Indiana Law Journal

Volume 46 | Issue 4 Article 6

Summer 1971

The Policeman's Right to Free Speech: Muller v. Conlisk

Richard L. Halpert
Indiana University School of Law

THE POLICEMAN'S RIGHT TO FREE SPEECH: MULLER v. CONLISK

In the case of *Muller v. Conlisk*[1] the United States Court of Appeals for the Seventh Circuit was confronted with the question of the extent to which a municipal police department may restrict the exercise of free speech by its members. Jack Muller, a Chicago Police detective, criticized the department's Internal Inspection Division,[2] responsible for investigating police misconduct, by stating to a television news reporter that "[t]he IID is like a great big washing machine. Everything they put into it comes out clean."[3]

The department's Disciplinary Board decided that Muller had violated Department Rule 31[4] which prohibitied policemen from "[e]ngaging in any activity, conversation, deliberation, or discussion which is derogatory to the Department or any member or policy of the Department."[5] The Board, therefore, ordered a written reprimand placed in Muller's service record.[6]

Muller's suit in federal district court for a declaratory judgment and injunctive relief was dismissed on the grounds that the reprimand did not constitute sufficient harm to grant the plaintiff standing.[7] The court of appeals reversed, holding that standing did not depend upon the reprimand but rather upon the Rule itself, which sufficiently restricted plaintiff's constitutionally protected right to freedom of speech so as to confer standing.[8] The court went on to hold Rule 31 unconstitutional on its face because it was overbroad, proscribing protected areas of speech.[9]

A brief recitation of the history of free speech restrictions in the realm of public employment adds insight into the *Muller* decision. In 1892 Oliver Wendell Holmes articulated the "no right to public employ-

---

1. 429 F.2d 901 (7th Cir. 1970) [hereinafter cited as *Muller*].
2. Hereinafter referred to as IID. Once before Muller had reported misconduct to the IID and received what he felt to be unsatisfactory results. *Id.* at 902.
3. *Id.*
4. Muller was twice summoned to receive an oral reprimand but had refused and demanded the hearing. *Id.*
5. *Id.*
6. The reprimand would be reviewed in connection with promotions and could limit plaintiff's advancement. *Id.*
7. It is unclear whether the district court dismissed because plaintiff lacked standing or because the controversy was not yet ripe for adjudication. *Id.*
8. *Id.*
9. *Id.* at 903-04.

ment" doctrine in *McAuliffe v. Mayor of New Bedford.*[10] McAuliffe, a policeman, was discharged because he solicited contributions for a political purpose contrary to police regulations. Mr. Justice Holmes upheld the Mayor's decision to discharge, stating that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[11]

As demonstrated by *Adler v. Board of Education,*[12] the "no right to public employment" approach was followed through 1952. *Adler* questioned the constitutionality of the Feinberg Law[13] which provided for the removal of any teacher advocating, or belonging to any organization which advocated, the violent overthrow of the government. Adler claimed the law infringed upon his right of free speech and association; however, the Supreme Court upheld the statute, stating that while people can assemble and speak what they choose, "[i]t is equally clear that they have no right to work for the State in the school system on their own terms."[14] In 1967 the *Adler* case was rejected by the Supreme Court in *Keyishian v. Board of Regents.*[15] In overturning the dismissal of faculty members who refused to sign an oath required by the Feinberg Law,[16] the Court rejected the theory that public employment may be subject to any conditions regardless of how unreasonable.

The Supreme Court, in 1968, described the manner in which first amendment rights and public employment are to be harmonized in the case of *Pickering v. Board of Education.*[17] Plaintiff, a teacher, was dismissed for publishing a letter which criticized the Board of Education's allocation of funds between educational and athletic programs. In reasoning that teachers did not relinquish all first amendment rights they would enjoy as citizens by accepting public employment,[18] the Court proposed a balancing test:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon

10. 155 Mass. 216, 29 N.E. 517 (1892).
11. *Id.* at 220, 29 N.E. at 517.
12. 342 U.S. 485 (1952).
13. N.Y. Educ. Law § 3022 (McKinney 1970).
14. 342 U.S. at 492.
15. 385 U.S. 589 (1967). The Court stated that the *Adler* case had been overruled by a series of cases following it. *Id.* at 595. However, the dissent questioned this statement. *Id.* at 625 (dissenting opinion of Clark, J.).
16. The law required personnel (including teachers) of any state institution of higher learning to sign the "Feinberg Certificate" declaring that the signer had never been a member of the Communist Party or, if he had, that he had so reported to the President of the State University. *Id.* at 595-96.
17. 391 U.S. 563 (1968).
18. *Id.* at 568.

> matters of public conern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[19]

Ultimately, the Court held that Pickering could not be dismissed for exercising his right to speak on issues of public importance.[20] In summary, it is now recognized that the public employee, including the policeman,[21] is no longer forced to forego constitutional rights in order to take public employment.

The court in *Muller* specifically held Rule 31 to be unconstitutionally overbroad,[22] reasoning that "in substance, it prohibits *all* criticism by policemen of the department."[23] There is little doubt that in formulating its regulations for police officers, the Chicago Police Department may restrict some comments, such as criticism which would have the effect of seriously impeding the public service. Yet, the court in the instant case established no guidelines as to the type of regulation which may be permissible, but merely mentioned that the balance may be different in the police context when compared to the teacher situation.[24]

In determining the extent to which a municipal police department should be permitted to restrict the free speech of its members, there are three legitimate interests to be balanced. First, there is the police depart-

---

19. *Id.*

20. *Id.* at 574.

21. The Supreme Court has also recognized that policemen do not necessarily waive their constitutional rights in accepting employment. In *Garrity v. New Jersey*, 385 U.S. 493 (1967), policemen were compelled to answer self-incriminating questions concerning ticket-fixing, or be subject to discharge. In holding the demand to be unconstitutional the Court said, "We conclude that policemen, like teahcers and lawyers, are not relegated to a watered-down version of constitutional rights." *Id.* at 500. The Court's decision was not limited to unconstitutional invasion of fifth amendment rights, but it included first amendment rights among those for the exercise of which the state cannot exact a price.

22. The "overbreadth problem," simply stated, is that once a determination has been made that specific actions are to be prohibitied, if the language of the rule is overbroad, it will result in the prohibition of conduct not intended to be prohibited. The result is that a regulation, which would otherwise be valid, is struck down as proscribing protected activity.

23. *Muller* at 903-04.

24. The department attempted to distinguish *Pickering* from the instant case on the grounds that the police situation is more factually similar to that of the military than to that of teachers. *Muller* at 904. While the need of a police department to maintain discipline may be more closely related to military cases than to teacher cases, this in no way discredits the balancing test proposed in *Pickering*. Rather, it merely alters the relative weights which should be given the relevant interests. While the maintenance of strong discipline may be much more important to police departments than to teachers, this does not affect the validity of applying a balancing test. For a more complete treatment of free speech in the military, see Sherman, *The Military Courts and Serviceman's First Amendment Rights*. 22 HASTINGS L.J. 325 (1971).

ment's interest in maintaining and improving the public service performed, which favors the imposition of regulations restricting public statements by police officers. Opposed to this interest are the interests of the individual officer in being able to express his opinions as a citizen and society's interest in maintaining the greatest possible amount of discourse on matters of public concern.

The interest of the police department or, to state in other terms, the interest of society in maintaining an efficient police department, can be categorized into internal and external considerations. The internal problem is that of maintaining discipline;[25] the external problem is that of maintaining public confidence and respect.[26] A police department must maintain a certain degree of discipline over its officers if it is to maintain the public service.[27] Police officers must be willing to accept and execute policy decisions and specific orders because failure to do so could lead to a breakdown of police operations.[28] Moreover, it is generally accepted that in a democratic society the maintenance of the public service is also dependent upon public cooperation, which in turn rests upon public confidence.[29] If citizens were to lose their respect for police and therefore withhold their voluntary cooperation, the effects on the maintenance of the public service could be disastrous. However, some critical statements may have so slight an impact upon internal discipline and external confidence that they do not affect performance of the public service. Regulations preventing police from making such statements are improper. Consequently, only those rules designed to prohibit the disruption or impairment of the public service should be permitted.[30]

A second interest to be weighed is that of the individual policeman in his right to voice an opinion in matters of public concern. Freedom of expression is so fundamental that the Supreme Court has held it must be protected even in cases where the speech is unpopular or lacks social value.[31]

---

25. *See In re* Gioglio, 104 N.J. Super. 88, 96, 248 A.2d 570, 574-75 (1968).

26. Brukiewa v. Police Commissioner, 257 Md. 36, 43, 52, 263 A.2d 210, 214-15, 218 (1970).

27. *See In re* Gioglio, 104 N.J. Super. 88, 96, 248 A.2d 570, 574-75 (1968). Gioglio refused to report, as ordered, to the uniformed division (rather than the detective division as he had done previously). In addition, he complained to the press about departmental decisions. The court held that punishment for failing to report for duty was justified while punishment for exercising his right to free speech was not proper absent impairment of the public service, which was not shown.

28. *Id.* at 96, 248 A.2d at 575.

29. Ours is not a police state in which police departments maintain order by sheer force. Rather, we function with relatively few officers because the public has confidence that the police are acting in its best interest and, therefore, lends its cooperation.

30. *In re* Gioglio, 104 N.J. Super. 88, 98, 248 A.2d 570, 575.

31. NAACP v. Button, 371 U.S. 415, 444-45 (1963).

The third interest to be weighed in the evaluation of police restrictions on free speech is that of society's desire to encourage the free exchange of ideas in order to facilitate opinion formation on the individual level and policy formation on the governmental level.[32] The dependence upon the free exchange of ideas to facilitate policy making is especially important with regard to those individuals having special knowledge or experience in the area of discussion; *i.e.,* policemen, who best know the dealings of their own department.[33] If a society limits the rights of policemen to criticize the department, it may be eliminating its best supply of accurate and insightful information.[34] For example, secrecy and "in group loyalties" among police departments are often great,[35] at times going so far as to conceal illegal activity.[36] By denying honest policemen the right to criticize, the secrecy is institutionalized and the public loses its key source of information and opportunity to correct the situation. This was the effect of Rule 31 in *Muller,* which virtually prohibited all statements concerning the department except those which were clearly complimentary.

The primary example of a recent case which has applied the balancing test in a police context is *Brukiewa v. Police Commissioner.*[37] Brukiewa was a verteran police officer who was interviewed on a city-wide television program about a position paper issued by the policemen's union. He severely criticized the new police commissioner and predicted that if his practices continued, ". . . the bottom is going to fall out of this city."[38] This statement occurred at a time when ". . . unprecedented rioting, looting, fire bombing and destructon of property"[39] had just

32. This observation has been characterized as fundamental to democracy. *See* Roth v. United States, 354 U.S. 476, 488 (1957).

33. *See* Pickering v. Board of Educ., 391 U.S. 563, 572 (1968).

34. One example of a situation in which policemen themselves were the only accurate source of information vital to public police administration policy can be found in ACLU, SECRET DETENTION BY THE CHICAGO POLICE (1959). The report deals with the illegal practice of the Chicago Police Department in holding arrested persons for long periods of time without bringing them before a magistrate. Because the practice was secret (and due no doubt in part to the ignorance of the arrested persons regarding their constitutional rights), the practice was not made known to the general public for a considerable length of time. This is but one illustration of a situation in which policemen have special information which, if made available to the public, could have a considerable impact upon policy-making. However, if the individual officer is not free to criticize the department, this information may remain unavailable to the public for a long period of time.

35. *See generally* Wilson, *Police Morale, Reform and Citizen Respect: The Chicago Case,* in THE POLICE: SIX SOCIOLOGICAL ESSAYS 137 (D. Bordua ed. 1967).

36. *See* note 33 *supra.*

37. 257 Md. 36, 263 A.2d 210 (1970).

38. *Id.* at 40, 263 A.2d at 212.

39. *Id.* at 65, 263 A.2d at 224 (dissenting opinion of Barnes, J.).

passed and the police department's conduct was being closely scrutinized by the public.[40] Nevertheless, the court held that because the state had failed to show that Brukiewa's statements imperiled either the discipline or operations of the police department, the criticism was protected by the first amendment.[41]

Likewise in *Muller,* even if Rule 31 had not failed for overbreadth, it is unlikely that the result would have been different under the balancing test. According to *Brukiewa,* the state must show an adverse effect on the public service. It was not shown that Muller's statements damaged the public confidence in, or the operations of, the Chicago Police Department. Moreover, it would have been extremely difficult for the department to argue that Muller's statements rendered him incapable of performing his functions since he was not suspended, but instead continued in the same position with the same rank. In summary, there was no showing that Muller's statements had any effect upon the Chicago Police Department.

RICHARD L. HALPERT

40. *Id.*
41. *Id.* at 57, 263 A.2d 221.