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Deciding a Hypothetical Free Speech Case: *Keller v. Regents of the University of California*

Following his apparent violation of the student code and complaints from both students and faculty, Ryan Keller was suspended from the University of California, Delphi (UCD) for belligerent and disruptive behavior, harassment, and creating a hostile learning environment. Petitioner Keller argues his speech did not violate the student code and Respondent UCD was retaliating against him for expressing unpopular political views and violating his constitutional rights. The Court agrees. We conclude Keller's suspension cannot be upheld, not because UCD was targeting him for his political views, but because his speech is protected under the First Amendment.

While students do not have the same speech rights adults, they do have some speech rights. We held in *Morse v. Frederick* (2007) that “students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,’” and “[a]t the same time... ‘the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.’” In *Morse*, the Court ruled a high school was justified in suspending a student when he, at a school event, refused to take down a banner promoting illegal drug use in breach of school policy, even if the banner would have been acceptable if displayed at a non-school event.

Since the *Morse* ruling pertained to public high schools, we must determine how these principles apply to public universities, which can be considered a limited public forum, or a forum that may have restrictions separate from a traditional public forum, like a public sidewalk

or park. The atmosphere and nature of universities are very different from high schools in terms of its policies and its objectives. Also, with few exceptions, university students are all adults. They have significantly more freedom and are capable of exercising judgement with responsibility as they are expected to do when operating as adults in society, so they do not need to be under restrictions that may alternatively be reasonable for high school students. We cannot judge this case using the *Morse* precedent of restricted student speech because it applies to high schools, not universities.

We must ask a new question: Do university students have more speech rights compared to high school students' limited speech rights determined in *Morse*? We hold that they do. University students are adults, are treated as adults, and are expected to act as adults; therefore, their speech is not subject to the restrictions high school students face. However, as we have continually held, First Amendment protection of speech is not absolute and university students' speech can be restricted in ways separate from limitations placed on other forums.

We will look at the two incidents of Keller's speech to decide if UCD can constitutionally restrict it. The first set of incidents were Keller and his group going to various campus organizations' open-house meetings to directly challenge those organizations' charter commitments. The second incident was Keller, outside a campus organization meeting and with a video camera, confronting a student who wrote an award-winning poem and asking the student to defend the poem. The student refused and walked away, Keller followed him and pressed him again, the student refused again, and Keller left; the student said he had an anxiety attack and filed a complaint saying Keller violated the student code, which prohibits harassment and disruptive behavior. When UCD scheduled a public hearing on concerns about Keller, other campus organizations also filed complaints, saying Keller's belligerent behavior turned open meetings into hostile events and threatened the creation of safe spaces on campus. In response to

these complaints, UCD deemed Keller's speech created a hostile learning environment, which was justification for Keller's suspension. Keller says his speech is protected and did not violate the student code, and UCD was targeting him for his political views.

To first address Keller's claim UCD was retaliating against him for expressing unpopular political views, we hold that UCD was not discriminating against a certain viewpoint through his suspension. UCD's reasoning for the suspension was that he was disruptive, belligerent, and hostile, and that it was not due to the content of his speech, although being disruptive, belligerent, and hostile seems hardly grounds for suspension from a university, as we will discuss later. Based on UCD's reasoning, we can assume that had another student with a different political view performed Keller's speech in the same manner and magnitude as Keller, the student would also have been suspended for the same reasons. However, that does not mean his suspension is outright constitutional. Since the suspension was content-neutral, we will examine UCD's restrictions with lower scrutiny in relation to the university's status as a limited forum and Keller's speech to decide if the First Amendment protects it. For UCD to constitutionally put a restriction, they must have an important interest and the restriction must be narrowly tailored (because the speech is content-neutral), as explained in *McCullen v. Coakley* (2014).

We find that it is unconstitutional to restrict Keller's speech. Keller's first set of incidents was him challenging campus organizations at open-house events, where we find his actions are protected. Any organization that hosts an open-house event where the public can learn and ask questions about the organization can expect people to engage in discussion with the organizations' members. Keller avoided closed meetings and went to open-house meetings that were open to the public, and hence, open for free discussion. His speech was neither too loud nor disruptive, did not hinder the stability of the event, and was not in defiance of the organization's policy; there is no evidence to suggest the contrary. Keller's speech was merely aggressive and

turned the meetings into supposed hostile events. If Keller's speech was so terrible to warrant a suspension, then we could expect Keller would have been thrown out of the meeting or complaints would have been filed before UCD specifically asked for them. UCD's restriction on his speech defies the First Amendment because even belligerent speech and whatever speech that can turn an event into a hostile one is protected.

Belligerent speech is simply a tone and method of communicating that adds a certain expressiveness that cannot be attained another way. Many people are belligerent in their speech, like when in a heated debate or argument. Belligerence is a mode of speaking; the Court is not to determine the level of aggressiveness in people's speech, judge how appropriate it is, and limit it. Belligerence is not a premise for restriction.

The First Amendment protects speech that can turn a regular event into a hostile event. We have held that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson* (1989). Turning a non-hostile event hostile means the attendees of the event became hostile to each other; the only way I can imagine the attendees becoming hostile to each other is if the attendees found Keller's speech offensive or disagreeable, and speech cannot be restricted because it is offensive or disagreeable. Keller's speech also cannot be considered "fighting words." *Chaplinsky v. New Hampshire* (1942). No one reasonable would have considered Keller's disagreeable questions to be words that would necessitate violence, and over multiple events that apparently turned hostile, there was no occasion of violence. From *Brandenburg v. Ohio* (1969), speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" can be restricted, but that does not apply here. The speech already happened at multiple events and never led to "imminent lawless action," and Keller's disagreeable questions are not at all related

to a direct threat of violence. The First Amendment protects speech that can turn an event into a hostile one.

Keller's second incident was his confrontation with another student. The student had written an award-winning poem that was featured in the school newspaper, meaning he received media attention and became somewhat of a public figure. The student was subject to only two questions delivered with an aggressive tone. While Keller's questions and harsh tone might reasonably be considered harassment, the First Amendment protects asking questions, one reason being that questions do not and did not lead to "imminent lawless action," nor do they directly threaten violence. His tone, as stated before, is simply a mode of speaking. Keller's speech also cannot be reasonably considered "fighting words" either, because a writer, when asked to defend his work, does not reasonably respond to the asker with violence. UCD said Keller's behavior when confronting the student was disruptive, but nothing was being disrupted besides the student's personal comfort in an encounter that cannot have lasted more than a minute. Even then, speech that might cause emotional distress or an anxiety attack is protected; in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* (1995), the Court ruled that "the point of all speech protection... is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." The First Amendment protects speech that harasses or allegedly disrupts.

UCD must show an important interest in limiting the speech, because the First Amendment otherwise protects all of Keller's speech. We rule that UCD does not demonstrate an important interest in having its speech restriction and, to top it off, the restriction is not narrowly tailored. UCD says their important interest is that they want to create a safe space, so students can learn in comfort. UCD claims Keller's speech threatened the creation of a safe space, turning the space into a hostile learning environment. While the intention is honorable,

creating a safe space at university is not an important interest, nor is it narrowly tailored in a way that allows ample means of communication, because it sacrifices the essential right of individuals' freedom of speech.

Keller's speech must be included in the conversation despite its hostility. His speech is not useless speech. It is an important addition to the marketplace of ideas because he speaks about issues that our nation and the world faces. He criticizes support for Palestine, undocumented students, and race-specific housing cooperatives. He condemns the leftist leanings of campus organizations, the trivializing of rape, and the disrespecting of rape victims. These issues are important to the national conversation, and to address these issues, we must hear all sides of the debate, including Keller's. We must not silence him simply because of the purported unsafe environment it may create.

UCD's restriction is also not narrowly tailored. Just as the Court ruled in *Snyder v. Phelps* (2011) that the term "outrageousness" is a "highly malleable standard with 'an inherent subjectiveness,'" so is the term "hostile learning environment." What is hostile to one may be not hostile to another; we cannot draw a clear line and we must allow freedom of speech instead of risking its suppression. Keller's supposed hostility serves an essential and distinct purpose in his speech.

Because the restriction is not narrow enough to allow a means of alternative communication, there is no other way Keller could have conveyed the same message through another communicative method within UCD's restriction. Keller attains a specific expressiveness in directly asking questions to someone else who disagrees with him, just as there is a certain "expressive element" in burning an American flag, wearing a black armband, sitting in a "whites only" area as a black person, and wearing American military uniforms in a dramatic presentation. *Texas v. Johnson*. While Keller could have sent the organizations an angrily worded letter or the

student writer a nasty email, a face-to-face confrontation is undoubtedly different. Keller could have been respectful, but societal pressure will address his unkind manners, not UCD's unconstitutional restrictions.

UCD intends to silence speech that some find disagreeable to preserve a safe space while the right to free speech and the right to mention offensive things gets trampled. The First Amendment protects Keller's rights and the rights of all people to challenge others and participate in the marketplace of ideas. The Court has said: "As a Nation we have chosen... to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps* (2011). The First Amendment displays the American commitment to open discussion, of which Keller contributes.

Keller's suspension from UCD is not constitutional, because the First Amendment protects Keller's speech, despite the disagreeable essence of his speech and the emotional distress it may have caused. The United States was founded through protest, aggression, disruption, harassment, and hostility, and freedom of speech remains a steadfast, towering pillar of American society. The problems of our time and the challenges that plague our civilization require a conversation where all can contribute and ask questions without regard for a tone of voice or offensive nature of the speech. Conquering our controversies requires courage, not comfort, and, as the debate unfolds, we must recognize the importance of our speech, the message it sends, and the influence it has in order to better deliberate the course of our societal progress.