

# Rights vs. Responsibilities

Freedom of Speech and Public Employees

*Thoughts for discussion*

*For the 2011 - 2012 Minnesota State Bar Association*

*High School Mock Trial Program*

*Presented by Trina Alvero Iijima*

# In the Balance

The issue:

Where do we draw the line between a government's interest in effectively operating its institutions and a public employee's right to freedom of expression?

# Freedom of Speech

- The basis for all protections of speech in the United States is the First Amendment within the Bill of Rights: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; **or abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”
- The broad protections of this Amendment have been extended to the states via Section One of the Fourteenth Amendment to the U.S. Constitution: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...”

## Section 1983 (42 U.S.C. § 1983)

- Note that the First Amendment does not provide a private right of action.
- Federal law was created to protect these rights: Civil Rights Act of 1871
- Codified at Chapter 42 of the United States Code, Section 1983
- Section 1983 essentially made equitable relief available to those whose constitutional rights had been violated by an actor acting under State authority.

# Governmental Order

- However, it is now well-established law that public employees do not enjoy the same protections that a private citizen would have when trying to speak out on certain topics.
- The reasoning for this is sound - to promote effective delivery of services, public employers must maintain efficient operations. Conduct by employees that disrupts morale or calls into question the agency's integrity would impinge that goal.

# Freedom of Speech vs. Governmental Order

What emerges from the competing interests of free speech protection and public employer service delivery is the proverbial “balancing test” seen in American courts: how to account for agency interests versus the individual’s rights.

# Consider this ...

Recent appellate court decisions reveal that public employees have been disciplined for:

- Complaining that a police helicopter unit was not operating safely.
- Criticizing a police policy that placed primarily African-American officers on the front lines of a community-policing project in certain neighborhoods.
- Uttering a racial slur at a dinner party.

*"Balancing Act: Public Employees and Free Speech"*  
David L. Hudson, Jr., The First Amendment Center

# What is protected?

- Freedom of speech is the freedom to speak freely without censorship.
- The right to freedom of speech is not absolute in any country and the right is commonly subject to limitations.

- Wikipedia

# Who has protected speech?

For many years, courts held that public employees **surrendered** their right to free speech:

“There may be a constitutional right to talk politics, but there is no constitutional right to be a policeman.”

Oliver Wendell Holmes  
(who would later become a U.S. Supreme Court justice) in  
*McAuliffe vs. New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892).

# Why do we limit free speech for public employees?

The primary function of a government agency is to provide efficient services to the public, and if a government employer were second-guessed every time it disciplined a public employee, services could grind to a halt.

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Consider this ...

Free Speech in the Military

What free speech rights do  
members of the military have?

# Free Speech in the Military

When can military members speak freely about their opinions?

- For example, it is a crime for someone in the military to ask someone else to desert or mutiny (disobey orders as a group).

- Article 82 of the Uniform Code of Military Justice

- Also, military members who behave with disrespect toward their superior commissioned officer can be subject to court martial.

- Article 88 of the Uniform Code of Military Justice

# Governments have an interest in maintaining military order.

“Any commissioned officer who uses contemptuous words against the President ... shall be punished as a court-martial may direct.”

Article 88 of the Uniform Code of Military Justice

*Potential punishment: Dismissal, forfeiture of all pay and allowances, and confinement for 1 year.*

# Freedoms for Military Members are Restricted

- Allowed to possess and read anything they want. Limitations apply to distribution
- Allowed to attend demonstrations. But only in the United States. Only if peaceful. Only off base. Only off duty. And only out of uniform. Free speech may be forbidden if it "constitute[s] a breach of law and order."

Department of Defense Directive 1325.6  
"Guidelines for Handling Dissident and Protest Activities  
Among Members of the Armed Forces."

# Now consider police forces ...

What does it take to become a police officer?

Let's consider the normal background and experience of a police officer:

- Extensive background check; no criminal history
- Often a military background
- Paramilitary training
- Excellent reputation and credibility - police officers are "in the public eye"

# Police Officers: Civilians or Extensions of the State?

Police forces are often defined as organizations separate from any military forces, or other organizations involved in the defense of the state against foreign aggressors.

The police is a personification of the state designated to put in practice the enforced law, protect property and reduce civil disorder in civilian matters.

- Wikipedia

# Police Accountability

Police are expected to uphold laws.

Police accountability involves holding both individual police officers, as well as law enforcement agencies responsible for effectively delivering basic services of crime control and maintaining order, while treating individuals fairly and within the bounds of law.

Holding police accountable is important for maintaining the public's "faith in the system"

# Freedom vs. Order: Rights and Limitations of Police

- What happens when a police officer criticizes the police department?
- Take, for example, the case of *Wayne Howell vs. Town of Carolina Beach*. Howell was fired for writing an internal memo regarding the inadequacies of the current weapon the department used.

# Article 19 of the Universal Declaration of Human Rights

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

# International Covenant on Civil and Political Rights (ICCPR).

## Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

# International Covenant on Civil and Political Rights (ICCPR)(continued).

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order, or of public health or morals.

# Minnesota Law Enforcement Code of Ethics

"As a Minnesota Law Enforcement Officer, my fundamental duty is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the Constitutional rights of all to liberty, equality and justice.

I will keep my private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn, or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both by personal and official life, I will be exemplary in obeying the laws of the land and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

Minneapolis Police Department  
Policy & Procedure Manual  
5-102.01

# Minnesota Law Enforcement Code of Ethics

I will never act officiously or permit personal feelings, prejudices, animosities or friendships to influence my decisions. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear of favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.

I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of the police service. I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession...law enforcement."

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Policy & Procedure Manual  
5-102.01