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McCall v. State, 354 So. 2d 869 (Fla. 1978)

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Constitutional Law—THE FINE LINE BETWEEN PROTECTED AND NON-PROTECTED SPEECH—*McCall v. State*, 354 So. 2d 869 (Fla. 1978).

In any situation involving the first amendment guarantee of free speech, there exists an uneasy balance between the absolute right of individual expression and the need for qualified restraint on that expression. Although freedom should be the rule and restraint the exception, restraint is both necessary and desirable.¹ With all due deference to its constitutional primacy, free speech will ultimately survive only to the extent that it exists in harmony with the broad spectrum of basic human and societal freedoms. The nature of this tension will be examined as it arose in *McCall v. State*, involving a school setting.² The overbreadth doctrine will then be analyzed especially as used by the United States Supreme Court in two different antidisturbance statutes concerned with the school environment. Additionally, several factors will be enumerated which the Florida Legislature should consider when drafting an antidisturbance statute to replace the one struck by the *McCall* court.

McCall presented a classic instance of the confrontation between individual and societal freedoms in an unlikely setting. In light of the important issues eventually decided by the court, it is ironic that this case arose out of a seemingly innocuous schoolyard dispute between two children over the ownership of a good luck charm. Noise from the dispute attracted a nearby teacher, who separated the children and tried to resolve the conflict. Although the record is not clear whether the teacher struck either child,³ one of the youngsters ran home and told her mother, Mrs. McCall, that the teacher had hit her.⁴

Mrs. McCall returned to the school with her daughter and confronted the teacher. While more than fifty students watched and listened, Mrs. McCall engaged in a "profane verbal attack" against the teacher, demanding to know why her daughter had been struck.⁵ The tirade continued for roughly fifteen minutes until the assistant school principal arrived and quieted Mrs. McCall.

The teacher later filed a complaint with the state attorney's office charging Mrs. McCall with violation of section 231.07, Florida Statutes,⁶ the first portion of which makes it a second degree misde-

1. See D. FELLMAN, *THE LIMITS OF FREEDOM* (1959).

2. 354 So. 2d 869 (Fla. 1978).

3. Transcript of trial at 17, 35-36, *State v. McCall*, No. 76-220053 (Dade County Ct. Jan. 6, 1977).

4. 354 So. 2d at 870.

5. *Id.*

6. (1977).

meanor to upbraid, abuse, or insult a member of the instructional staff on school property or in the presence of students at a school activity.

Both prior to trial and at the conclusion of the state's case against her, Mrs. McCall moved to dismiss the charges against her on the ground that the statute was overbroad, vague, and standardless, in that it restricted constitutionally protected speech. The motion was denied each time, and Mrs. McCall was subsequently convicted and fined \$100.⁷

An appeal was brought directly to the Florida Supreme Court based on the ruling of the lower court which passed initially and directly on the validity of a state statute.⁸ Justice Hatchett, writing for a unanimous court, reversed the trial court and held the statute unconstitutional as reaching speech protected by the first and fourteenth amendments to the United States Constitution.⁹

The competing values in *McCall* bear witness to the inherent difficulties in devising a workable standard of review for first amendment controversies. On the one hand, a school cannot possibly function if expression is not limited to some degree because classroom order would dissolve into a contest to see who could talk the loudest. On the other hand, a strictly regimented school could forbid any and all "nonsanctioned expression," based entirely on the administration's discretion.¹⁰ Between these two extremes an acceptable standard must be formulated.

The overbreadth doctrine arises from the constitutional principle that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."¹¹ In first amendment cases involving overbreadth, a common distinction is made between a statute that is overbroad on its face, and one that is overbroad as applied to a particular factual situation.¹² This distinction is important because a court reviews a statute challenged on facial overbreadth differently than a statute challenged for overbreadth as applied.

In a facial overbreadth challenge to a statute, a court is not gener-

7. Transcript of trial, *supra* note 3, at 8, 30, 39.

8. FLA. CONST. art. V, § 3(b)(1).

9. 354 So. 2d at 870.

10. Olson, *Tinker and the Administrator*, 100 SCH. AND SOC'Y 86, 86-87 (1972).

11. *NAACP v. Alabama*, 377 U.S. 288, 307 (1964) (Supreme Court reversed an Alabama state court contempt order against the NAACP for refusing to disclose its membership lists to the Alabama Secretary of State, a prerequisite for qualifying to do business in Alabama).

12. See Note, Grayned v. City of Rockford—A Limitation on the Application of the Overbreadth Doctrine to Antidisturbance Regulations in the Schools, 24 HASTINGS L.J. 1263 (1973).

ally concerned with the factual situation giving rise to the case, but is concerned with whether it is possible for the statute to reach protected activity. Under some circumstances, if it is possible for the statute to prohibit protected activity, the entire statute is unconstitutional regardless of whether the activity giving rise to the case was protected or nonprotected activity.¹³ If it is not possible for the statute to reach protected activity, the statute is facially constitutional. However, in an overbreadth challenge to a statute as it has been applied, the facts in the record are crucial.¹⁴ The defendant must demonstrate that regardless of the statute's terms, it was applied to protected activity. If the court finds that the statute is thus overbroad as applied, that portion of the statute prohibiting the protected activity will be struck while any portions prohibiting nonprotected activity will remain in force.¹⁵

The primary justification for striking in toto those statutes which are facially overbroad is grounded in the similarity of the overbreadth doctrine to the void for vagueness doctrine.¹⁶ Despite distinctions between the two doctrines,¹⁷ the area in which they are parallel facilitates an understanding of the underlying rationale for declaring a statute entirely invalid. Both vague and overbroad statutes fail to give fair warning as to what constitutes a breach of law; consequently, individuals may forgo constitutionally protected activities for fear of violating an unclear law.¹⁸ In this way overbroad

13. In *Broadrick v. Oklahoma*, 413 U.S. 601, 612-13 (1973), the Court characterized facial overbreadth review as a narrow exception to traditional rules of standing, to be employed only in certain situations. Thus, facial review is limited to statutes which regulate speech alone, statutes which burden rights of association, statutes purporting to regulate the time, place and manner of expressive conduct, and statutes that provide no standards to guide the discretion of the official charged with their enforcement.

14. Courts reviewing the constitutionality of statutes as applied will focus on the specific facts in a given case, rather than on any hypothetical constitutional infirmities. See *Herndon v. Lowry*, 301 U.S. 242 (1937).

15. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 844-45 (1970). The court may achieve this either through restrictive construction or by separating the offensive portion of the statute and leaving the remainder intact. *Id.* at 862.

16. *Id.* at 871-75. "Where statutes have an overbroad sweep, just as where they are vague, 'the hazard of loss or substantial impairment of those precious rights may be critical.'" *Keyishian v. Board of Regents*, 385 U.S. 589, 609 (1967) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

17. A statute is vague when "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). Overbreadth focuses, not upon any uncertainty of the statutory language, but upon whether a statute has actually reached protected activity or, in some instances, whether a statute has the potential for reaching protected activity. See generally *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

18. See generally *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). In *Lanzetta*, a New Jersey statute, which essentially made it a crime to be a member of a gang, was held unconstitutionally vague because of the ambiguity surrounding the meaning of the word "gang." The Court demonstrated that a reasonable interpretation of the statutory language might include some "groups of workers engaged under leadership in [a] lawful undertaking." *Id.* at 457.

statutes are invidious, not only because they may actually clash with preferred freedoms, but also because of the substantial "chilling effect" they may exert on the exercise of fundamental liberties.¹⁹

The rationale for only partially striking statutes that are overbroad as applied is two-fold. First, it exonerates the defendant whose activity is protected and prevents further application of the statute to that activity. Second, it permits the statute to function in those areas where it prohibits nonprotected activity. The court reviewing a statute so challenged examines the results generated by the statute's application to the facts before the court. The technique utilized in evaluating these results is a balancing of the interests promoted by the statute against the personal and societal interests advanced by the protected expression, and ultimately a determination as to which is weightier.²⁰

The as applied review is more restrained and traditional than facial review.²¹ Facial review, by invalidating statutes in toto, is thought to generate tension between the judiciary and the legislature. Moreover, facial review seemingly violates the premise that the court will not decide constitutional issues unless they are raised specifically by the facts in issue.²²

Two important United States Supreme Court decisions involving first amendment freedom in the academic environment were cited in *McCall: Tinker v. Des Moines Independent Community School District*²³ and *Grayned v. City of Rockford*.²⁴ *Tinker* involved conduct that was "closely akin to 'pure speech.'" ²⁵ The *Tinker* Court held that the wearing of black armbands by students at their public school during school hours in protest of the Vietnam War was constitutionally protected expression. Observing that other political symbols were not banned from the school, the Court noted that "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."²⁶ However, the court hastened to add that any conduct materially disrupting or substantially inter-

19. See *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (potential members and contributors of appellant's organization were frightened off by accusations by state officials that the organization was a Communist-front organization, whose members had to register with appellee's Committee on Unamerican Activities or they would be prosecuted).

20. See Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821 (1962).

21. *The First Amendment Overbreadth Doctrine*, *supra* note 15, at 845.

22. See generally *Ashwander v. T.V.A.*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring) (noting seven Court-developed rules used to avoid deciding many constitutional issues).

23. 393 U.S. 503 (1969).

24. 408 U.S. 104 (1972).

25. 393 U.S. at 505.

26. *Id.* at 512 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

fering with the rights of others is not immunized by the first amendment.²⁷

In *Grayned*, the Court reaffirmed the material and substantial interference test developed in *Tinker*.²⁸ The ordinance in *Grayned* prohibited "mak[ing] or assist[ing] in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of [a] school session or class."²⁹ Despite contentions that the regulation was overbroad, the Court held that this ordinance was constitutional because it was "narrowly tailored" to furthering the city's legitimate interest in having an uninterrupted school session.³⁰

In both *Tinker* and *Grayned* the Court recognized that the state has an important interest in education. Because the state has a responsibility to maintain an academic atmosphere which is conducive to learning,³¹ a statute limiting first amendment freedoms may be permitted even though it infringes upon a constitutional right as basic as freedom of speech. This governmental interest was sufficient to overcome a challenge of overbreadth in *Grayned*, but not in *Tinker*.

Since the first amendment gives more freedom to people communicating ideas by pure speech than to those communicating ideas by conduct,³² statutes regulating primarily the former are far more likely to be held unconstitutional by the Court than are statutes regulating primarily the latter. In *Tinker*, the symbolic action of wearing black armbands "was entirely divorced from actually or potentially disruptive conduct by those participating in it."³³ In other words, the student's expressive behavior more closely approximated pure speech than conduct. *Grayned*, on the other hand, involved an ordinance aimed at regulating disruptive conduct.³⁴

The United States Supreme Court will permit a first amendment

27. 393 U.S. at 513.

28. 408 U.S. at 118.

29. *Id.* at 108.

30. *Id.* at 119.

31. *Id.*

32. See generally *Cox v. Louisiana*, 379 U.S. 559, 563-64 (1965) (narrowly drawn statute prohibiting picketing near a courthouse upheld as a valid regulation of conduct as distinguished from pure speech).

33. 393 U.S. at 505.

34. *Tinker* and *Grayned* may be distinguished not only by virtue of the *type* of activity regulated but also according to *identity* of the persons causing the disturbances. In *Tinker*, only students were involved in the symbolic protest of the Vietnam War by wearing black armbands to classes. 393 U.S. at 504. The *Grayned* case, on the other hand, involved a public demonstration right outside the school by roughly 200 people, including students and nonstudents. 408 U.S. at 105. In *McCall*, the defendant was a nonstudent, and furthermore, the challenged statute expressly exempts students from its coverage. FLA. STAT. § 231.07 (1977). However, the constitutionality of these statutes did not turn on who was causing the disturbance.

challenge by an individual whose conduct could be proscribed by the state only if the overbreadth of the statute is "real" and "substantial."³⁵ The city ordinance in *Grayned* was narrowly tailored to the school context, where "prohibited disturbances are easily measured by their impact on the normal activities of the school."³⁶ Reasoning that language can never achieve mathematical certainty, the Court added that the ordinance was not overbroad merely because it was marked by "flexibility and reasonable breadth, rather than meticulous specificity."³⁷

The following bifurcated approach provides a useful tool for analyzing the breadth of statutory language. The first step to ascertain whether a time, place and manner regulation is constitutional consists of examining the regulation on its face to determine if it is narrowly tied to precluding the use of certain public facilities for certain purposes at certain inconvenient hours. In the school context this means the regulation must be aimed at prohibiting the disturbance of normal classroom activities. The second step, to be taken only if the first test is satisfied, is to determine if the regulation is reasonable as applied to the conduct of the person before the court.³⁸

This two-pronged test can be applied to the statute challenged in *McCall*. The first clause of section 231.07, Florida Statutes, states that anyone who "upbraids, abuses, or insults" a teacher "on school property or in the presence of pupils at a school activity" is guilty of a second degree misdemeanor.³⁹ Justice Hatchett, speaking for the court, held that as a matter of statutory construction, the first clause must be treated separately from the remainder of the statute.⁴⁰ cursory examination of the clause reveals that the proscribed conduct, unlike that in *Grayned*, is not tied to disruption of normal classroom activities at fixed times.

The *McCall* court demonstrated the ambiguity of this portion of the statute by setting up two examples of patently protected expression which fall within the scope of its regulation.⁴¹ The court stated that the first clause of section 231.07 would permit the conviction of an old lady present on school property at midnight, with no students around, who criticizes the quality of a teacher's work. Sim-

35. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

36. 408 U.S. at 112.

37. *Id.* at 110 (quoting *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1088 (8th Cir. 1969)).

38. See generally *Grayned*, 408 U.S. at 119-20.

39. (1977).

40. 354 So. 2d at 872 n.3.

41. Using hypothetical examples to illustrate the ambiguity of a statute is a classic technique for reviewing facial overbreadth. See *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Baggett v. Bullitt*, 377 U.S. 360 (1964).

ilarly, a conviction could issue from an individual telling a band instructor after a parade, while not on school property but in the presence of other students, that the band played poorly because of the band instructor's inability to teach music.⁴²

That section 231.07 could reach these and other constitutionally protected activities contributed heavily to the court's determination that the statute was overbroad on its face. Therefore the acts of the appellant were given no weight in the court's determination. Even though McCall's actions were deemed reprehensible, deserving of punishment, and may have been prohibited under a more carefully drawn statute,⁴³ she was permitted to escape the consequences of her misconduct because the statute as drafted was overinclusive.

Chapter 231, Florida Statutes,⁴⁴ which contains the section held unconstitutional in *McCall*, deals with government regulation of school personnel. The entire chapter is scheduled to be repealed in 1982.⁴⁵ Pursuant to the Regulatory Reform Act of 1976, one year prior to the repeal of that chapter, the legislature must begin reviewing the state's role in regulating the school with an eye toward restoring, replacing, or doing away with its various sections.⁴⁶

The fundamental change the legislature must make in section 231.07 is obvious. The prohibited expression contained in that section must be tied to a material disturbance of the school classroom at specific times in order to survive facial overbreadth review. Two problems exist with the statutory language as it now reads. First, by attempting to proscribe upbraiding, insulting, and abusive language, the statute comes close to regulating speech based on its content. Second, by including within its prohibitions insulting attacks that occur in the presence of students at a school activity, the statute proscribes conduct which is not directly tied to disruption of normal classroom activities. Courts may determine that the state interest in promoting school order is so attenuated at nonscholastic activities that the statute would be punishing protected expression. Thus, the best procedure for rewriting section 231.07 so that it would pass facial overbreadth review would be to model the new statute after the ordinance upheld in *Grayned*.

The state has an interest in the proper functioning of its schools and parents have an interest in promoting stability in their homes.⁴⁷ Both of these concerns suggest that the state and parents have a

42. 354 So. 2d at 872.

43. *Id.* at 872 & n.5.

44. (1977).

45. Regulatory Reform Act of 1976, ch. 76-168, § 3(3)(b), 1976 Fla. Laws 299 (omitted).

46. *Id.*

47. See generally *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

significant interest in promoting respect for authority. Mrs. McCall abused her parental privilege of questioning a teacher's handling of her child when she chose to use a face-to-face billingsgate, rather than a calm inquiry into her daughter's charges. Outbursts such as hers tend to hold school personnel in a light which provokes contempt and disrespect among students, and undermine the discipline of a school. Arguably, personal attacks of this nature have no legitimate place in the classroom, or at any school function where there are students present.

On the other hand, reasoned criticism by parents of school policies and personnel should be constitutionally safeguarded. It is questionable, however, whether the same protection should be afforded to the sort of attack made on the teacher in *McCall*. If parental abuse of a teacher or school official could be shown to contribute to physical disruption in the classroom, it could clearly be prohibited under the *Grayned* standard. But, even if the parental abuse of a teacher or school official could not be shown to contribute to classroom disruption, such conduct may produce other damaging effects which may also deserve to be proscribed (*i.e.*, the disrespect for authority already mentioned).⁴⁸

Whether this type of damage to the student-teacher relationship may be prohibited under the *Grayned* disturbance standard is problematic. Nevertheless, neither *Grayned* nor *Tinker* suggests that only that conduct which completely disrupts the classroom can be prohibited. Depending on the situation, the nature of the disturbance necessary to disrupt a classroom will vary. A properly drafted statute which carefully ties abusing and insulting a teacher to those situations where listening students would be adversely affected may satisfy the *Grayned* standard.

Therefore, assuming that the legislature still wishes to do so, it may be possible to rewrite section 231.07 narrowly enough to meet the *Grayned* test, while retaining the notion of prohibiting abusive and insulting language toward teachers in the presence of students. But the statute must be worded so that private criticism of a teacher, no matter how ascerbic, is not proscribed. Also, criticism of a teacher in front of students should be carefully proscribed so that it includes only abuse that undeniably promotes disrespect for the teacher and school authority. And the statute should be worded so that it could not be used by school administrators to suppress the expression of ideas.

48. Concern that traditional notions regarding the teacher-student relationship, especially with respect to authority of the teacher, were being rejected without justification prompted the vigorous dissent of Justice Black in *Tinker*. 393 U.S. at 515-26.

All statutes, no matter how carefully drafted, are susceptible to invalid application. The inherent limitations of language, coupled with the need for statutory flexibility, make it difficult to write a law not subject to some infirmity. These drafting difficulties are multiplied in statutes involving speech and communicative conduct. At times, a court faced with a first amendment case will use facial overbreadth review sweepingly to overrule challenged statutes without regard to the offending conduct at issue. At other times, the same court will evaluate a challenged statute as applied to the conduct by balancing the interests promoted by the statute against the interest in allowing such expression to continue. This divergence is but a reflection of the delicate function of choosing between two long-recognized and accepted constitutional rights: the cherished right of free speech and the extraordinary power of the state in promoting education of its citizenry.⁴⁹

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49. Effective June 6, 1979, the Florida Legislature enacted Chapter 79-163, Laws of Florida, conforming § 231.07, Florida Statutes, to the decision in *McCall*. This was achieved by deleting all reference to the first portion of the statute which was the subject of this comment. The remaining portion of the statute was left intact and now reads:

Any person not subject to the rules and regulations of a school who creates a disturbance on the property or grounds of any school, who commits any act that interrupts the orderly conduct of a school or any activity thereof shall be guilty of a misdemeanor of the second degree, punishable as provided by law. This section shall not apply to any pupil in or subject to the discipline of a school.

