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FROM BLACK ARMBANDS TO RED BALL CAPS: NAVIGATING STUDENT SPEECH IN POLITICALLY CHARGED TIMES

Presented by:
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By David C. Bloomfield

Updated 9:02 PM ET, Thu October 12, 2017

Agenda

- **Legal Overview**
- **Hypotheticals**
- **Best Practices**

START
HERE

IS STUDENT SPEECH PROTECTED?

Is speech intended to convey a message?
Under circumstances, will messages be understood by those who view it?

IF YES, *Protected!*

IS SPEECH:
 Lewd, vulgar, or profane?
 Promoting illegal conduct?

IF NO, *Not Protected!*

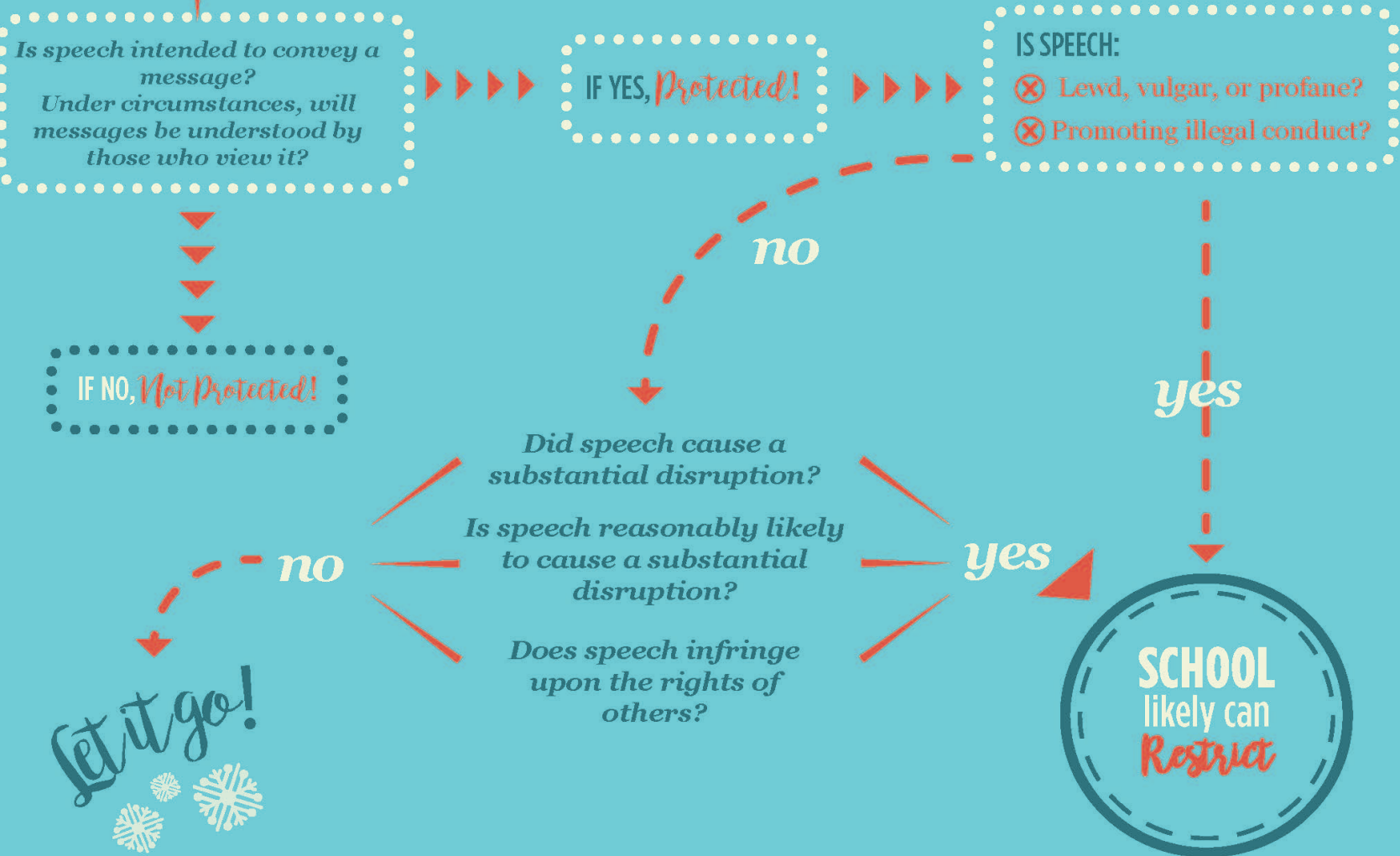
Did speech cause a substantial disruption?

Is speech reasonably likely to cause a substantial disruption?

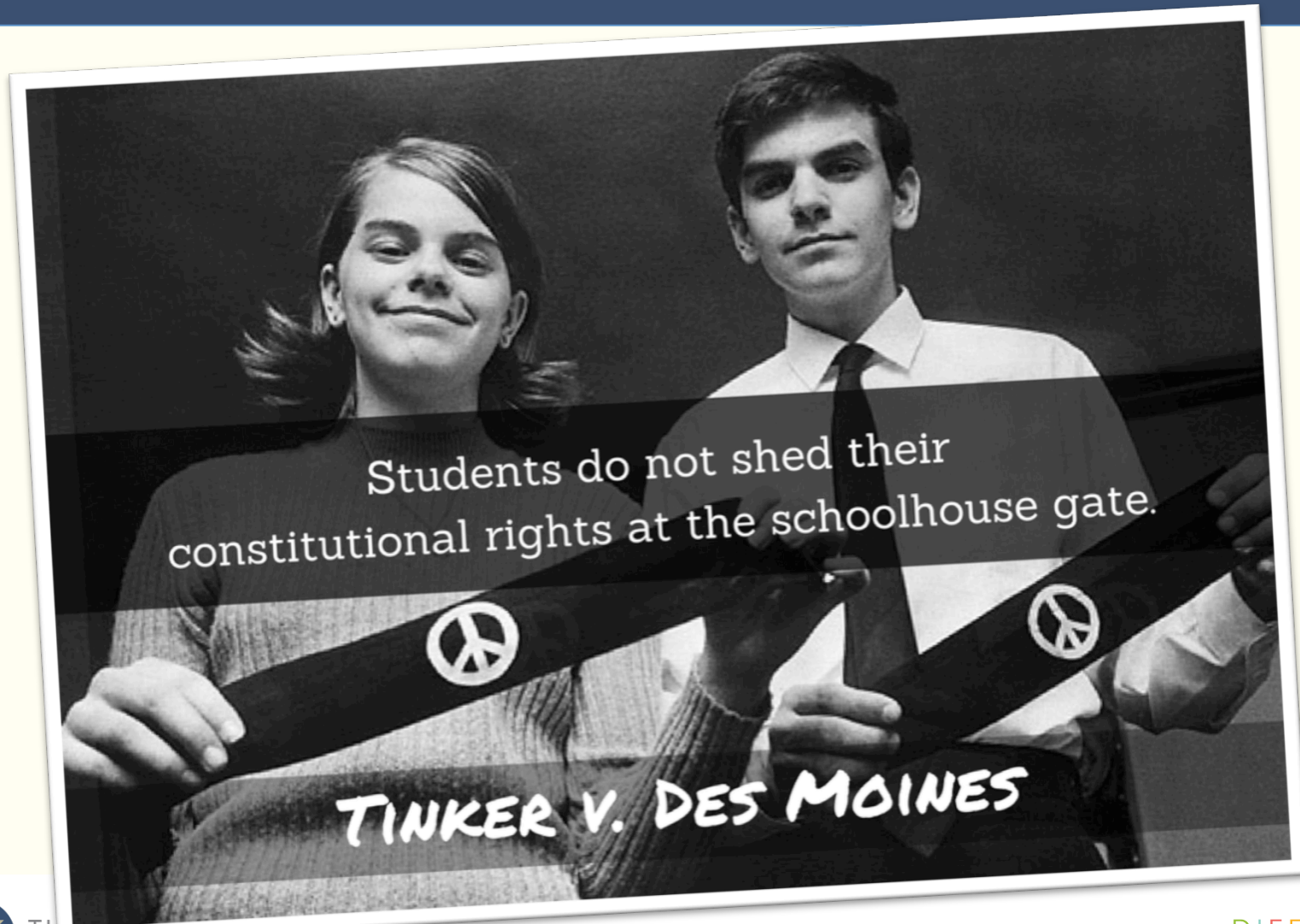
Does speech infringe upon the rights of others?

Let it go!

SCHOOL likely can *Restrict*



Bedrock Legal Concepts



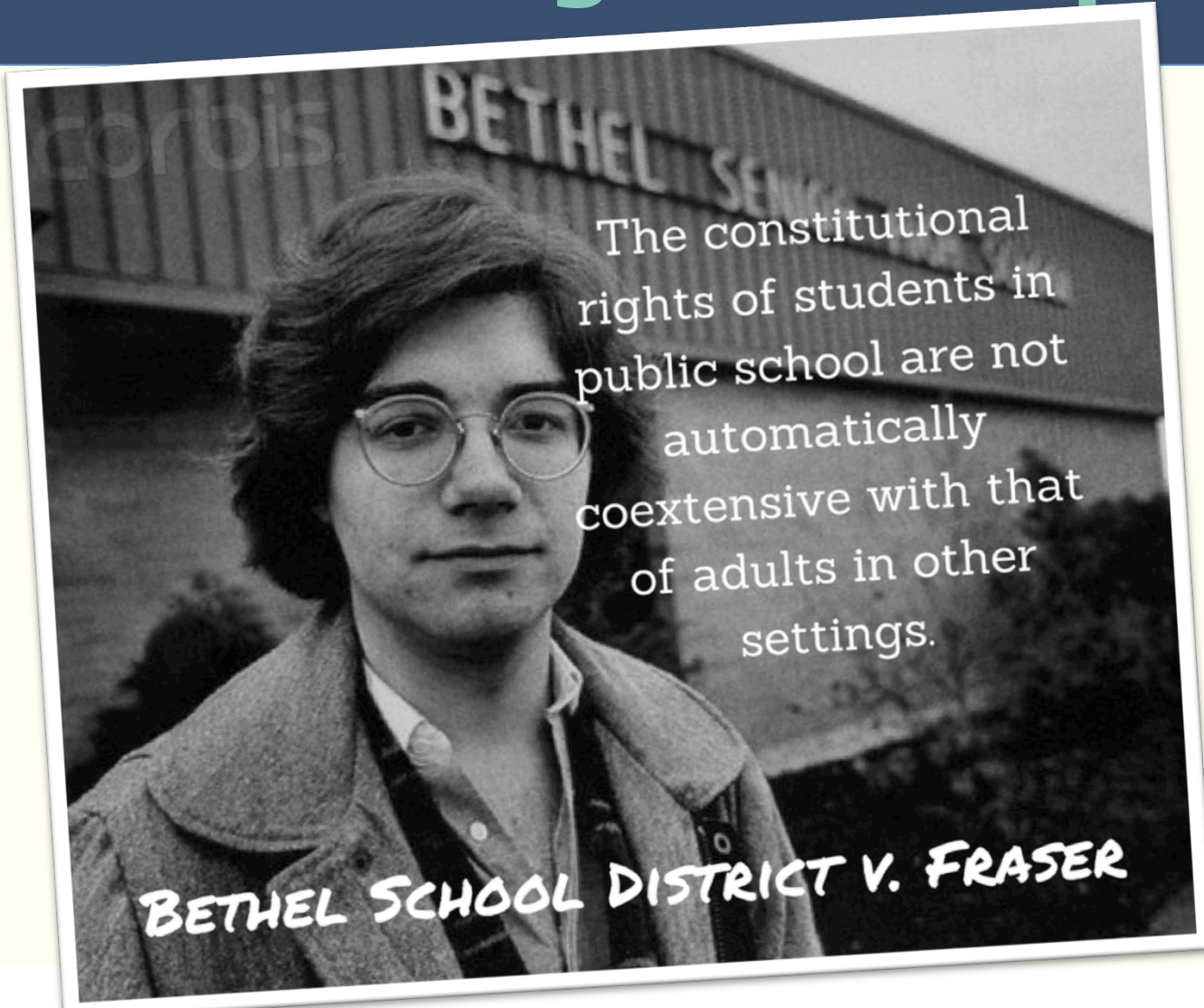
Analysis

- Is speech protected under the First Amendment?
 - Intended to convey a message?
 - Under the circumstances, is the likelihood great that the message would be understood by those who view it?

Analysis

- A school district can prohibit speech that **materially disrupts** classwork or involves **substantial disorder**.
- Factors to consider:
 - Content of the speech
 - Time, place, and manner of the speech
 - Student's intent in making the speech
 - The current environment in the community
- Also, consider – does the speech infringe on the rights of others?

Bedrock Legal Concepts



Bedrock Legal Concepts



Bedrock Legal Concepts

School officials can regulate the style and content of school-sponsored student speech in ways that are reasonably related to legitimate pedagogical concerns.

HAZELWOOD V. KUHLMAYER

Analysis

- Even if speech is protected...
 - Is it lewd, vulgar, or profane?
 - Does it promote illegal conduct?
 - Is the speech school sponsored?

Analysis

- A note on **school-sponsored** speech:
 - Be wary of viewpoint discrimination.
 - Consider:
 - The amount of control exercised over the publication or activity by the district.
 - Any relevant school district policies.
 - Past practice related to publication/activity at issue.

Hypothetical #1

- Appleville School District is gearing up for World Hijab Day on February 1. Approximately 6% of the District's students are Muslim, and several students regularly wear the hijab.
- The District has a dress code that prohibits head coverings; however, there is an exception for religious head coverings.
- Several non-Muslim students plan to wear hijab to show support for Muslim students and have placed flyers around the school encouraging participation. Another group of students, expressing concern about national security, plan to wear their "Make America Great Again" caps.
- Administrators have issued reminders to students regarding dress code.

Hypothetical #1

- On February 1, several students are referred to the office for dress code violations.
- During a classroom discuss about the hijab, a student raises his arm in what appears to be a Nazi salute. Several students complain to the administration.

POLL

- Discipline the students wearing the hijab for non-religious reasons?
- Discipline the students wearing MAGA hats?
- Discipline the student making the gesture in class?

Legal Issues

- What is the student speech? Is it protected?
- Can the students be prohibited from wearing hijab?
- Can the students be prohibited from wearing the red ball caps?
- Can the students be disciplined for dress code violations?
- Can the student be disciplined for raising his hand in what appeared to be a Nazi salute?

Practical Considerations

- Do not to make assumptions about a student's intent.
 - Ask the student what he or she meant by the conduct in question.
 - Ask other students what they understood by the conduct in question.



Practical Considerations

- Consider underlying basis for policy at issue.
 - What is the governmental interest served by the policy?
 - Is the policy specifically tailored to that interest?



Practical Considerations

- Consider underlying basis for policy at issue.
 - What is the governmental interest served by the policy?
 - Is the policy specifically tailored to that interest?



Hypothetical #2

- A student at Orangeville School District's high school parks his truck in the school's lot Friday morning. In the truck bed is a flag pole, with a confederate flag attached.
- Reports reach the principal after the first bell. By that time, students have disbursed to enter the building.
- Social media begins picking up the truck, with flag, and pictures are circulating that show the flag in front of the high school building. The high school and district's name are visible in the pictures.

Hypothetical #2

- The high school's central office begins receiving calls.
- One of the calls is from the parent of an African-American freshman student. The parent reports that her son feels harassed. The parent demands that the flag come down and that the student who placed the flag on his truck be disciplined.
- Parent also reports football coach told students he would cut anyone who kneels during the national anthem at football games.
- The principal then receives a call that a local media van has just pulled up and is filming the flag, with the school in the background.

POLL

- Request student to take down flag?
- Discipline student for bringing flag to school?
- Discipline students for taking a knee at football games?

Legal Issues

- What is the student speech? Is it protected?
- Has the district's non-discrimination policy been violated?
- Disruption? When? Ever?

Practical Considerations

- An actual disruption does not need to occur!
- When school officials reasonably foresee that speech will cause substantial disruption or materially interfere with learning environment, the school can prohibit the speech.

Practical Considerations

- A note about off-campus conduct – must be reasonably foreseeable that the speech will reach the school community
- Consider anti-harassment, anti-bullying laws

Best Practices

- Focus on the facts.
- Document current environment to justify determination that substantial disruption is reasonable likelihood.
- Consider whether to address the behavior through disciplinary consequences, or an alternative approach.
- Consider whether it is better to prevent or facilitate a protest.

Best Practices

- Provide proactive training.
- Use community resources.
- Be prepared for media.
- Be reasonable.
- Remember:
 - Approach conduct in a viewpoint neutral manner, and
 - Treat similar conduct in a similar manner.

QUESTIONS?

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