MITCHELL | HAMLINE School of Law

William Mitchell Law Review

Volume 25 | Issue 3 Article 9

1999

A Survey Of Recent Developments In The Law: Constitutional Law

Adam D. Rosenfield

IV. CONSTITUTIONAL LAW

A. *First Amendment and "Fighting Words"*

Minnesota's harassment and stalking crimes statute violates the First Amendment to the United States Constitution.[1] In *State v. Machholz*,[2] the Minnesota Supreme Court held that Minnesota Statutes section 609.749, subdivisions 1(1) and 2(7)[3] are invalid because they are impermissibly vague and reach a wide range of constitutionally protected activity.[4]

On October 11, 1995, Kurtis Dean Machholz rode his horse through a crowd that gathered in downtown Rochester, Minnesota, to celebrate "National Coming Out Day," an annual event for homosexuals, their families and friends.[5] Machholz rode through the crowd shouting: "'You're giving us AIDS'; 'You're spreading your filth!'; 'There are no homosexuals in heaven!'; and 'You're corrupting our children!'"[6] At one point, Machholz swung the horse's lead rope and knocked down an easel holding a sign announcing the celebration.[7] While there were no allegations that Machholz actually struck anyone, several people did claim to feel "threatened" and "frightened" by his conduct.[8]

Machholz was charged with a felony violation of Minnesota Statutes section 609.749, subdivisions 1(1), 2(7) and 3(1), which criminalizes any "harassing conduct that interferes with another person or intrudes on the person's privacy or liberty" on the basis of the victim's "actual or perceived . . . sexual orientation."[9] The

1. *See* State v. Machholz, 574 N.W.2d 415, 417-18 (Minn. 1998). *See also* U.S. CONST. amend. I.
2. 574 N.W.2d 415 (Minn. 1998).
3. MINN. STAT. § 609.749, subds. 1(1) & 2(7) (1998). The court noted that subdivision 1(1), which defines the term "harassment," is only overbroad when read in conjunction with subdivision 2(7) which criminalizes "any other harassing conduct." *See Machholz*, 574 N.W.2d at 417 n.1.
4. *See id.* at 417.
5. *See id.* at 417-18.
6. *Id.* at 418.
7. *See id.*
8. *See id.*
9. *See* MINN. STAT. § 609.749 (1998). The statute provides:

statute defines "harass" as intentional conduct which the "actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated."[10]

At pre-trial, the district court dismissed all charges against Machholz, holding that the statute was impermissibly vague and overbroad and therefore invalid under the First Amendment to the United States Constitution.[11] The court of appeals, however, reversed, finding that the language of the statute was "virtually

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> Subdivision 1. Definition. As used in this section, "harass" means to engage in intentional conduct which: (1) the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated; and (2) causes this reaction on the part of the victim . . . .
>
> Subdivision. 2. Harassment and stalking crimes. (a) A person who harasses another by committing any of the following acts is guilty of a gross misdemeanor: (1) directly or indirectly manifests a purpose or intent to injure the person, property, or rights of another by the commission of an unlawful act; (2) stalks, follows, or pursues another; (3) returns to the property of another if the actor is without claim of right to the property or consent of one with authority to consent; (4) repeatedly makes telephone calls, or induces a victim to make telephone calls to the actor, whether or not conversation ensues; (5) makes or causes the telephone of another repeatedly or continuously to ring; (6) repeatedly mails or delivers or causes the delivery of letters, telegrams, messages, packages, or other objects; or (7) engages in *any other harassing conduct* that interferes with another person or intrudes on the person's privacy or liberty . . . .
>
> Subdivision 3. Aggravated violations. A person who commits any of the following acts is guilty of a felony: (1) commits any offense described in subdivision 2 because of the victim's or another's actual or perceived race, color, religion, sex, sexual orientation, disability as defined in section 363.01, age, or national origin . . . .

Id. (emphasis added).

10. *Id.* The definition of "harass" also includes a victim who actually feels frightened, threatened, oppressed, persecuted, or intimidated. *See id.* at subd. 1(1).

11. *See Machholz*, 574 N.W.2d at 417. *See also* U.S. CONST. amend. I. The First Amendment to the U.S. Constitution reads as follows:

> 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.

Id.

equivalent to the 'fighting words' category of unprotected speech"[12] as articulated in *Chaplinsky v. New Hampshire.*[13]

Writing for the court, Justice Page rejected the State's assertion that the statute could be narrowly applied only to "fighting words."[14] Rather, the broad reach of the statute would criminalize numerous forms of constitutionally protected speech.[15] For example, a neo-nazi march through a residential community of Holocaust survivors,[16] or burning a cross at a political rally[17] or on the lawn of a black family in the middle of the night[18] could certainly intrude upon an individual's liberty or privacy and would undoubtedly cause feelings of fear, oppression or intimidation on the part of the victims.[19] While it is established that the U.S. Supreme Court considers these activities to be constitutionally protected forms of speech,[20] the conduct would nonetheless be criminally punishable under the Minnesota statute.[21]

Furthermore, the court posited that any number of benign daily interactions would likewise fall within the reach of the statute, such as a supervisor who forcefully chastises a consistently tardy employee, or a basketball coach who yells at his team for its uninspired performance, or the law professor who ridicules the unprepared first-year student.[22] The court observed that while these activities are clearly forms of speech protected by the First Amendment, the supervisor, coach and law professor could all potentially be criminally prosecuted under the State's expansive reading of subdivision 2(7).[23] Thus, considering the broad reach of the statute and the fact that it is not susceptible to a limited application, the statute is impermissibly and unconstitutionally overbroad on its face.[24]

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12. *See* State v. Machholz, 561 N.W.2d 198, 201 (Minn. Ct. App. 1997).
13. 315 U.S. 568, 573 (1942) (defining "fighting words" as those "which by their very utterance inflict injury or tend to incite an immediate breach of the peace").
14. *See Machholz*, 574 N.W.2d at 420.
15. *See id.*
16. *See* Nationalist Socialist Party of Am. v. Skokie, 432 U.S. 43, 50 (1977).
17. *See* Brandenburg v. Ohio, 395 U.S. 444, 451 (1969).
18. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 384 (1992).
19. *See Machholz*, 574 N.W.2d at 420.
20. *See id.*; *see also R.A.V.*, 505 U.S. at 384; *Skokie*, 432 U.S. at 50; *Brandenburg*, 395 U.S. at 451.
21. *See Machholz*, 574 N.W.2d at 420.
22. *See id.* at 420-21.
23. *See id.* at 421.
24. *See id.*

Noting that Machholz's actions and speech together are constitutionally protected forms of expressive activity, the court ruled that the statute is also unconstitutional as applied.[25] Machholz's activity did not constitute "fighting words," a form of speech not protected under the First Amendment.[26] In so holding, the court applied the test articulated by the U.S. Supreme Court in *Chaplinsky* and its progeny defining "fighting words" as those "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[27] The danger produced by the words must rise "far above public inconvenience, annoyance, or unrest" to fall outside the protective parameters of the First Amendment.[28] Conceding that Machholz's statements were "offensive and obnoxious," the court held that they did not "incite an immediate breach of the peace" or "produce a clear and present danger of a serious substantial evil."[29]

Machholz's statements were made in a public place, aimed at no particular individual and expressed a personal viewpoint on a particular lifestyle.[30] This, the court reiterated, is "a classic form of speech that lies at the heart of the First Amendment, and speech in public arenas is at its most protected on public sidewalks, a prototypical example of a traditional public forum."[31]

B. Federal Subsidies and the First Amendment

The United States Government may establish subjective, viewpoint based criteria on applications for federal subsidies of the arts.[32] In *National Endowment for the Arts v. Finley*,[33] the Supreme Court addressed the issue of whether a 1990 amendment to the National Foundation on the Arts and the Humanities Act of 1965[34]

25. *See id.*
26. *See id.*; *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).
27. *Id.*
28. Terminiello v. Chicago, 337 U.S. 1, 9 (1949); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 414 (1992) (White, J. concurring) (noting that "the mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected").
29. *Machholz*, 574 N.W.2d at 422 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) and Terminiello v. Chicago, 377 U.S. 1, 9 (1949)).
30. *See id.*
31. *Id.* (quoting Schenck v. Pro-Choice Network, 519 U.S. 357, 360 (1997)).
32. *See* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2179 (1998).
33. 118 S. Ct. 2168 (1998).
34. 20 U.S.C.A. § 954(d)(1) (West Supp. 1998).

violated artists' First Amendment rights by requiring the Chairperson of the National Endowment for the Arts ("NEA") to ensure that "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[35] Rejecting assertions that the amendment provided for viewpoint-based discrimination, the Court upheld the statute's constitutionality because it did not "rais[e] concern[s] about the suppression of disfavored viewpoints . . . ."[36]

In June of 1990, performance artists Karen Finley, John Fleck, Holly Hughes, and Tim Miller were advised by the NEA that their application for a federal grant had been denied.[37] The artists filed suit in United States District Court for the Central District of California[38] arguing that the NEA statute violated their First Amendment rights because it was unconstitutionally vague and imposed content-based restrictions on protected speech.[39] Essentially, they argued that the subjectivity of the selection process permits the

35. *See Finley*, 118 S. Ct. at 2178 (quoting 20 U.S.C.A. § 954(d)). 20 U.S.C.A. § 954(d) provides:

> No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedure, the Chairperson shall ensure that (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American Public; and (2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. Projects, productions, workshops, and programs that are determined to be obscene are prohibited from receiving financial assistance under this subchapter from the National Endowment for the Arts. The disapproval or approval of an application by the Chairperson shall not be construed to mean, and shall not be considered as evidence that, the project, production, workshop, or program for which the applicant requested financial assistance is or is not obscene.

20 U.S.C.A. § 954(d).

36. *Finley*, 118 S. Ct. at 2179.

37. *See id.* at 2174. The artists applied for their grants from the NEA prior to enactment of the amendment. *See id.* Initially, their applications were recommended for approval. *See id.* Their applications were, however, rejected in June 1990 following promulgation of this amendment. *See id.*

38. *See* Finley v. National Endowment for the Arts, 795 F. Supp. 1457 (C.D. Cal. 1992).

39. *See id.* at 1460.

agency to engage in viewpoint-based discrimination and thereby reject applications involving artistic speech that may be outside the mainstream values or standards of decency.[40] The district court granted Finley's motion for summary judgment[41] noting that section 954(d)(1), which requires the NEA to "take into consideration general standards of decency and respect for the diverse beliefs and values of the American public,"[42] violated plaintiffs' due process and free speech rights.[43]

On appeal, the Ninth Circuit held that the "decency and respect" provision is unconstitutionally vague because it "is not susceptible to objective definition" and therefore is a potential instrument of arbitrary discrimination.[44] Because the government failed to provide compelling justification for section 954(d)(1), the court found that provision violated the First Amendment.[45] The Supreme Court concluded otherwise.[46]

Writing for the majority, Justice O'Connor noted that the provision neither discriminates based on viewpoint nor is impermissibly vague.[47] Rejecting the claim that section 954(d)(1) unconstitutionally prohibits the agency from considering funding a specific class of speech, the Court observed that the provision is not an absolute ban on funding offensive or questionable forms of artistic expression.[48] Rather, the language of the provision is merely advisory, "imposes no categorical requirement"[49] and does not conclusively preclude funding for projects that might be indecent or disrespectful.[50] "Section 954(d)(1) simply adds considerations to the grant-making process."[51]

The Court further noted that the legislative history surrounding the promulgation of the amendment is inconsistent with the plaintiffs' argument that its express intent was to prohibit certain

40. *See id.*
41. *See id.*
42. 20 U.S.C.A. § 954(d)(1) (West Supp. 1998).
43. *See Finley*, 795 F. Supp. at 1459.
44. Finley v. National Endowment for the Arts, 100 F.3d 671, 680-81 (9th Cir. 1996).
45. *See id.*
46. *See* Finley v. National Endowment for the Arts, 118 S. Ct. 2168, 2179 (1998).
47. *See id.* at 2180.
48. *See id.* at 2176.
49. *Id.* at 2175.
50. *See id.*
51. *Id.*

forms of speech based on content.[52] Rather, the resulting amendment is a bipartisan "counterweight" to proposed legislation aimed at eliminating the NEA's funding altogether.[53] The Court further observed that in situations where the legislative intent was to prohibit funding for certain forms of speech, Congress had "done so in no uncertain terms."[54]

The Court also noted that any content-based criteria employed in the decision-making process is simply a consequence of the inherently subjective nature of arts funding.[55] Clearly, with finite resources, it is "impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected expression."[56]

Rejecting the assertion that the language of the statute is impermissibly vague, the Court nevertheless conceded that the terms of the provision are "opaque."[57] In the context of federal funding of the arts, however, an applicant's compulsion to conform their speech to fit the provision's criteria in order to obtain funding does not involve the same coercive effect as a threat of criminal sanctions.[58] However, "when the Government is acting as a patron rather than as sovereign, the consequences of imprecision are not constitutionally severe."[59]

The Court noted that if the provision in question were in fact unconstitutionally vague, then so too are all other government programs that award grants and scholarships based entirely on subjective criteria.[60] The Court concluded that the statute does nothing more than "add[] imprecise considerations to an already subjective selection process."[61]

Concurring in the judgment, Justice Scalia parted with the majority's characterization of the provision as merely hortatory.[62]

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52. *See id.* at 2176.
53. *See id.*
54. *Id.* (citing 20 U.S.C.A. § 954(6)(2), which states that obscenity is without artistic merit, is not protected speech, and shall not be funded).
55. *See id.* at 2177.
56. *Id.* at 2178.
57. *Id.* at 2179. The Court suggested that if the language in question were to appear in a criminal statute or regulatory scheme, it could raise "substantial vagueness concerns." *Id.*
58. *See id.*
59. *Id.*
60. *See id.* at 2179.
61. *Id.* at 2180.
62. *See id.*

Such an interpretation "guts" and "emasculates" the purpose of the provision.[63] The statute simply "means what it says":[64] that all applications must be judged by content and viewpoint-based criteria.[65]

Rejecting the relevance of the majority's citation of the legislative history surrounding the promulgation of the provision,[66] Scalia focused on the text of the statute itself.[67] Justice Scalia felt that the statute was clearly intended to disfavor and discriminate against artistic expression that violates American values of decency and respect.[68] Yet, the provision does not abridge or curtail artistic expression that is repugnant to or inconsistent with American values, because those who wish to produce such work are no less free to do so.[69] The provision merely provides that taxpayers need not pay for it and the government need not fund it.[70] "And that," asserts Scalia, "is perfectly constitutional."[71]

C. *Due Process and Equal Protection*

In a case of first impression, the Minnesota Supreme Court, in *State v. Mitchell*,[72] ruled that it is not a violation of the Minnesota Constitution to impose a mandatory sentence of life imprisonment, with a minimum of thirty-years, upon a fifteen-year old child convicted of first-degree murder.[73] Reversing the court of appeals, the court held that the punishment is neither cruel nor unusual, and does not infringe upon an individual's rights to due process and equal protection.[74]

After school on November 17, 1994, fifteen-year old Eric William Mitchell gathered with friends at the apartment of Jeffery

63. *Id.*
64. *Id.* at 2180.
65. *See id.*
66. *See id.* at 2182. Scalia noted, "It matters not whether this enactment was the product of the most partisan alignment in history or whether, upon its passage, the Members all linked arms and sang, the more we get together, the happier we'll be." *Id.*
67. *See id.*
68. *See id.* at 2182.
69. *See id.*
70. *See id.* at 2183.
71. *Id.* at 2180.
72. 577 N.W.2d 481 (Minn. 1998).
73. *See id.* at 481. The court noted that neither the Minnesota Supreme Court nor the U.S. Supreme Court has addressed the specific issue of the constitutionality of sentencing a fifteen-year old child to life imprisonment without the possibility of parole for a minimum of thirty years. *See id.* at 488.
74. *See id.* at 492.

Meidl in Hutchinson, Minnesota.[75] In need of money, the boys formulated a plan to rob the Food and Fuel convenience store.[76] That evening, at approximately nine-thirty, Mitchell entered the store[77] and approached the counter where nineteen-year old Mickey Wilfert was working as a clerk.[78] In spite of Wilfert's compliance, Mitchell shot him in the face.[79] Mitchell then walked behind the counter and again pointed the gun in Wilfert's face and kicked him as he lay on the floor.[80] Mitchell took the money from the cash register and ran from the store.[81] At approximately ten-thirty that evening, Mickey Wilfert died from a gunshot wound to the head.[82]

Mitchell and his accomplice were arrested approximately four hours after the murder and taken to the Sibley County Sheriff's Department.[83] The County charged Mitchell with the first-degree murder of Mickey Wilfert.[84]

A reference hearing was held in February of 1995 after which the juvenile court granted the county attorney's motion for referral to adult district court.[85] A jury convicted Mitchell on one count of first-degree murder, one count of second-degree murder and one count of aggravated robbery.[86] Following a sentencing hearing,[87] Mitchell was sentenced to the mandatory term of life imprisonment

75. *See id.* at 483.

76. *See id.*

77. *See id.* Mitchell was accompanied in the robbery by an accomplice, seventeen-year old Harley Hildenbrand. *See id.* The entire robbery was captured on video by the store's security camera. *See id.*

78. *See id.* at 484.

79. *See id.*

80. *See id.*

81. *See id.*

82. *See id.*

83. *See id.* Mitchell's wallet contained his identification, fell from his pocket during the course of the robbery, and was recovered by police. *See id.*

84. *See id.*

85. *See id.* Mitchell appealed the juvenile court's referral to adult district court. *See id.* Affirming the order, the court of appeals found that the evidence sufficiently supported the juvenile court's finding that Mitchell was not "suitable for treatment within the juvenile system and that public safety would not be served under the juvenile court provisions." *Id.*

86. *See id.* at 486.

87. *See id.* Under the Minnesota Sentencing Guidelines, a defendant convicted of first-degree murder receives a mandatory sentence of life imprisonment, without the possibility of parole for a minimum of thirty years. *See* MINN. SENTENCING GUIDELINES GRID (1998); MINN. STAT. § 244.05, subd. 4 (1998). The trial judge, therefore, had no sentencing discretion. Notwithstanding this fact, the court granted defense counsel's request for a sentencing hearing. *See id.*

without possibility of parole for a minimum of thirty years.[88]

On appeal to the Minnesota Supreme Court, Mitchell asserted that his sentence constituted a violation of his rights against cruel or unusual punishment prohibited by the Minnesota Constitution.[89] Whether a form of punishment is cruel or unusual requires consideration of whether the punishment violates the "evolving standards of decency that mark the progress of maturing society."[90] In its analysis, the court considered evidence suggesting that the public was becoming increasingly intolerant of child crime and more tolerant of harsher penalties.[91] Similarly, the fact that numerous states imposed similar penalties on fifteen-year old children indicated that the punishment was also not unusual.[92] Therefore, the court found that a life sentence for a fifteen-year old child convicted of first-degree murder is neither offensive to society's evolving standards of decency nor abhorrent to the community.[93] Thus, Mitchell's sentence was not cruel or unusual.[94]

Mitchell also argued that both the disparity in punishment between adults and children convicted of first-degree murder and the district court's preclusion from considering age in sentencing amounted to a violation of his substantive and procedural due process rights.[95] The court observed, however, that one does not have a fundamental right to either a juvenile proceeding or to have age considered in sentencing.[96] Expressing a degree of concern that the legislature chose not to provide for intermediate sentencing for children in Mitchell's position, the court nonetheless noted that the district court simply does not have the authority to deviate from the mandatory sentence.[97] Furthermore, because the judge at the

88. *See Mitchell*, 577 N.W.2d at 488.

89. *See id.* at 488; *see also* MINN. CONST. art. I, § 5 (noting that excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted).

90. Trop v. Dulles, 356 U.S. 86, 101 (1958).

91. *See Mitchell*, 577 N.W.2d. at 488.

92. *See id.*

93. *See id.*

94. *See id.*

95. *See id.* at 491.

96. *See id.*; *see also* State v. Behl, 564 N.W.2d 560, 562 (Minn. 1997) (holding that automatic certification of a sixteen-year old indicted for murder without a hearing did not violate substantive due process); State v. Walker, 306 Minn. 105, 108, 235 N.W.2d 810, 813 (1975) (holding that a mandatory life sentence for first-degree murder is not a violation of substantive due process notwithstanding the district court's statutory preclusion from considering mitigating factors).

97. *See Mitchell*, 577 N.W.2d at 491.

juvenile certification hearing is required to consider the "totality of the circumstances, including the sophistication and maturity of the child."[98] Mitchell's age was considered in the certification decision.[99] Therefore, Mitchell had not been deprived of his right to procedural due process of law.[100]

Sharing in the district court judge's articulated dismay at the inability to deviate from the sentencing guidelines and the ability to "treat children differently,"[101] the court nonetheless reiterated that it is a matter for the legislature to establish the severity of criminal sanctions.[102] It is clear, however, that the court was sending a message to the legislature that a "middle ground" sentencing alternative would provide courts with the necessary and "preferable" discretion to prevent potentially unjust sentencing.[103] As it stands, however, once the juvenile system waives jurisdiction by referring the matter to adult district court, it is to be adjudicated as though juvenile jurisdiction never attached.[104] The sentencing guidelines, the court added, provide that sentences are to be applied with the same presumptive force to a child certified as an adult as any other adult convicted of that crime.[105]

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98. MINN. R. JUV. P. 32.05.
99. *See Mitchell*, 577 N.W.2d at 492.
100. *See id.*
101. *Id.*
102. *See id.* at 488.
103. *See id.* at 491.
104. *See id.* at 489.
105. *See id.*