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Straight Talk


Free Speech Limits Under the First Amendment

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Today's Presenters





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First Amendment to the U.S. Constitution

- "Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof; or abridging freedom of speech, or of the press; or right of the people peaceably to assemble, and to petition government for a redress of grievances."

Constitutional Standard for Restrictions on Expressive Activities

- Types of forums
 - Traditional public forum
 - Designated/limited public forum
 - Non-public forum
- Type of forum determines applicable constitutional standard for restrictions on expressive activities.



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What is a Public Forum?

- Places by which long tradition or government fiat have been devoted to assembly and debate
- Examples: Streets, park, sidewalks



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Rights of Government to Restrict Speech

- May exclude speaker, only when exclusion is necessary to serve a compelling state interest.
- May impose reasonable time, place and manner restrictions, as long as they are justified without reference to content, narrowly tailored to serve significant governmental interest and leave open ample alternative channels for communication of information

Continued



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Rights of Government to Restrict Speech

- To be content neutral, restriction may not be based upon either content or subject matter of speech.
- Central inquiry with respect to content neutrality is whether government has adopted regulation of speech because of disagreement with message it conveys.

Continued



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Rights of Government to Restrict Speech

- Content-based restriction on speech must be least restrictive means of achieving a compelling state interest.



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Rights of Speakers

- Speakers have most protection in traditional public forums.
- Speech can be robust, offensive and even obnoxious.



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Ater v Armstrong, **961 F2d 1224 (1992)**

- Ater, a Grand Dragon of the Realm of the Kentucky Invisible Empire, Knights of the Ku Klux Klan, sought to distribute political literature while standing on medians or on Jefferson County, Kentucky roadways.
- Police Chief denied permission for such distribution under a Kentucky statute. Ater sued, challenging constitutionality of statute.

Continued



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Ater v Armstrong

- Kentucky statute generally prohibited persons from standing in roadways, including medians.
- However, statute carved out exception: "No person shall stand on the highway for the purpose of soliciting contributions unless such soliciting is designated by the presence of a traffic control device or warning signal or an emergency vehicle or public safety vehicle ... making use of the flashing, rotating or oscillating red, blue or yellow lights on such devices."



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Ater v Armstrong Issues

- Whether statute imposed reasonable time, place, and manner restriction that was content neutral
- Whether statute was narrowly tailored to serve significant government interest



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***Ater v Armstrong* Analysis**

- Statute was content neutral on its face.
- Prohibited *all* parties from distributing literature in roadways.
- Because it permitted *all* parties to solicit contributions in roadways, if precautions prescribed were undertaken, statute applied evenhandedly to all who wished to distribute written materials or solicit funds.



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***Ater v Armstrong* Analysis**

- Under statute, both Ku Klux Klan and NAACP would be barred from distributing their literature, irrespective of their diverse viewpoints or informational content of their messages.
- Both organizations, however, could solicit contributions, provided safety requirements were met under the statute.



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***Ater v Armstrong* Analysis**

- Statute did not vest officials with arbitrary discretion relative to individuals who were allowed access to Kentucky's roadways.
- Statute aimed at non-communicative impact of conduct (i.e., creation of unsafe conditions on roadways), not governmental intent to suppress ideas or information.
- Government has legitimate interest in safe and orderly flow of traffic on its roadways.



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***Ater v Armstrong* Analysis**

- Statute intended to promote legitimate goal of safety in roadways.
- By prohibiting distribution of literature in roadways, statute eliminates no more activity than was considered necessary.
- State's legitimate interest in safety would support prohibition of all pedestrian activities on its roadways, even solicitation of funds, which it has chosen to except from prohibition.



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Key Points from *Ater*

- Government's ability to restrict expressive conduct in traditional public forum is quite limited; however, government can impose reasonable time, place and manner restrictions.
- For purposes of determining whether restriction on protected speech is narrowly tailored to serve legitimate government interest, it need only justify general prohibition of protected speech activity; so long as its distinctions are content neutral, it need not justify allowance of some expression.



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What is a Designated Public Forum?

- Government creates designated public forum when it opens a piece of public property to public at large, treating it as if it were a public forum.
 - Examples: City Council meetings, municipal theaters, school board meetings, public university meeting rooms



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Rights of Government to Restrict Speech

- Can restrict speech as long as restrictions do not discriminate against speech on basis of viewpoint and are reasonable in light of purpose served by forum.
- Reasonable time, place and manner regulations are permissible.
- Content-based prohibition must be narrowly drawn to effectuate compelling state interest.



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Gault v City of Battle Creek, **73 F Supp 2d 811**

- Plaintiffs were ruled out of order when they attempted to raise allegations that city's police chief had an affair with another officer's wife.
- Plaintiffs, likewise, tried to assert that police chief was not fit for duty because he participated in cloning of officer's (husband of the individual he was having an affair with) pager for personal reasons.

Continued



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Gault v City of Battle Creek

- At next meeting, the Commission, in response to request by police chief, voted to go into closed session to hear plaintiffs' complaints and charges against him. Plaintiffs were afforded opportunity to speak against police chief in closed session, but did not do so.

Continued



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Gault v City of Battle Creek

- During public comment time after closed session, plaintiffs again attempted to address Commission concerning the police chief.
- Plaintiffs claimed they were threatened with being ruled out of order and arrest when they attempted to speak again.

Continued



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Gault v City of Battle Creek Analysis

- Court concluded that:
 - Police chief's affair with another officer's wife was not solely a matter of private concern. It was relevant to public affairs involving city officials.
 - This type of behavior is of even greater public concern when it involves a paramilitary organization like a police department.

Continued



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Gault v City of Battle Creek Analysis

- Similarly, allegations regarding police chief's attempt to clone pager were a matter of public concern and, thus, protected by First Amendment in limited public forum of public comment during Commission meetings.
- Court rejected defendants argument that comments were personal attacks concerning private matters.

Continued



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Gault v City of Battle Creek Analysis

- Even if defendants properly closed meeting, plaintiffs still had right to address the Commission on any matter of public concern.
- Court looked to a Michigan Attorney General opinion that concluded that public body may not prohibit person from addressing it on grounds the matter to be addressed is, or might be, subject of closed meeting.

Continued



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Gault v City of Battle Creek Analysis

- First Amendment rights would be unduly restricted based on content if a public body was allowed to rule out of order any speech concerning a subject that was being considered, or might be considered, in a closed meeting.



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Key Points from Gault

- Moderator is permitted to stop individual from speaking if individual's speech disrupts or, otherwise, impedes orderly conduct of a council meeting.
- Citizen may be stopped from speaking, if speech is irrelevant, repetitious, disruptive, disturbs or, otherwise, impedes orderly conduct at meeting.



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Hypothetical Scenario

- Resident frequently attends council meetings to speak about his prior arrest, alleged crimes against him and city's refusal to prosecute same.
- During council meeting, resident is ruled out of order by mayor after he refers to police officer as a criminal.
- Resident then calls mayor a liar and coward.

Continued



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Hypothetical Scenario

- Resident is ruled out of order again. Once ruled out of order, resident begins to curse and yell.
- Eventually, after third ruling, resident is escorted out by police.
- Criminal charges are filed against him for disturbing a public meeting (MCL 750.170). Mayor is identified as complainant.

Continued



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Hypothetical Scenario

- Resident is arrested hours before next council meeting and hours after he has shared with council members that he has audio recordings of officers saying inappropriate things that he intends to share at upcoming council meeting.



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Let's Discuss

- At what point is it appropriate to rule resident out of order and escort her out of meeting?
- Are there any pitfalls associated with seeking an arrest warrant under these facts?



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Analysis

- City council can generally:
 - Set time limit for speakers provided amount of time given to speakers is not related to subject of discussion
 - Set agenda for its meetings
 - Have rules of decorum that address profanity and provide for a orderly meeting free of disruptions



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Important Reminders

- Context of speech is important.
- Once public comment is permitted, city council cannot then exclude a person from speaking simply because it does not like topic or viewpoint.
- Absent libel or profane attacks, speaker is, as a general matter, permitted to speak, even if statements are critical of council members.



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What is a Non-Public Forum?

- Government-owned property that is, not by tradition or governmental distinction, a form for public communication
 - Examples: Office building, school, airport terminals, polling places, sidewalks leading up to a post office



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Rights of Government to Restrict Speech

- Municipalities can enforce reasonable time, place and manner regulations.
- May exclude speakers on basis of their subject matter, as long as distinctions drawn are viewpoint-neutral and reasonable in light of purpose served by forum.

Continued



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Rights of Government to Restrict Speech

- May reserve forum for intended purposes, communicative or otherwise, provided regulation on speech is reasonable and not effort to suppress expression



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United Food & Commercial Workers Local 1099 v City of Sidney, 364 F3d 738 (2004)

- Plaintiffs filed suit after they were prohibited from soliciting signatures for referendum petition outside six polling places on election day in Sidney, Ohio.
- Polling places included public schools, local YMCA and a church.



Continued



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United Food v City of Sidney

- Plaintiffs attempted to solicit signatures in areas on school or private property that were outside of areas that had been designated as "campaign-free zones" under Ohio statute.
- Plaintiffs were asked to leave and threatened with arrest if they failed to comply.
- At one location, two individuals were threatened with arrest, even after they relocated to a spot on a public sidewalk, outside of the campaign-free zone.



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United Food v City of Sidney Analysis

- Court identified relevant forums as follows:
 - (1) public sidewalk within 100 feet of a polling place,
 - (2) parking lots and walkways on school or private property leading up to polling place and
 - (3) public sidewalk beyond 100 feet from polling place

Continued



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United Food v City of Sidney Analysis

- Public sidewalk within 100 feet of a polling place:
 - Public sidewalks are generally considered traditional public forums.
 - However, speakers may be excluded on basis of content of their speech as long as exclusion is necessary to serve compelling state interest and narrowly tailored to achieve that interest.

Continued



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United Food v City of Sidney Analysis

- Court looked to Supreme Court's holding in *Burson v Freeman*
 - Campaign free zones are necessary in order to serve state's compelling interest in protecting voters from confusion and undue influence.
 - No First Amendment violation

Continued



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United Food v City of Sidney Analysis

- Parking lots and walkways leading to polling place:
 - No evidence that Ohio intended to open up nontraditional forums, like schools and privately owned buildings, for public discourse by utilizing portions of them as polling places on election day

Continued



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United Food v City of Sidney Analysis

- In absence of evidence of intent on part of government to open these nontraditional forums for public discourse, limited or otherwise, parking lots and sidewalks leading to polling places were deemed nonpublic forums.

Continued



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United Food v City of Sidney Analysis

- Decision to exclude plaintiffs from soliciting signatures in parking lots and walkways leading to polling places was reasonable and viewpoint neutral.
 - No contention that others were permitted to solicit signatures for referendum petitions on other topics
 - No evidence that others were allowed to engage in other types of electioneering activities within these areas, therefore, no First Amendment violation

Continued



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United Food v City of Sidney Analysis

- Public sidewalk beyond 100 feet from polling place:
 - Court remanded to district court to determine whether plaintiff's rights were deterred or chilled by deputy's threat of arrest and whether that threat was motivated by reasonable time, place and manner concerns or whether it was an impermissible content-based restriction on speech in a traditional public forum.



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Speech That Is Not Protected

- Fighting words
 - Words that tend to incite an immediate breach of peace by their mere recitation in public
 - Personally abusive epithets, which, when addressed to ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.

Chaplinsky v New Hampshire, 315 US 568 (1942)



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Cohen v California, 403 US 15 (1971)

- Concerned a prosecution under California law that made it illegal to use any vulgar, profane or indecent language within presence or hearing of women or children, in a loud or boisterous manner.



Continued



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Cohen v California Holding

- Court overturned disturbing the peace conviction of protester wearing jacket that read “F*** the Draft,” noting: “no individual, actually or likely to be present, could reasonably have regarded the words on appellant’s jacket as a direct personal insult.”



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Cohen v California Analysis

- Discussing fighting words exception as potential basis for upholding conviction, court observed that to constitute fighting words, speech must be specifically addressed to particular listeners.
- Although f*** would be, and often is, used as a personal insult, in this case, speaker used his jacket merely to express an opinion about the draft.

Continued



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Cohen v California Analysis

- Had Cohen, instead, walked up to a soldier in uniform and yelled "F** the draft," that would perhaps have constituted the type of personalized insult that could constitutionally be punished for its likelihood of generating a breach of peace.



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Key Points from Cohen

- Proactive language must be directed to specific individual in a manner likely to lead to breach of peace.
- Law enforcement must evaluate speech to determine if its utterance to objective listeners in that situation was likely to cause breach of peace.
- Police officers, in arresting for fighting words, must assess not only what speech is, but also likely reaction to speech.



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Sandul v Larion, 119 F3d 1250 (1997)

- Officer on duty talking with group of abortion protestors who were picketing outside a local restaurant.
- While talking to protestors, a truck drove by at a high rate of speed. Passenger in truck leaned out as it passed the abortion protestors and shouted "f*** you" and extended his middle finger to group.



Continued



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Sandul v Larion

- Officer pursues truck, believing passenger's conduct violated city's disorderly conduct ordinance.
- Stopped vehicle and informed passenger he was under arrest for trying to start a riot.
- Citizen, not believing officer was serious, turned and walked toward his house.

Continued



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Sandul v Larion

- Officer followed him to porch and grabbed his arm in an attempt to prevent him from entering the home. Officer claimed citizen swung at him and missed, pulled away from him and entered the house.
- Officer claimed citizen began yelling obscenities at him from inside the house and then emerged carrying a butcher knife threatening to kill officer.



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***Sandul v Larion* Issue**

- Whether officer violated citizen's constitutional rights by falsely arresting citizen while he was exercising his right to free speech



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***Sandul v Larion* Analysis**

- Absent more particularized and compelling reason for its actions, state may not make simple public display of a four letter expletive a criminal offense.



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***Sandul v Larion* Holding**

- Words did not amount to fighting words.
- Actions were not likely to inflict injury or to incite immediate breach of peace.
- Inconceivable that plaintiff's fleeting actions and words would provoke type of lawless action alluded to in *Chaplinsky*

Continued



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Highlights Arriving to Conclusion

- Plaintiff's vehicle was traveling at a high rate of speed on opposite side of street, considerable distance away from protestors to whom language was directed.
- Plaintiff was in a moving vehicle.
- Entire incident happened in a matter of seconds.

Continued



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Highlights Arriving to Conclusion

- No evidence any of abortion protestors were offended or that anyone acknowledged plaintiff's behavior with exception of the officer.
- No face to face contact with protestors and plaintiff



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Key Points from *Sandul*

- Fighting words exception is very limited.
- Mere words and gesture "f*** you" are constitutionally protected speech.



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Takeaway Points

- Type of forum determines constitutional standards for restrictions on expressive activities.
- Determining whether individual's First Amendment free speech rights have been violated is often times a highly fact-intensive inquiry.



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Questions?



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