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MLA style

Hands Up! First Amendment Protection When a Gun is a Censor

In November 2018, an African-American advocacy group, Black Lives Matter, and five of its members brought action against the town of Clarkstown and town officials. Plaintiffs claimed that the group's First Amendment rights were violated when a police officer trained a red laser from a police sniper rifle on a member who was giving a speech at a peaceful rally. This incident occurred on April 17, 2013. A district court decided that the individuals in the group had suffered injury from this incident, they had a First Amendment retaliation claim, and officers are not entitled to qualified immunity in this case. This paper will argue that aiming a rifle at someone in such a way that the person is aware of it is a form of intimidation and censorship because it would chill free speech.

Although this case has since been settled out of court, the plaintiffs in this case would have had a valid First Amendment claim because the officer's actions threatened the freedoms of assembly, expression, and potentially petition of government guaranteed by the First Amendment. Examining the facts of the case and viewing them through the lenses of a three-part test, the chilling effect, and criteria for censorship will make it clear that the officer's actions on April 17 were an unlawful censor on free speech. In an era when media and First Amendment rights to dissent are continually brought into the public eye for scrutiny, it is crucial to recognize censoring efforts that pose a threat to the rights guaranteed by the First Amendment: freedom of speech, press, assembly, religion, and petition of the government for redress of grievances.

Argument: The defendant's actions in Black Lives Matter v. Town of Clarkstown are an unlawful censor on free speech.

In Dorsett v. County of Nassau, a test emerges containing criteria for a First Amendment retaliation claim, stating that a First Amendment retaliation claim requires a showing that “(1) [plaintiff] has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by his exercise of that right; and (3) the defendant's actions caused him some injury.” Establishing the officer’s actions as First Amendment retaliation helps to identify the harm of the chilling effect in this case.

The background and significance of the Black Lives Matter movement is central in understanding the context of the case. Black Lives Matter is a movement ignited by the police shootings of several unarmed black men in the United States. The movement echoes cries for justice heard throughout centuries of civil rights advocacy, with roots from pre-civil war slavery to Jim Crow laws to lynchings in the American south in the twentieth century (Swarns 1022-1025). Participating in a Black Lives Matter protest is a political act of assembly and petition— both rights guaranteed by the First Amendment.

In establishing the first criteria in this test, the court referenced Engquist v. Oregon Department of Agriculture (2008), which established that “speech on matters of public concern...falls within the core of First Amendment protection.” Plaintiffs in the Black Lives Matter v. Town of Clarkstown case stated that they participated in Black Lives Matter to “call for justice” and racial equality and based upon their belief “that the killing of unarmed people of color by law enforcement must stop.” Discussion of the case in case documents by the United States District Court, S.D. New York stated, “this pursuit falls squarely within matters of public

concern, particularly at a time when awareness of violence between law enforcement and unarmed people of color is rapidly increasing.” Therefore, the court found that plaintiffs in *Black Lives Matter v. Town of Clarkstown* stated a plausible claim that their activity and speech was protected by the First Amendment. Based on this fact alone, any intervention by a police officer at this protest would have been questionable. A police officer has no role in regulating speech that is protected by the First Amendment unless that speech is deemed incitement. The defendant in this case violated the the plaintiff’s First Amendment rights.

To satisfy the second criteria of the test, one may look to *Marom v. City of New York* (2016), in which individuals were subjected to surveillance and snipers at an Occupy Wall Street rally. The court held that “similar allegations were sufficient to plausibly allege that the defendant’s actions were motivated or substantially caused by the plaintiff’s exercise of her First Amendment rights.” While one cannot be absolutely certain, recognizing the roots of the Black Lives Matter movement and using this case as precedent, one can reasonably suspect that plaintiffs in *Black Lives Matter v. Town of Clarkstown* were targeted for participation in this rally. This conclusion further reinforces that the police action in this case was inappropriate.

The third criteria in this test can be difficult to prove due to the nature and sometimes overly-broad application of the chilling effect. The chilling effect, in essence, is an act of deterrence that applies to both people and activities (Schauer 689). Essentially, the law recognizes that an activity is chilled if people are deterred from participating in that activity, be it through fear of punishment such as “fines, imprisonment, imposition of civil liability, or deprivation of governmental benefit” (Schauer 689). However, the term “the chilling effect” can

be problematic when applied widely and in a general sense, and there are a few limitations that qualify the chilling effect as a legal term.

Firstly, the practitioner must recognize the uncertainty involved in declaring an activity as chilled. This uncertainty refers to both the fact that the legal system makes errors and that punishment for the chilling effect is applied irregularly (Schauer 695), and to the idea that one can never be certain about what *would* have happened had an activity not been chilled. Secondly, one must recognize that according to the principle of comparative harm, a wrongful limitation on speech is more serious than an overextension of free speech (Schauer 701). Therefore, applying rules about the chilling effect may itself deter individuals from participating in protected speech, so laws regarding the chilling effect doctrine must minimize the risk of erroneous judgement (Schauer 704). This information will be important when determining whether or not the defendant in *Black Lives Matter v. Town of Clarkstown* participated in activities that had a chilling effect.

There are numerous examples of the chilling effect in action, especially regarding law enforcement officials. For example, in a 2015 incident a student was arrested and removed from a school for videotaping the arrest of another student. In an earlier case, *Hartman v. Moore* (2006), the United States Supreme Court determined that to establish a First Amendment retaliation claim, the plaintiff must prove the absence of probable cause. When applied to the 2015 incident, Zhang argues that the extension of *Hartman* decision to retaliatory arrest claims would chill speech in two ways: “ (1) it would increase the likelihood of arrests of those who speak out, and (2) it would discourage others from speaking out upon seeing those arrests” (Zhang 1328). When applying this reasoning to *Black Lives Matter v. Town of Clarkstown*, one

can see that placing the burden of proof on the plaintiff in this scenario would further the chilling effect of the officer's actions in a similar way: (1) it would increase the likelihood of targeting of those who speak out, and (2) it would discourage others from speaking out upon seeing that targeting. Here, recognizing the chilling effect in action, both in the activity and the application of the law, reinforces the depth of the chilling effect and its role in First Amendment retaliation claims.

In a similar case, *Marom v. City of New York* (2016), plaintiffs demonstrated a plausible First Amendment retaliation claim that plaintiffs were subjected to surveillance and to snipers at a July Occupy Wall Street rally because of their participation in Black Lives Matter. In this case, the chilling effect was present in the implicit threat of violence as well as in the immediate halting of speech resulting from Marom's arrest. This case also serves as a familiar parallel to the key case and a precedent that supports the plaintiff's claim in the key case. If anything is an implicit threat of violence, it is a gun aimed directly at someone.

However, it is reasonable in many cases to assume that there is a natural tension between the open carrying of firearms and participation in protests (Zick 252). In regards to the chilling effect of open carry in protests, Zick writes that some protesters may experience increased tensions, fear, and intimidation while protesting in the presence of armed counter protesters. "Some will either not participate in protests or will trim their sails for fear that expression will lead to violent reactions from armed protesters" (Zick 252). One does not necessarily need the particular facts of a case to know that the presence of a gun is enough to silence a person. Operating under this assumption, it is reasonable to conclude that the plaintiff's speech in the key case was, indeed, chilled and the First Amendment retaliation claim is therefore valid. However,

this determination must be made with care because the judge in this scenario should recognize uncertainty and realize that mistakenly determining this action as a chill is a serious wrong (Schauer 701).

Declaring the defendant's actions as a chill on free speech raises subsequent questions about the gun laser being a censor on free speech. The chilling effect shares qualities of prior restraints in that it stops the distribution of information before the opportunity arises to distribute it. *Near v. Minnesota* (1931) determined that preventing publication is "a more serious public evil" than the disturbance of the peace the publication might cause. Therefore, when applying *Near v. Minnesota* to the key case, the defendant's actions that caused a chill on free speech is more serious than the effect the Black Lives Matter protest may have had. If the police officers are viewed as arms of the government, one can draw parallels between their actions and the Alien and Sedition Acts of 1918, which allowed the silencing of dissent against the government in a time where national security was at risk. However, this reasoning cannot be used to justify the defendant's actions because the purpose of the Black Lives Matter movement is to advocate for "racial justice, criminal justice, and civil rights" (Swarns 1022) which does not pose any sort of national security threat. Also important in this case is determining whether or not the defendant's visible aim of the gun was a "true threat." *Virginia v. Black* (2003) establishes a true threat as a threat with logical evidence of targeting. In the key case, the plaintiff certainly felt personally targeted by the implicit threat to violence and therefore had reason to believe that if he did not stop speaking, he would be shot. This seems to be a clear example of the censoring power of the noticeable aim of a firearm.

Of course, the questions in the key case are complicated by the equal weight of the Second Amendment against the First Amendment. The Second Amendment states “a well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.” Some say that the intersection between public expression and open carry laws are inherently incompatible (Zick 230), especially in the realm of political protest. In an argument favoring the Second Amendment, Justice Scalia’s opinion in *District of Columbia v. Heller* (2008) concluded that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.” The Court also decided in this case that “the inherent right of self-defense” is at the heart of the Second Amendment (Zick 234). Although there have been no judicial decisions that address the intersection of the rights guaranteed by the First Amendment and the Second Amendment specifically at public protests (Zick 227), a compelling argument emerges when considering the Second Amendment’s “sensitive places” exception. It is by this exception that the banning of firearms in schools and government buildings is justified. This exception should be interpreted in a way that protects the places “where the presence of guns negatively impacts the exercise of free speech” (Morgan 182). Political rallies certainly fall under the category of places where free speech is sacred and necessary, and as precedent shows, the presence of a gun negatively affects that free speech. However, also problematic is the scope of a law that would declare the noticeable aim of a gun as a censor. Such a law could easily be classified as too narrowly-tailored and therefore prejudicial against individuals who own and carry guns (*RAV v. St. Paul*, 1992).

Additionally, another counter argument to the claim that the defendant’s action in the key case was unlawful censorship is that the government can impose restrictions on the time, place,

and manner of expression as long as those restrictions are content-neutral and suppress no more speech than is necessary (Zick 231). For example, if a police officer sensed a threat to public order and safety, privacy, or aesthetics, the officer could be within his right to impose a restriction (Zick 231). However, these restrictions are traditionally handled through the use of permits and not through the use of a firearm (Zick 232).

Another tension in the law comes with the possibility of classifying the open carry of a gun itself as an act of free speech protected by the First Amendment (Morgan 186-187). Under this classification, owning and displaying a gun is a clear statement to others who see an individual possessing the gun. However, courts have repeatedly ruled against the notion that armed demonstration falls under the category of expressive conduct, because “gun possessors frequently fail to express a particularized message that others are likely to understand. Burning the American flag, with no other speech, clearly conveys a message. Waving a gun in the air does not” (Morgan 188). Therefore, it is not a stretch to conclude that the officer’s aiming of the gun at the speaker in the key case was not an act of free speech itself, and is therefore not subject to First Amendment protection.

Lastly, one could argue that the defendant was within his obligations as a police officer to monitor the protest and keep the peace. Officers in this key case cited the doctrine of qualified immunity, which gives officials “breathing room to make reasonable but mistaken judgments about open legal questions” (Black Lives Matter v. Town of Clarkstown, 2018). However, in discussion of the case and reference to the First Amendment, the court determined that “no reasonable official would have thought engaging in surveillance and intimidation solely based on plaintiffs' membership in the group was lawful” and therefore the action was unjustified.

Implications of recognizing guns as a censor

It is evident that plaintiffs have a valid First Amendment retaliation case. Furthermore, the officer's pointing of a gun with a laser at the speaker at a protest was an unlawful chill on the plaintiff's free speech and acted as a censor. If states recognized guns as a censor, it could possibly warrant revisiting scores of law regarding the Second Amendment, open carry laws, and particularly open carry laws in areas of public protest. This classification of guns could also suggest the extension of Heller's sacred places concept to political protests in addition to schools and government buildings. This decision would call into discussion opinions and law regarding the balance between the rights to peacefully assemble and the right to bear arms. However, recognizing guns as a censor would also provide an extra layer of protection for public protests and create an area where speakers at public protests could be more free of fear of retaliation for their First Amendment rights, whether by law enforcement officials or civilians.

Conclusion

Free speech and the ability for citizens to participate in the political process is the cornerstone of American democracy. It is important to recognize censorship in all of its forms in order to preserve the right to free speech, assembly, and petition. Holding law enforcement officials, as well as government and its agencies, responsible for censorship efforts is the only way to ensure the extension of these rights in the future. Plaintiffs in *Black Lives Matter v. Town of Clarkstown* settled out of court after establishing grounds for a First Amendment retaliation claim. This means that progress in the way of recognizing guns as a censor has been halted in this case. Pursuing cases like *Black Lives Matter v. Town of Clarkstown* to their full extent is

necessary to establish at least common law solutions for clear violations of basic American rights such as this, if not a larger legislative solution.

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