



## **Children Shall be Seen and Not Heard: The First Amendment and the Public School Student**

Curriculum Unit 92.01.08

by Robert Johnson Moore, Esq.

### **INTRODUCTION:**

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Recently in a public high school somewhere in New England, the only white graduating senior and valedictorian claims that she was denied her constitutional right to give the graduation speech that she had originally prepared. She had wanted to include in her speech what it felt like being the only white student in an otherwise all black school. She wanted also to stress the importance of integration as an effort to erase racial tensions. Public school officials, fearing that her speech might be poorly received or misinterpreted, urged her to change the text of her speech deleting any references to racism and integration. The student succumbed to the pressure and gave a lacklustre speech which left her with the feeling that she had greatly compromised her principles. ( *N.H. Register* 7/12/92,A12)

Similarly a recent Supreme Court decision dealt with an analogous issue. In *Hazelwood School District v. Kuhlmeier* , 484 U.S. 260, the principal of a St. Louis high school objected to two articles that dealt with teenage sexuality and divorce that were to appear in the school newspaper. The articles were substituted with less controversial ones without discussion of the replacement with the student editors. The students sued the principal and the board of education. The district court ruled in favor of the school officials who censored the articles holding that the school newspaper was not protected by the first amendment. The school newspaper *Spectrum* was an extension of a classroom project and the principal had broad discretion to restrain student speech if it had “a substantial and reasonable basis.” On appeal in the Eighth Circuit the court distinguished the classroom from the student newspaper, and held that students’ first amendment rights had been violated. In 1988 the Supreme Court in 1988 in a heated debate sided with school officials.

How the graduation school speech will be handled by local authorities remains to be seen. The local Civil Liberties Union has already made an inquiry. How the issue will be resolved will be based on established constitutional cases that high school students will find exciting and resourceful.

## PURPOSE:

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This course is designed for high school students participating in the Saturday Law Class of the Yale-New Haven Public School International Studies Program. The purpose of the curricula is to examine the extension of the Bill of Rights, the first ten amendments, to the protection of children.

Historically, children derived constitutional protection through their parents. They were viewed as wards of their parents first, then wards of the State. Until the mid 1960's juveniles in the court system were not treated as adults with regard to due process, the right to counsel and the right to a jury trial. More recent constitutional decisions have been made with regard to students rights to privacy in the school room and their right to publish a newspaper without the restraint of adult censorship.

The focal point of this unit are the rights of students under the first amendment. Classroom activities will include small group discussions, mock trials, summation arguments as well as written examinations on knowledge of legal terminology. Sample tests and discussion materials are attached at the end of the unit.

### **What does the First Amendment Say?**

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.

(Amendment I, *United States Constitution* )

Students should be reminded that the First Amendment encompasses a broad spectrum of rights and privileges. Many scholars on the constitution focus on Amendment I exclusively. Freedom of religion, press, speech and assemblage is not without limitations, as students will find when they read the Supreme Court Case *Bethel School District No. 403 v. Fraser* . What if a student in his address to the student body made the following comments?

I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

Jeff is a man who will go to the very end—even the climax, for each and every one of you.

So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be . . .

This speech made to nominate a fellow student to office resulted in the suspension of the deliverer. The suspension was upheld because the Supreme Court found the speech to be “an elaborate, graphic, and explicit sexual metaphor” which was not constitutionally protected. The speech the court noted was followed by numerous disruptions during the assembly.

Bethel, however, did not go so far as to give school officials limitless discretion to apply their own notions of indecency to those expressions of school students. Spirited, provocative speech may unwarrantedly be chilled

by the overzealous prudishness of adults. ( *Rights* , 28-29)

In discussing what First Amendment rights students have, two legal terms should be discussed in detail: in loco parentis and Parens Patriae. Briefly stated the constitution does not clearly delineate rights of free speech, religion, press, and assembly for juveniles. Children derive their rights through their parents. School officials act in loco parentis (in place of parents) when deciding how children should be disciplined, censured, and punished. School officials may silence student expression within the same parameters as would their parents give permission for their children to express certain views which conflict with those of school officials who are responsible for the care during the school day. Such is the case of *Tinker v. Des Moines School District* 393 U.S. 503 (1969), which will be discussed later.

Parens Patriae, in brief, gives the state superior rights over the parents of juveniles under certain circumstances. Based on the old English legal system, the state acts as the parent of the country. Under the doctrine of parens patriae court proceedings involving juveniles were informal and without the constitutional protections granted to adults such as the right to counsel, the right to an adversarial trial and the right to be tried by a jury. Paternalistic and benevolent in theory, parens patriae resulted in many abuses. The case *In re Gault* 378 U.S. 1 (1966) greatly limited this doctrine giving juveniles many of the same constitutional protections afforded adults. (Renstrom,58) Most relevant to this unit is the fact that parens patriae was successfully used to free children from possible suffering because of the religious beliefs of their parents. ( *Prince v. Massachusetts* 321 U.S. 158 (1944).)

### **Limits on Freedom of Expression**

For adults we know that the freedom of speech does not permit the yelling of the word "Fire!" in a crowded theater unless, of course, the theater is engulfed in flames. A series of important cases have carefully limited First Amendment guarantees:

*Brandenburg v. Ohio* , 395 U.S. 444 (1969) limits speech content when it creates a "clear and present danger" and "where the speech is directed to inciting or producing imminent lawless action, and is likely to incite or produce such action."

*Bethel School District No. 403 v. Fraser* , 478 U.S. \_\_\_\_ (1986) excluded high school student's lewd and offensive campaign speech from First Amendment protection.

*Chaplinsky v. New Hampshire* , 315 U.S. 568 (1942) defined speech containing "fighting words" not constitutionally protected. Calling a police officer "a Goddamned racketeer" and "a damned Fascist" was more than just annoying and offensive, but created a genuine likelihood that imminent violence would result.

*New York Times v. Sullivan* , 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.* , 418 U.S. 323 (1974) held that the First Amendment provides no protection against defamatory statements or writings.

*Time v. Hill* , 385 U.S. 374 (1967) and *Cox Broadcasting Co. v. Cohn* , 420 U.S. 469 (1975) held that the constitution did not protect speech that invaded the privacy of citizens by reporting matters of public interest upon proof that the plaintiff reported a false story with knowledge of its falsity or in reckless disregard of the truth.

*Roth v. United States* , 354 U.S. 476 (1957) and *Miller v. California* , 413 U.S. 15 (1973) held that speech defined as obscene was unprotected by the First Amendment.

Numerous cases permit governmental regulation of the time, place and manner of speech. Reasonable restraints are allowed to further an important or significant governmental interest. These cases do not attempt to regulate the content of the speech, but try to provide the proper public forum for expressing ideas that may be controversial. Cases include: *Talley v. California* , 362 U.S. 50 (1960), *Cox v. Louisiana* , 379 U.S. 536 (1965), *Grayned v. City of Rockford* , 408 U.S. 104 (1972) and *Tinker v. Des Moines School District* , 393 U.S. 503 (1969).

## TINKER AND SYMBOLIC SPEECH

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Freedom of speech under the constitution is not narrowly limited to the spoken word. Speech may include gestures, lyrics to a song, or the wearing of a button, a T shirt, or a slogan on a sweatshirt or a jacket. Speech may be expressed under certain conditions as silence. Freedom of expression has become the most inclusive phrasing of the protected concept.

To thirteen year old Mary Beth Tinker, speech was the wearing of a black arm band to her junior high school as a symbol of her opposition to the Vietnam War. Fifteen year old John F. Tinker, Mary's brother and his friend Christopher Eckhardt, sixteen, wore similar arm bands to their Des Moines High School. Despite the fact that their protest was silent in nature, all three students were suspended from school under a policy promulgated by the principals of the Des Moines schools "that any student wearing black armbands to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband."

Mary Beth, through her parents, filed a federal lawsuit under 42 U.S.C. 1983 of Title 42 of the United States Code against the school system praying "for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and sought nominal damages." At the district court level the complaint was dismissed. School authorities were held to have constitutionally based authority to prevent disturbance of school discipline. The district refused to follow the Fifth Circuit's holding in a similar case (*Burnside v. Byars* , 363 F. 2d 744) that "the wearing of symbols like armbands cannot be prohibited unless it 'materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school.' " *Tinker* moved slowly through the court system. In 1969 at the height of the Vietnam protests, the Supreme Court ruled in a 7 to 2 vote that the wearing of armbands was constitutionally protected and that school authorities, absent a showing of disruption could not ban peaceful protests.

*Tinker* clarified that the conduct of wearing an armband was "pure speech" and therefore entitled to comprehensive protection under the First Amendment. While school officials may wish to regulate "the length of skirts or the type of clothing, . . . hair style, or deportment," the conduct in *Tinker* "does not concern aggressive, disruptive action or even group demonstrations."

"The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students."

The majority opinion in *Tinker* continued:

“. . . [The]he action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands of opposition to this Nation’s part in the conflagration in Vietnam. It is revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student’s statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper. (The student was dissuaded.)”

The court pointed out that all political symbols were not subject to the regulation. The wearing of armbands to protest the Vietnam War was the specific target of school authorities. Justice Brennan in a related case is cited as saying:

“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools. *Shelton v. Tucker* , 364 U.S. 479 at 487. The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’ “

Justice Stewart concurred with the majority opinion delivered by Justice Fortas. Yet he took exception to the court’s assumption that the First Amendment rights of children are co-extensive with those of adults. Citing a case which dealt with restricting children from pornography ( *Ginsberg v. New York* , 390 U.S. 629). Stewart recognized that the state may “permissibly determine that, at least in some precisely delineated areas, a child-like someone in a captive audience is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.” A discussion of the landmark *Prince v. Massachusetts* case (321 U.S. 158), upon which Stewart based his concerns will be discussed in appropriate detail shortly.

Stewart cautions the court that in *Tinker* and related cases, the students derived their First Amendment protection from their parents. In *Tinker* the parents of the students supported the protests and encouraged their children to wear the armbands. Arguably *Tinker* may have been decided differently if the parents of the children did not approve of the silent protest.

Justice Black’s dissenting opinion in *Tinker* highlights the fact that the students involved were expressing the views of their politically active parents. School officials elected by the community had the vested authority to prevent the school room from becoming a political platform at the whim of students and teachers. Moreover, Justice Black found evidence of disruption. He writes: “While the record does not show that any of these armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone.” Mary Beth’s classmates were more interested in looking at her armband than in paying attention to the mathematics lesson. “I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students’ minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam War.”

Constitutional experts feel that *Tinker* was more a case about upholding family expression or parental inculcation of values than a case about children’s rights under the First Amendment. ( *Children’s Rights* , 81).

In *Prince v. Massachusetts* , Betty M. Simmons, nine years old, wanted to go with her aunt Sarah Prince when she sold copies of “Watchtower,” the official religious newsletter of the Jehovah’s Witnesses at night on the streets of Brockton. Under relevant sections of Massachusetts’ comprehensive child labor law, Mrs. Prince was convicted of permitting a minor to sell papers. Mrs. Prince claimed that the child labor laws interfered with her

rightful exercise of her religious convictions as guaranteed by the First and Fourteenth Amendments. Sections 80 and 81 abridged her freedom of religion and denied her equal protection of the laws.

Applying the doctrine of *parens patriae*, the court in *Prince* stated that:

“the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. . . . And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child’s course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”

The court continues:

“The state’s authority over children’s activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. . . . The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at times does create situations difficult enough for adults to cope with the wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves. . . .”

While the ruling in *Prince* was not intended to extend beyond the facts of case, it has broad implications. Children do not have the First Amendment rights of their parents in certain religious matters when public safety is a concern. The court balances the competing legal issues and decides in favor of the state’s compelling interest in protecting young children’s health and safety while curtailing some of the religious practices of the adults. How the court in *Tinker* found in favor of political practices of parents and students under the First Amendment in wake of *Prince* is open for further discussion.

## **HAZELWOOD: TINKER REVERSED?**

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In a 5 to 3 ruling, the Supreme Court held in 1988 that the First Amendment rights of the student journalists had not been violated in *Hazelwood School District v. Cathy Kulmeier* , 484 U.S. 260. As mentioned in the second paragraph of this unit, the high school principal had objected to two of the articles that were to appear in the student publication *Spectrum* . The articles dealt with birth control, teenage pregnancy and sexuality. In another article a student was critical of her father’s absence from the family after the divorce.

Without consulting the student staff, the principal ordered that the controversial articles be deleted. Student staff members did not learn of the censorship until the newspaper was distributed. The principal felt justified in his actions. He stated that the two articles were “too sensitive” for “the immature audience of readers” and “inappropriate, personal, and unsuitable for the newspaper.”

The court’s majority in reaching its decision reviewed a related case, *Bethel School District No. 403 v. Fraser* ,

which upheld a school board's punishment of a student who gave a vulgar speech at a school assembly. Justice Byron R. White writing for the majority stated that schools do not have to permit student expression if it conflicts with the basic educational mission of the classroom. The purpose of the student newspaper *Spectrum* was not to provide "a forum for public expression," but rather to create a "laboratory situation" for students to practice basic journalism skills.

In reaching its decision the Court majority distinguished the situation in *Hazelwood* from that in *Tinker*. The Court recognized two forms of student expression in public schools. "Personal expression" of students which stems from outside influences may not be protected under the First Amendment if influences may not be protected under the First Amendment if school authorities feel that it interrupts the school process or violates the rights of others. But student expression which generates from within school sponsored activities may be strongly regulated by school officials. The standard school officials may use to censor school newspapers and other school-sponsored activities should be based on whether their expression was "reasonably related to legitimate pedagogical concerns."

Justice Brennan joined by Marshall and Blackmun dissented. The expressed purpose of the *Spectrum* was to provide a forum for students to express their views. The student publication neither disrupted nor invaded the rights of others at the high school. The operation of the school was not threatened. The dissenting three admonished the principal's "brutal manner" in cutting the two articles without talking to the students editors who could have found alternative ways of expressing their views. Where else but in public schools can students from diverse backgrounds express and explore controversial ideas without being unduly censored by self-appointed "thought police?"

In applying the standard in *Hazelwood* to the speech of the white valedictorian in an otherwise all black graduating class, was the school official justified in censoring her opinion at a graduation ceremony sponsored by the school? Were the ideas of her speech stemming from an outside source as in *Tinker*? Or were her views related directly to a school sponsored activity?

Students will have an interesting discussion of First Amendment protections in the lesson plans that follow:

## LESSON PLANS:

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ROLE PLAYING is an exciting way to discuss constitutional issues. Divide the class into small groups of three, four or five and assign each group a role in the case presented in class. Using *Hazelwood* as a model, group 1 could represent the student editors of *Spectrum*, group 2 the principal, group 3 the school board, group 4 the parents of the student editors, group 5 members of the student body. Each group may be called to testify before the nine Justices played by other students. The class may wish to see how the Justices argue among themselves in delivering their concurring or dissenting opinions. If black robes are available, please use. The effect is awesome.

A follow up activity is suggested in *CRF BILL OF RIGHTS IN ACTION* published by the Constitutional Rights Foundation. Winter 1989/Vol. 5 Number 3) The lesson is protected by copyright, but is readily available to

classroom teachers who subscribe to the publication. The cost is under \$10.00. Write to: Constitutional Rights Foundation, 601 South Kingsley Drive. Los Angeles, California 90005 or call (213) 487-5590.

An original situation for the role playing follows:

Operation Yellow Ribbons: A group of students in Canary High School wanted to celebrate the safe return of American soldiers to the States after operation DESERT STORM in the Saudi Arabia. They arrived in school the next day adorned in yellow ribbons. Ribbons were tied to every conceivable part of their bodies. These students carried extra rolls of ribbon for students who wished to join in their peaceful welcoming ceremony. Many of these students had sisters, brothers and other close relatives and friends serving in the armed forces. School officials were not informed of the activity beforehand. The principal learned of it during homeroom period when the halls were ablazed in yellow strips. Teacher reported no major disruptions, but there was an air of excitement. The school seemed taken by surprise. No one outwardly objected to the ribbon fest, but some students who were annoyed did refuse to wear the yellow ribbon when encouraged by this small ban of student activists to do so.

The principal announced over the public address system that the further distribution of ribbons was banned. Students were asked to remove the ribbons while in class. They were further told not to wear the ribbons to school anymore. Students who did so would be asked to leave school until they removed the ribbon. The next day half the student body was reported absent.

Discuss the relevant constitutional issues. Divide the class into group 1 the students who organized the ribbon ceremony, group 2 the school principal, group 3 classroom teachers, group 4 students who did not wish to wear the ribbon, group 5 the parents of several students and group 6 the Board of Education.

Hint: Could the conflict be avoided if the principal had allowed the students to express their views on school grounds at another time, place or manner?

- ESSAY WRITING is another means of assessing student comprehension of constitutional issues. Here are two examples of essay questions that challenge students to apply First Amendment principals discussed in *Prince v. Massachusetts* and *Tinker v. Des Moines School District* .
- II.

- a. Peter and Lucy Zirk enrolled at Pleasant Hill Elementary School for the fourth and fifth grade. Dressed oddly in clothing that seemed to belong to another century, Peter and his sister proved to be excellent students. They attended school regularly. Teachers praised them for their good manners and superior academic work. The Zirk family volunteered information that they were members of a small religious group of which no one at Pleasant Hill had ever heard.

When Peter and Lucy were promoted to the seventh and eighth grade three years later, they were absent



from school for about a week for no apparent reason. When they returned to school, the teachers noticed that the middle finger of each hand of the children was missing. Peter and Lucy would not comment as to how and why their middle fingers were removed. Upon extensive investigation, school authorities learned that the removal of the fingers was part of a major religious practice of the Zirk family. Mother and father Zirk on careful scrutiny also lacked their middle fingers.

Apparently when children in this particular religious group reach the age of puberty, the middle finger is removed as a sign to respect to one's elders. To raise one's finger to an adult is a sign of contempt, highly punishable. To prevent children from showing disrespect to anyone, the middle finger is removed in a painless fashion.

School authorities report their findings to the local police and have the Zirks arrested for child abuse. Discuss the possible outcome raising all constitutional issues.

A 17 year old male high school student was suspended from school for wearing black lipstick. His 16 year old brother was also kicked out of school for wearing a dress in protest of his brother's suspension. School officials state the students were suspended for conduct that disrupted the educational process. The students' appearance in both cases could distract classmates and teachers.

The student who wore the lipstick could be admitted to school if he removed the lipstick. The student maintains that his appearance was not disruptive. His grades were good and he had been named student of the month. A student questionnaire was circulated asking students if they thought the wearing of black lipstick and dresses by boys was disruptive. The suspension case goes before the Board of Education next week. As attorney for the board, how would you advise them to rule to avoid a constitutional challenge. (This is based on an actual case reported in the *New Haven Register* . Copies are available).

I recommend that students follow a definite outline in writing their responses:

1. State the conflicting legal issues involved.
2. What constitutional rule of law is needed to analyze this case? (Cite specific cases if you know them).
3. Are there any noted exceptions to the rule that apply to the present case?
4. How do the facts of this case correspond to the existing law? Are there facts that do not apply? Should this affect materially the outcome of the case?
5. Based on your analysis of all relevant legal issues involved, what are your conclusions.

Remember: There are no wrong or right answers to these essay questions. Rather, appropriate interpretation of established constitutional principles is important. Students will learn that the opinion of the Court has changed over the years on many matters of dispute. "Stare Decisis," or "let the decision stand" to many constitutional scholars is a concept waving like kleenex in the breeze.

## SOURCES:

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T for teachers only

S for students only

TS for teachers and students

*BILL OF RIGHTS IN ACTION* . CONSTITUTIONAL RIGHTS FOUNDATION. LOS ANGELES, 1991. TS

*CHILDREN IN THE LEGAL SYSTEM, CASES AND MATERIALS* . WALTER WADLINGTON ET ALS. THE FOUNDATION PRESS. MINEOLA, NEW YORK, 1983. (cited in text as Children’s Rights) T

*JUVENILE COURTS* . STANFORD J. FOX. WEST PUBLISHING COMPANY. ST. PAUL MINNESOTA, 1983. T

*THE AMERICAN JUDICIAL SYSTEM* . ISIDORE STARR. OXFORD BOOK COMPANY, NEW YORK, 1972. TS

*THE AMERICAN LAW DICTIONARY* . PETER G. RENSTROM. ABC-CLIO, INC. SANTA BARBARA, CALIFORNIA, 1991. (cited in text as Renstrom) T

*THE CONSTITUTION AND AMERICAN PUBLIC EDUCATION* . ARVAL A. MORRIS. CAROLINA ACADEMIC PRESS. DURHAM, NORTH CAROLINA, 1989. T

*THE FIRST AMENDMENT BOOK*. ROBERT J. WAGMAN. PHAROS BOOKS, NEW YORK, 1991. TS

*THE RIGHTS OF STUDENTS* , 3 rd. ed. ACLU. SOUTHERN ILLINOIS UNIVERSITY PRESS, 1988. (cited in text as Rights) TS

Newspaper articles from the *New Haven Register* containing the text of the valedictorian’s original speech will be made available at the Institute office.

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