

# The Teacher

## Civil Liberties and Poetic License

Marc Lendler

A number of articles in *PS* have described the value of involving students directly in political life as part of teaching. Concepts come to life; the purposes of compromise become clearer; and above all, the serious stakes behind the public circus of politics become more apparent. My experience is that confronting practical situations, especially those eliciting passionate argument, can be a valuable aid in focusing attention and clarifying underlying principles.

Twice in the last three years, conflicts about freedom of artistic expression broke out on my campus in the middle of a course I was teaching on speech rights. What was evident both in and out of class was the development in student judgment from the first to the second event, and the way in which a more complex understanding emerged of the relation between the different kinds of rights and between the right of free expression and other values.

### Creative Conflict

Bennington College is a tiny school with a substantial percentage of students who are interested in the arts. One of the symbols of the importance of art is the recent tradition of a President's Gallery—student photography, painting, and sculpture exhibited in the hallway leading to the offices of the president and the dean of faculty. Those halls are a traffic thoroughway for students going to class, prospective students visiting campus, official visitors, and office staff going to work.

The duration of a student exhibit is between one and three weeks,

and the method by which the space is reserved is a simple sign-up list in the Visual Arts Division. As could reasonably be expected, some of the exhibits featured nudity, and there were occasional murmurs of disapproval from those who worked in offices nearby and from others passing through the halls. But those who objected generally did so quietly, mindful of the need for tolerance.

In fall term 1991 an exhibit appeared that upgraded the murmurs to an uproar and posed the question of whether the school should regulate what appeared in that space. A student hung a photography exhibit in which one of the pictures was a close-in shot of a female torso with a small amount of blood dripping from the vagina. Many passersby found it distasteful. But the group that protested most vehemently was the office staff whose only means to and from their workplace was that hallway. They complained to the school administration and to the Art Division that they had no way to avoid seeing the photograph, which some said they found so upsetting that they were unable to perform their jobs. There was no reason to doubt the sincerity and depth of the office workers' feelings about this photograph; some pointed out that they had tolerated a great deal that was offensive to them previously.

The school did not order the exhibit removed. In fact, it stayed up for two weeks, longer than some others. The day before the exhibit was scheduled to come down an unknown party stole the controversial photograph.

The issues raised by the exhibit and the furor surrounding it were

not simple ones. The traditional use of the space by signing and rotation and the word "gallery" itself implied to most students that the school had no right to review the content of any exhibit. But this gallery was also the most publicly visible face of Bennington College, and that might just as logically give the school control over its decor.

Expression has always been subject to regulation of place, as well as time and manner (Cox 1981). The fact that this hallway led directly to workspace also posed the special problem of a captive audience (Emerson 1970). To ask the office workers—who had to pass through those hallways continuously—to avert their eyes or turn away might have been unreasonably demanding.

The Supreme Court has reasoned that nonconsenting viewers may be protected from offensive material (*Rowan*, see side box) but has also placed a burden on those who ask for protection to establish that they have no other means of avoiding the offensive display (*Cohen*, side box). But did regulation of place for aesthetic reasons and the captive-audience problem permit—or oblige—the school to select only some exhibits as unacceptable? The Court has generally argued that regulation on those two grounds should be content-neutral (Tribe, 1988, 947–953; *Erznoznik*, side box).

My class was considering recent speech controversies on campuses when this debate unfolded, so I thought it might be useful to hear out the class members. Conventional wisdom among students was that it was an open and shut question, and a predictably traditional one. The office workers were de-

**Cohen v. California (1971).** Court overturns conviction for publicly wearing a jacket bearing “F\_\_ the Draft” slogan. “One man’s vulgarity is another man’s lyric.”

**Erznoznik v. Jacksonville (1975).** Court invalidates ordinance banning visible nude dancing; leaves open noncontent-specific ban of visible drive-ins *in toto*. “The plain, if at times disquieting, truth is that . . . we are inescapably captive audiences for many purposes.”

**Miller v. California (1973).** Seminal case continuing status of obscenity as less protected speech. Said community standards could be applied. “It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York.”

**Pope v. Illinois (1987).** Refinement of *Miller*. A “reasonable person” rather than “any given community” must find a work obscene for it to lie outside First Amendment protection. One cannot “come to an objective assessment of . . . literary or artistic value, there being many accomplished people who have found literature in Dada and art in the replication of a soup can.”

**Rowan v. U.S. Post Office (1970).** A person getting obscene advertisement has right to get order for sender to stop. “A mailer’s right to communicate must stop at the mailbox of an unreceptive addressee.” Held that privacy interest was strongest at home, weakest in public places.

**Terminiello v. Chicago (1949).** Landmark free speech case. Overturned conviction for racist, anti-Semitic speech at which opponents protested violently. Douglas for the majority: “[F]reedom of speech, while not absolute . . . is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.” Jackson for the minority: “There is the danger that if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”

**Tinker v. Des Moines School District (1969).** Court overturned suspension of high school students for wearing armbands protesting Vietnam war. Held that some regulation was permissible for orderly functioning, but “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”

manding censorship, and the school administration, while it had taken no action, had a barely suppressed inclination to comply. The students who spoke in class seemed to be fairly representative of student thinking in the school as a whole.<sup>1</sup> Freedom for artists to express themselves without restraint occupies a special place in the pantheon of values on this campus.

My own views on the exhibit were somewhat different, and I outlined them to the class this way: the school had a right to decorate that area in any way it saw fit and had erred primarily in letting the term “gallery” come to mean student-selected exhibits. In addition, the school had an obligation to listen to the protests of the office

workers since the hallway could be considered part of their workspace. I added that these principles should guide future policy. Up to this point the works shown were self-selected, and the school should not act in an ad hoc way against this particular exhibit (which it had not done).

That last point did not help; I had lost my audience. Before their eyes I had become transformed into Donald Wildmon railing against the Mapplethorpe exhibit. The students in the class saw the terms of the debate as the ancient one of avant-garde artist against narrow-minded philistine. They seemed to accept the notion that the degree of offense taken should determine what kind of expression

could be permitted; the problem (to them) was that the office workers were excessively prudish. The specific conclusions they drew were less interesting to me than the framing of the issue—any interference with artistic expression in that hallway was the equivalent of government suppression of *Ulysses*.

## The Communitarian Alternative

After the exhibit came down, the school organized a discussion group to examine the controversy and broader issues of free speech and artistic expression on campus. The group was comprised of various sectors of the campus community, including faculty, office workers, and students. The position that the school administration argued for was loosely derived from the communitarian critique of rights. A community (particularly one as small as Bennington) should be able to discuss these matters within itself, learn more about each other’s values, and make decisions based on increased mutual understanding.

I say “loosely derived” because many communitarians reject coercion as a tool in resolving speech debates.<sup>2</sup> In “hate speech” controversies, the analogous argument is that civility and speech rights are co-equal values, and that rules for speech need to be worked out through community consensus.<sup>3</sup> This is not quite the same as the “community standards” test of *Miller*, although it may not be as far away from that as its proponents believe.<sup>4</sup> The office workers should be heard (in this rendition) not principally because they were a captive audience, but because they were offended members of the community. The implied corollary of this is that the concept of “rights” is too abstract and atomizing to be useful in adjudicating conflict.

The group met several times and then dissipated with the issues left unresolved, due not to differences but to the ordinary forces of entropy and the fading immediacy of the issues. The only change in pol-

icy was that the Visual Arts Division would review the exhibits to determine their appropriateness for the President's Gallery. This new policy was quickly ignored in practice, and the situation returned to the status quo ante—students displaying their work merely by signing for the space. This made it almost certain that there would be a next round of debate, and there was, right on schedule to coincide with the second time I offered my course on free speech three terms later.

A student hung an exhibit of photographs and writings which contained criticism of an administration decision the previous summer about student housing. The display was crude, but the same could be said about a number of other exhibits. What caused the controversy this time was not so much the critical nature of the display as the timing. It appeared on the day prospective students were visiting campus.

Bennington has been underenrolled for several years, and freshman recruiting is critically important. Some school officials, apparently concerned that this exhibit might have an adverse affect on recruitment, called the chairman of the Visual Arts Division to determine whether the exhibit met the unwritten guidelines for the President's Gallery. The chair concluded it did not, and told the student to move it to a less visible area. When the exhibit was taken down, some students responded by hanging up an even cruder display in protest, including a poster of the school president as a Nazi.<sup>5</sup> Ironically, this exhibit stayed up for several days and was seen by more prospective students than the one it replaced.

The size and intensity of the debate that followed dwarfed the first incident, and again my class provided a gauge of student sentiment. There was less division on the central issue—that ordering an exhibit taken down because of its potential bad effect was unjustifiable. That is unsurprising, since in the previous case removal was considered, but not enacted. Students, not less than the citizenry as a whole, tend to

look at issues on a “front-burner, back-burner” basis; this one now moved to the front. What was surprising was the growth in understanding about the place and purposes of civil liberties.

There were, of course, several types of responses. Some students still argued reflexively that Bennington was an art-oriented school that placed a premium on creativity and that unrestricted art belonged in any space the creative impulse led the artist. Others were bothered most by the absence of written guidelines. But what marked student discourse as a whole, in class and out, was a markedly greater willingness to entertain more complex arguments.

McClosky and Brill (1983) describe the essence of civil libertarian thinking as internalizing the principle of reciprocity—that the claims made for one's own rights are no more worthy than the claims made by others. In the debate over the first incident, little thought was given to competing rights or other values involved. That was one of the reasons the issue could not be resolved.

The second round forced many students—including some of those who most passionately opposed the removal of the exhibit—to present a more integrated map of mutual rights. There was a growing tendency to recognize that the school had a right to regulate the place of artistic expression but not the content. The specific reciprocal arrangement that now seemed fair to students was that this space should not be considered gallery space in the normal meaning of the term, but that other such space should be provided, and that in those areas the school should forswear the right to remove exhibits based on their offensiveness to anyone.

### Relearning Rights

Why would a sizeable number of students adopt a position that they had indignantly rejected in the previous debate? Civil libertarian thinking is learned behavior. Students, like most people, are especially solicitous of their own rights.

The oft-repeated finding that Americans support free speech only when it is posed in abstract form may be because at root those questions are not tapping feelings about civil liberties at all. People may be responding to the notion of a government taking away their rights as it might some other good, and therefore be a measure not of tolerance (even in the abstract), but of individualism. That appeared to underlie students' reaction to the first incident.

When the events recurred, it became clearer to the students that an extended framework that took in the competing claims of others would be necessary to secure their own. Conflicting arguments drove everyone deeper into the heart of civil liberties debates. Some faculty who supported the removal of the exhibit also referred to aspects of judicial reasoning about speech rights. Those included an argument based on *Tinker* (side box) that an institution has the right to prohibit expression that substantially interferes with its work (here, the work of recruiting students), and the inevitable popularized version of Robert Jackson's dissent in *Terminiello* (side box), was bowdlerized into “The Constitution is not a suicide pact.”

“You can't tell us what to hang on those walls” was not a sufficiently compelling counterargument. Students who felt strongly about the issue were forced to reason further and develop a more complex and consistent scheme of rights. In the immediate aftermath of this debate, there was talk of writing a student constitution. While nothing has come of it so far, it represented an almost breathtaking transformation for an anti-authoritarian student body that previously seemed to regard rules and process as inherently oppressive.

It would be overly sanguine to conclude that every protracted conflict over speech rights draws people toward a more civil libertarian position. Repeated exposure to civil libertarian arguments is an important factor in determining whether people come to accept them (McClosky and Brill 1983), and there is a more concentrated

presentation of those arguments in a campus setting than in most other sectors of society. Students had a powerful incentive to work out a more finely tuned understanding of rights—there was something to be gained that they valued highly (freedom for artistic expression).

The discussion (particularly the class discussion) paradoxically benefited from the fact that it took place in the context of a private college, which has some flexibility in determining what rights of free expression to permit. In a debate of that nature, the use of Supreme Court decisions plays a different pedagogical role than in situations where they are binding. It was not a matter of discovering what rules *do* apply, but of discussing what rules a community *should adopt* if it were free to do so. That has the salutary effect of forcing discussion back to first principles and of eliminating the temptation to shorten the discussion by appeal to holy writ (“Offensive expression? The Court already decided that in *Cohen*. Next question.”). Those decisions are one important entrant in the discussion, but only on the basis of their persuasiveness, not on their authority. My references to court reasoning are in that spirit.

The question of what can hang on those walls and of the relation between civility and free expression has still been left unresolved. I teach the free speech course again next year, and it is likely that there will be another occasion to recycle these arguments. Given what I have written here about the teaching possibilities inherent in public debate, I find my interests as a teacher and a community member to be slightly at odds—somewhat

akin to those political scientists who secretly relished the possibility of the last presidential election going to the House of Representatives because it would pose so many devilishly interesting teaching and writing opportunities.

### Postscript

The prediction in the final paragraph proved inaccurate. The next campus uproar over these issues took place *before* my next course. This one worked its way into *USA Today*. A student received a note from the head of housekeeping telling him to clean up garbage outside his room. The only thing there was his bicycle, and he wrote, “Go to hell. It’s my bike. I’ll park it where I want,” on the note and sent it back. He was brought before an administrative committee, found guilty of “verbal harassment,” and put on disciplinary probation for the rest of the year. About a third of the student body signed a protest letter.

A defender of the decision again drew on communitarian language: “We have this culture on campuses in America where it’s cool to be cynical and to be angry and to be negative and disrespectful, and you don’t get a good society out of that.” The state ACLU director said that it appeared that the school wanted “a campus of unthinking robots who simply say what’s nice.”

Heated controversy, competing claims of rights, protesting students, inquiring reporters—great material for an exciting first class!

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### Notes

1. I have no way of substantiating this or other remarks in the article about student sentiment, but at a school as small as this (less than 350 students), it is not difficult to get a good read on student views of hotly discussed topics.
2. For instance, Etzioni (1993), ch. 7.
3. For a counterargument, one I find compelling, see “Freedom of Expression at Yale,” more commonly known as the Woodward Report.
4. Actually, the communitarian critique can be more restrictive of free expression than post-Miller Supreme Court decisions. In *Pope* the court held that it must be a “reasonable person” who would find a work obscene, not the narrow consensus of a particular community.
5. The “Nazi poster” became an interesting sidebar issue. The president protested vehemently at a public meeting on the events that it was irresponsible, violated the respect necessary for community, and that as a Jew, she was especially offended.

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### About the Author

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