bias based on gender and sexual orientation. Jason said he did not mean the remark as a slur against anyone and that many students use the phrase "you sound like a horse and walk like a man" just to mean that a person is performing poorly. The vice-principal said Jason had still violated the anti-bias rule and suspended him for three days.

- Did Jason have a right to shout "you sound like a horse and walk like a man" at the glee club performance? What part of the Constitution might be involved?
- What if Jason truly did not intend for the statement to be interpreted as a slur? Does that matter?
- Does your opinion change if Jason yelled "this performance is retarded" instead?
- Should insensitive speech be protected? If not, who decides what is insensitive?
- Is it okay to be told what you can and cannot say at an extra-curricular event? Or anywhere else? Does the fact that the statement was made after school make a difference?

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Manual and Reference Materials for Volunteers

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GENERAL TEACHING TIPS
How to be a Great Dialogue Leader

1. The most important thing is to be a moderator, not a lecturer.

2. Before you start, introduce yourself. Tell the students who you are and why you're there.

3. Remind the students to be respectful. There are no right and wrong answers in this exercise, just opinions.

4. Be flexible. You will not have time to discuss all of the situations, so select a few topics you want to make sure you discuss. Or ask the class to vote on which topics they most want to discuss. Start with the topic that receives the most votes and work your way down.

5. Try to engage ALL of the students in the dialogue. Don't let one or two students dominate the discussion. If this happens, try the following:

- Take a poll of the classroom with a show of hands.
- Ask other students to respond to opinions already expressed.
- If students are providing physical cues like nodding or frowning, ask them whether they agree with the recent statement or if they have anything to add.
- Don't wait for a volunteer. Call on a particular student.

6. Use visual aids. Write key words or list student answers on the marker or chalk board. This breaks up the monotony of talking, giving the students a chance to digest the discussion and giving them something to refer to later.

7. Don't talk like a lawyer. Remember that these students haven't been to law school. Keep your discussion at their level. Also, remember that English may not be the primary language for some of the students.

8. Contact the teachers for your assigned session(s) in advance. Make sure they are prepared for your visit, have advised their students of the upcoming session, and will have copies of the materials available for their students.

SITUATION #1
The Kneeling Quarterback

Situation #1 implicates a public school student's First Amendment right to free speech. The issue was first litigated during the Vietnam War, when students wore black armbands to school as a sign of protest against the war. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). After several high school students were suspended for wearing the armbands, the Supreme Court found the suspension was unreasonable and in violation of the students' First Amendment right to freedom of expression. The Court held that students do not leave their Constitutional rights at the school's "front gates." However, a school may limit those rights if they reasonably believe the activities of the or speech "substantially interfere with the work of the school, or impinge upon the rights of other students."

Since the Vietnam War case, the Supreme Court has identified four categories of speech or expression a public school can limit: (a) speech that constitutes a substantial disruption; (b) speech that is vulgar, lewd, obscene, and plainly offensive; (c) school-sponsored speech, which is speech that carries the imprimatur of the school; and (d) speech that could be reasonably interpreted as advocating for illegal drug use.

Colin's actions are clearly not "vulgar, lewd, obscene, [or] plainly offensive" speech. Further, even though his actions occurred during a school sanctioned activity, Colin's kneeling during the National Anthem is easily interpreted and distinguished as his own expression, and not that bearing the school's imprimatur. Consequently, this case is governed by *Tinker*. Recently, a California Court found that a High School could not prevent its student athletes from kneeling during the National Anthem, as under *Tinker*, "a school cannot limit a student's right of free speech if it is unlikely to substantially disrupt the school's activities or learning or interfere with other students' rights." *V.A. v. San Pasqual Valley Unified School District., et al.*, 2017 WL 6541447 (S.D. Cal. 2017). Incidentally, the court found that silently kneeling during the National Anthem was a form of speech that neither disrupted the school's activities nor interfered with other students' rights.

Relevant Cases

- *V.A. v. San Pasqual Valley Unified School District., et al.*, 2017 WL 6541447 (S.D. Cal. 2017) (California District Court found a violation of student's First Amendment rights where athletes were prohibited from kneeling during the playing of the National Anthem)
- *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)
- *Bethel School District v. Fraser*, 478 U.S. 675 (1986) (Supreme Court found it was *not* a violation of student's First Amendment rights when school disciplined student for giving a lewd speech when campaigning for student body vice president)
- *Hazelwood Sch. Dist.. v. Kuhlmeier*, 484 U.S. 260 (1988) (Supreme Court found it is *not* a violation of students' First Amendment rights for school to limit content of school sponsored publications)
- *W. Va. State Bd. Of Educ. V. Barnette*, 319 U.S. 624 (1943) (Supreme Court it is a violation of students' First Amendment rights to compel the flag salute and pledge)

SITUATION #2
High School "Admission" Test

Situation #2 implicates a public school student's Fifth Amendment right against self-incrimination. The Fifth Amendment protects individuals from being forced to incriminate themselves. Accordingly, every person has the constitutional right to refuse to answer questions or otherwise given testimony against himself. Historically, this legal protection was directly related to protecting individuals from torture. Most related to the prompt is the Fifth Amendment's limitation on the use of evidence obtained illegally by law enforcement officers. Originally, the common law recognized that both coerced and voluntary confessions were admissible as evidence. However, over the last 100 years, the Supreme Court has repeatedly overruled convictions based on coerced confessions. This is true even where law enforcement use subtle techniques, such as prolonged questioning, to coerce a confession.

Miranda v. Arizona (1966) was a landmark case involving confessions. Ernesto Miranda had signed a statement confessing to the crime, but the Supreme Court held that the confession was inadmissible because the defendant had not been advised of his right against coerced confessions, including his right to remain silent and to an attorney. The Court held "the prosecution may not use statements ... stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Custodial interrogation is initiated by law enforcement after a person has been taken into custody or otherwise deprived of his freedom of movement before being questioned as to the specifics of the crime. *Dickerson v. U.S.*, 530 U.S. 428 (2000).

Here, Jacob's admission and its use as evidence in juvenile court would be a violation of his 5th Amendment Rights. A court would likely find that Jacob's admission was coerced, as he was sequestered from the rest of the student body, questioned in the presence of an armed guard and never told that he did not have to answer Ms. Enriquez's questioning or that he faced criminal charges. And at no time did Mr. Cho provide with a statement notifying Jacob with his *Miranda* rights. And in fact, this fact pattern is based off of a similar case in which the Kentucky Supreme Court found that a the student in Jacob's position had his rights violate. *N.C. v. Commonwealth of Kentucky* (Ky. 2013).

However, because, arguably, Ms. Enriquez was not acting as an agent of the police, Ms. Enriquez was not required to give Jacob *Miranda* warnings when she began questioning him. Importantly, Ms. Enriquez's ultimate objective for questioning Jacob was not for law enforcement, but rather to maintain school discipline and safety. *N.C. v. Commonwealth of Kentucky* (Ky. 2013).

Relevant Cases

- *Miranda v. Arizona*, 384 U.S. 436 (1966) (Landmark United States Supreme Court case recognizing that unless other fully effective means are devised to inform accused person of the right to silence and to assure continuous opportunity to exercise it, person must, before any questioning, be warned that he has right to remain silent, that any statement he does make may be used as evidence against him, and that he has right to presence of attorney, retained or appointed.)
- *Dickerson v. U.S.*, 530 U.S. 428 (2000) (Recognizing that the inherently coercive nature of custodial interrogation "blurs the line between voluntary and involuntary statements.")
- *N.C. v. Commonwealth of Kentucky*, 396 S.W.3d 852 (Ky. 2013) (School officials may question freely for school discipline and safety purposes, but any statement *may not* be used against a student as a basis for criminal charge when law enforcement is involved or if school officials are working in concert with law enforcement, unless student is given the *Miranda* warnings).
- *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011) (A child's age properly informs the Miranda custody analysis, so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer.)

SITUATION #3:

Hotel Search on Prom Night

The Supreme Court weighed in on the extent of public school students' Fourth Amendment rights against unreasonable searches and seizures in *New Jersey v. T.L.O*. In that case, the school principal searched the purse of a student caught smoking on campus and found marijuana. The principal called the police and the student was ultimately sentenced to probation based partly on the marijuana the principal found. The Supreme Court found that the search was not prohibited by the Fourth Amendment. While the Court noted that the Fourth Amendment's prohibition of unreasonable searches applies to searches conducted by public school officials, the Court found that it would not require "strict adherence to the requirement that searches be based on probable cause." Instead, "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."

In this case, however, the search was not conducted by public school officials on campus, but instead by police in a hotel room. *Ybarra v. Illinois*, 444 U.S. 85 (1979) (individuals, unlike students on public school campuses, are protected against searches made without probable cause). As such, the Supreme Court's analysis in *Stoner v. California*, is more applicable. 376 U.S. 483 (1964). In *Stoner*, the Supreme Court found that the search of a defendant's hotel room without consent of the defendant and without a search warrant was unlawful even though it was conducted with the consent of the hotel clerk. In *Stoner*, police officers were investigating the armed robbery of a market when they discovered a checkbook belonging to the defendant in a nearby parking lot. The checkbook's stubs revealed that the defendant had stayed at a nearby hotel. After discovering that the defendant had a criminal record and obtaining affirmative identifications of a photograph of the defendant from eyewitnesses, the officers went to the hotel. They had neither search nor arrest warrants. At the hotel, they received permission from the hotel clerk to search the room, where they subsequently discovered a gun, cartridges, a clip, horn-rimmed glasses, and a grey jacket. All of these items were used evidence against the defendant at trial. The Supreme Court found that the search of the defendant's room could only survive 4th Amendment's right against unreasonable search and seizures if the prosecution could show that the search fell within one of the exception to the rule that a search must rest upon a search warrant. The six exceptions are: (1) Search Incident to a Lawful Arrest; (2) The Plain View Exception; (3) Consent; (4) Stop and Frisk; (5) The Automobile Exception; and (6) Hot Pursuit.

The Court rejected arguments that the search was incident to a lawful arrest, as "a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." In *Stoner*, the defendant was arrested two days after the hotel search in another state. The Court also rejected that the hotel clerk's consent made the search lawful, as although hotel guests give "implied or express permission" to persons such as "maids, janitors, or repairmen" to enter their room to perform their duties, that consent does not extend to the conduct performed by the hotel clerk and the police.

Relevant Cases

- *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (the 1985 Supreme Court case discussed above)
- *Safford Unified School District No. 1 v. Redding*, 129 S. Ct. 2633 (2009)
- *Stoner v. California*, 375 U.S. 483 (1964)
- *Ybarra v. Illinois*, 444 U.S. 85 (1979) (individuals, unlike students on public school campuses, are protected against searches made without probable cause)

SITUATION #4:
Student GPS Tracking

Situation #4 implicates the First Amendment's free exercise clause: "Congress shall make no law . . . prohibiting the free exercise (of religion)." In 1995, President Bill Clinton sent material containing guidelines on student religious expression to every school district in the United States. The letter accompanying these guidelines declared:

> Nothing in the First Amendment converts our public schools into religion-free zones, or requires all religious expression to be left behind at the schoolhouse door. While the government may not use schools to coerce the consciences of our students, or to convey official endorsement of religion, the public schools also may not discriminate against private religious expression during the school day.
>
> Religion is too important in our history and our heritage for us to keep it out of our schools … . [I]t shouldn't be demanded, but as long as it is not sponsored by school officials and doesn't interfere with other children's rights, it mustn't be denied.

As with the situation here, questions of free exercise usually arise when a citizen's civic obligation to comply with a law conflicts with that citizen's religious beliefs or practices. If a law specifically singles out a specific religion or particular religious practice, it violates the First Amendment according to current Supreme Court cases. When a law is generally applicable and religiously neutral but nevertheless has the "accidental" or "unintentional" effect of interfering with a particular religious practice or belief, the question is more difficult.

In 1990, the Supreme Court narrowed a 35-year-old constitutional doctrine that required a government entity to prove that it had a "compelling interest" whenever a generally applicable law was found to infringe on a claimant's religious beliefs or practices. In *Employment Division v. Smith*, the Court held that a government burden on a religious belief or practice requires little justification as long as the law in question is determined to be generally applicable and does not target a specific religion or religious practice.

In 1993, in *Church of the Lukumi Babalu Aye v. City of Hialeah*, the city passed a law banning animal sacrifices. The law was presumably facially neutral and generally applicable, but the Court found otherwise. Since the law burdened a religious practice (here the animal sacrifice ritual of the Santeria religion), the government would have to demonstrate that it had a compelling interest in passing the law. The Court then "strictly scrutinized" the government's claims. In Hialeah, the government could not meet its burden and the law was stuck down.

Relevant Cases

- *Employment Division v. Smith*, 494 U.S. 872 (1990) (the Supreme Court case discussed above)
- *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (the Supreme Court case discussed above)
- *A.H. ex rel. Hernandez v. Northside Indep. Sch. Dist.*, 916 F. Supp. 2d 757 (W.D. Tex. 2013) (For purposes of free exercise challenge, Texas school district's requirement that every student on high school campus wear the same identification badge, which happened to be "Smart ID" badge with radio frequency identification chip, was neutral in both purpose and application and was rationally related to district's legitimate interest in easily identifying its students for purposes of safety, security, attendance, and funding).

SITUATION #5:
Hate Speech in the Theater

Like Situation #1, Situation #5 also implicates a public school student's First Amendment right to free speech. The same case law applies, particularly the *Tinker* analysis. In *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), the Court held that students do not leave their Constitutional rights at the school's "front gates." However, a school may limit those rights if they reasonably believe the activities of the or speech "substantially interfere with the work of the school, or impinge upon the rights of other students."

At the heart of Situation #5 is whether Jason's comment falls into the category of "vulgar, lewd, obscene, [or] plainly offensive" speech. The Supreme Court case most akin to this situation is *Bethel School District v. Fraser*, 478 U.S. 675 (1986). In that case, a student was suspended for giving a lewd speech at a high school assembly. Distinguishing the Vietnam War case and finding that the school could regulate and punish such lewd speech, the Court found: "These fundamental values and 'habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these 'fundamental values' must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."

With Situation #5, the question is whether yelling "you sound like a horse and walk like a man" is so far outside "the boundaries of socially appropriate behavior" that the statement can be punished and regulated by the school.

Relevant Cases

- *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)
- *Bethel School District v. Fraser*, 478 U.S. 675 (1986)
- *Hazelwood School District et al. v. Kuhlmeier et al*., 484 U.S. 260 (1988) (Supreme Court found it is not a violation of students' First Amendment rights for school to limit content of school sponsored publications)
- *Morse v. Frederick*, 551 U.S. 393 (2007) (finding that preventing illegal drug use is a compelling interest of school districts, making the student's banner reading "Bong Hits 4 Jesus", which arguably advocated for illegal drug use, appropriate for discipline)
- *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668 (7th Cir. 2008) (J. Posner) (high school student likely to succeed on claim that school would violate his speech rights by preventing him from wearing T-shirt with slogan "Be Happy, Not Gay" in response to "Day of Silence" intended to draw attention to harassment of homosexuals, and, thus, given absence of irreparable harm to school, student was entitled to preliminary injunction to prevent school from banning his T-shirt; although school's rule banning derogatory comments referring to sexual orientation appeared to satisfy First Amendment, slogan was only tepidly negative, and it was highly speculative that it would poison educational atmosphere).