

EDUCATION LAW INTO PRACTICE

STUDENT FREE EXPRESSION AND HUMAN DIGNITY: LESSONS FROM SOUTH AFRICA*

by

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INTRODUCTION

The important rights of persons in South Africa, as for persons in the United States, are found in the respective written constitutions of each country. A major difference between the two countries is that, while the United States' Constitution has over two hundred years of interpretative history, the South Africa's Constitution which was not finalized until 1996 has no such lengthy interpretative record. However, the South African Constitution is far more comprehensive regarding its identification of protected rights. The enumeration of these rights and their interpretation by South African courts affords some useful insights into the approach by the United States to due process. The purpose of this article is to examine a fairly recent high court decision and to assess its lessons for American law.

Right to Education in South Africa and the United States

Of particular importance are the rights of the child and the right to education. The South African Constitution stipulates that "a child's best interests are of paramount importance in every matter concerning the child"¹ and enumerates a broad range of rights for children.² In addition, the South

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1. S. A. Const., § 28(2).
2. Section 28 of the S.A. Constitution contains a panoply of rights for children.
§ 28. (1) Every child has the right

- a. to a name and a nationality from birth;
- b. to family care or parental care, or to appropriate alternative care when removed from the family environment;
- c. to basic nutrition, shelter, basic health care services and social services;
- d. to be protected from maltreatment, neglect, abuse or degradation;
- e. to be protected from exploitative labour practices;
- f. not to be required or permitted to perform work or provide services that
 - i. are inappropriate for a person of that child's age; or
 - ii. place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
- g. not to be detained except as a measure of last resort, in which case, in addi-

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African Constitution guarantees the right “to a basic education, including adult basic education . . . [that is] progressively available and accessible . . . in the official language or languages of . . . choice in public educational institutions where that education is reasonably practicable.”³ The U.S. Constitution contains no references to education nor does the Constitution confer upon students a right to education,⁴ although the Supreme Court has not been reluctant to create rights attendant to participation in education.⁵

All rights in South Africa’s Constitution are prefaced at the beginning of their constitution with three core values of “human dignity, equality and freedom.”⁶ Of these three, human dignity, codified as recognition of everyone’s “inherent dignity and the right to have their dignity respected and protected,”⁷ appears to be pivotal⁸ and is the only one of the three core values that has no counterpart in the U.S. Constitution. The right to equality under the South African Constitution, providing that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law,”⁹ is reminiscent of the U.S. Constitution’s Fourteenth Amendment guarantee of “equal protection.” The South African constitutional guarantee of equality though is much broader, prohibiting unfair discrimination “on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience,

tion to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be

- i. kept separately from detained persons over the age of 18 years; and
- ii. treated in a manner, and kept in conditions, that take account of the child’s age;

h. to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

- i. not to be used directly in armed conflict, and to be protected in times of armed conflict.

For a discussion of some of these rights, see *S. v. Z. and 23 Similar Cases*, 2004 (4)BCLR 410(E), 2003 SACLR LEXIS 53.

3. S.A. Const. §§ 29(1) and (2).

4. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (In refusing to find that the state financing of education in Texas violated the federal Equal Protection Clause under a rational purpose test, the Court observed that “[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do

we find any basis for saying it is implicitly so protected.”)

5. See, e.g., *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (invalidating state statute requiring attendance at public schools, reasoning that the state law “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control”); *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (invalidating school punishment of students for passive private speech, reasoning that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

6. S. A. Const. at § 7(1).

7. *Id.* at § 10.

8. See *S. v. Makwanyabe*, 1995 (6) BCLR 665 (CC), par. 144. (In a case challenging the administration of capital punishment, the Court observed that “The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter 3 [of the Constitution]. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.”)

9. S. A. Const. at § 9(1)

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belief, culture, language and birth,”¹⁰ areas addressed in the United States under a myriad of federal and state laws.¹¹ The constitutional right to freedom protects “the right to freedom and security of the person”¹² and “the right to bodily and psychological integrity”¹³ (including everyone’s right “to make decisions concerning reproduction” and to exercise “control over their bodies”),¹⁴ areas protected as derivative rights in the U.S. Constitution under the liberty clause of the Fourteenth Amendment.¹⁵ Even though “human dignity” has no specific counterpart in the U.S. Constitution, the Supreme Court has incorporated this concept into a number of its decisions.¹⁶

10. *Id.* at § 9(3).

11. *See, e.g., Federal Constitution: Brown v. Bd. of Educ.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (prohibiting race discrimination in education under Equal Protection Clause, using a strict scrutiny test); *U.S. v. Va.*, 516 U.S. 910, 116 S.Ct. 281, 133 L.Ed.2d 201 (1996) (finding refusal to admit women to state supported military academy a violation of Equal Protection Clause under a heightened scrutiny test); *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 [4 Ed.Law Rep. [953]] (1982) (invalidating, under Equal Protection Clause, Texas statute withholding funds from school districts providing education to undocumented children, using a rational purpose test). **Federal Statutes:** 42 U.S.C. §§ 2000 *et seq.* (prohibiting employment discrimination on the bases of race, color, religion, sex, and national origin); 29 U.S.C. §§ 621 *et seq.* (prohibiting employment discrimination on the basis of age); 42 U.S.C. §§ 12101 *et seq.* (prohibiting discrimination on basis of disability in employment [title I], in state and local agencies [title II], and in public accommodations [title III]); 42 U.S.C. § 2000e(k) (prohibiting employment discrimination on the basis of pregnancy). **State Statutes/Constitutions:** Ohio Rev. Code § 4112.02 (prohibiting employment discrimination on the grounds of race, color, religion, sex, national origin, disability, age, or ancestry); Ohio Rev. Code § 4112.021 (prohibiting discrimination in credit applications on the bases of race, color, religion, age, sex, marital status, national origin, disability, or ancestry); N.J. Stat. Ann. § 10:5-4 (prohibiting employment discrimination on the bases of “race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, nationality, sex or source of lawful income.”) *See also*, Colo. Const. Art. 2, § 30b (constitutional provision enacted by popular initiative to prohibit protected status on the basis of “homosexual, lesbian or bisexual orientation” invalidated in *Romer v. Evans*, 517

U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 [109 Ed.Law Rep. [539]] (1996), on grounds that the state constitutional amendment lacked a rational relationship to legitimate state interests under the Equal Protection Clause).

12. S. A. Const. at § 12(1).

13. *Id.* at § 12(2).

14. *Id.* at §§ 12(2) (a) and (b).

15. *See Roe v. Wade*, 410 U.S. 113, 153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (state statute criminalizing performance of an abortion at any time during pregnancy except for health of woman violated right of privacy under the Fourteenth Amendment; “the right of personal privacy includes the abortion decision”).

16. *See, e.g., Chavez v. Martinez*, 538 U.S. 760, 774, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003) (in remanding for trial plaintiff’s substantive due process claim concerning his detention and questioning, the Justice Souter writing for a divided Court noted that “[c]onvictions based on evidence obtained by methods that are ‘so brutal and so offensive to human dignity’ that they ‘shoc[k] the conscience’ violate the Due Process Clause [of the Fourteenth Amendment]”); *Hope v. Pelzer*, 536 U.S. 730, 745, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) (upholding prisoner’s Eighth Amendment claim for “cruel and unusual punishment” where handcuffing plaintiff to a fixed object in the prison after he had been subdued “treated [him] in a way antithetical to human dignity”); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 916, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (in upholding the legitimacy of *Roe v. Wade*, Justice Stevens, concurring in part and dissenting in part, observed that “[t]he woman’s constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature The authority to make such traumatic and yet empower-

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In addition to the three core rights of human dignity, freedom and equality, the South African Constitution protects a broad range of rights similar to the U.S. Bill of Rights. However, while the South African Constitution protects rights of expression,¹⁷ religion,¹⁸ property,¹⁹ assembly and presenting petitions²⁰ that have their direct counterpart in the U.S. Constitution, their Constitution also enumerates rights, such as association²¹ and privacy,²² that are protected as derivative rights under the U. S. Constitution.²³

ing decisions is an element of basic human dignity”); *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 271, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) (in upholding Missouri Supreme Court’s clear and convincing evidence standard as to whether a vegetative patient’s artificial hydration and nutrition could be terminated, the Supreme Court recognized that states could set high standards in protecting the interests of incompetent persons without necessarily endorsing the “[r]easoning that an incompetent person retains the same rights as a competent individual because the value of human dignity extends to both. . . .”). See also, *Roper v. Simmons*, 1 (2005) (in invalidating execution of juveniles as a violation of the Eighth Amendment of the U.S. Constitution, Justice Kennedy writing for a 5–4 Court, relied on “our society’s evolving standards of decency,” as reflected in his observations that most states no longer executed juveniles, the nations that share our Anglo–American judicial have abolished capital punishment for juveniles, and the United States is the last country in the world still executing juveniles).

17. S. A. Const. at § 16. However, the South African constitutional approach to expression contains much detail that has developed by interpretation in the United States. For example, South Africa includes as expression “freedom of the press and other media” and “freedom to receive or impart information or ideas” while excluding “propaganda for war,” “incitement of imminent violence,” or “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.” *Id.* at §§ 16(1)(a) and (b), 16(2). See, e.g., *Board of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 [4 Ed.Law Rep. [1013]] (1982) (invalidating school board removal of books from library based on political or personal views of board members where such removal deprived students of free speech right of access to ideas).

18. S.A. Const. § 15. While the Constitution protects “the right to freedom of conscience, religion, thought, belief and opinion,” it also permits “religious observances” at state or state-aided institutions provided that “those observances follow rules made by the appropriate public authorities; they are conducted on an equitable basis; and attendance at them is free and voluntary.” *Id.* at §§ 15(1) and (2). In effect, South Africa’s Constitution does not contain an Establishment Clause that has generated considerable litigation in the United States. See generally, Ralph Mawdsley, *Access to Public School Facilities for Religious Expression by Students, Student Groups and Community Organizations: Extending the Reach of the Free Speech Clause*, 2004 B.Y.U. Educ. and L. J. 269 (2004).

19. S.A. Const. § 25. Of the 39 provisions in the Bill of Rights, this provision regarding property rights [other than sec. 35 addressing the rights of those accused, detained or imprisoned] is the longest. While the section protects both private right to property and government’s right of eminent domain, it also addresses the equitable process for determining the value of property and the role of government in correcting past discriminatory actions through land reform.

20. *Id.* at § 17. This section also includes the rights “to demonstrate [and] to picket.”

21. *Id.* at § 18.

22. *Id.* at § 14. Specifically enumerated are the rights of persons not to have “their person or home searched; their property searched; their possessions seized; or the privacy of their communications infringed.”

23. See *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) (Boy Scouts dismissal of homosexual scout leader not in violation of state nondiscrimination statute prohibiting employment discrimination on basis of sexual orientation because organization had First Amendment association expressive rights to shared values). See generally, Ralph Mawdsley and

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The purpose of this article is to examine South Africa's approach to protecting student expressive rights, using as a template a recent South African Cape High Court decision, *Danielle Antonine v. Governing Body, The Settlers High School and Head Western Cape Education Department (Danielle Antonine)*.²⁴ Because the facts of the case are of importance, they are recorded in some detail.

Facts of *Danielle Antonine*

The plaintiff in *Danielle Antonine*, a fifteen-year-old student at Settlers High School in Belleville, Western Cape Province, became interested in various religions and in December 1999 decided to adopt the Rastafarian religion. Two Rastafarian beliefs that became an issue in this case were that women wore their hair as dreadlocks and covered their head. Plaintiff approached the school headmaster for permission to wear dreadlocks and, receiving no response, wore dreadlocks to school in April 2000 covered by a cap that she had knitted in the prescribed school colors. The headmaster considered the student's conduct to be in defiance of school rules and an earlier agreement with plaintiff's mother that her daughter would not wear headgear with her school uniform.

The school's Code of Conduct, which is representative generally of such Codes in South African public schools, contained considerable detail regarding the wearing of hair, none of which specifically mentioned dreadlocks. In a disciplinary hearing held May 10, 2000, the student was charged with serious misconduct in that she had acted in an unbecoming manner in defiance of school regulations, and more particularly, that her misconduct had caused "disruption and uncertainty."²⁵ The student denied she had caused any disruption and emphasized "her need to express her religious convictions and to develop her individuality."²⁶ The school Governing Body (comparable to a U.S. school board) before whom plaintiff's hearing was held found her guilty of serious misconduct and suspended her for five days.²⁷ Plaintiff chose to stop attending the school even though the punishment was stayed pending appeal. Even with plaintiff's nonattendance in school, the High Court refused to regard this case as moot, not only because of the "blot [it left] on her school career" and its effect on "her normal development into full maturity [and] . . . her future career," but because the Court saw the importance of "lay[ing] down guidelines for dealing with and resolving unfortunate situations such as that which [had] given rise to the present [case]."²⁸

South African Provincial Court Decision

The Cape High Court in *Danielle Antonine* analyzed the school's decision that plaintiff's wearing dreadlocks and a head covering constituted serious misconduct from the perspectives of the constitutional rights of free expression and human dignity.

- Charles Russo, *Student Privacy and Classroom Pedagogies: An American Perspective*. 7 Australia and New Zealand J. of Law and Educ. 65 (2002).
24. 2002 (4) SA 738 (C). 25. *Id.* at 741.
26. *Id.*
27. *Id.* at 740.
28. *Id.*

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In viewing plaintiff's dreadlocks in terms of free expression under the South African Constitution, the court observed that free expression extends to "forms of outward expression as seen in clothing selection and hairstyles" as long as the expression does not lead "to material and substantial disruption in school operations."²⁹ To enforce the school's code of conduct in a rigid manner without considering the expressive nature of the dreadlocks "would bring it into conflict with the justice, fairness and reasonableness which underpins our new Constitution and centuries of common law."³⁰

In addition, the court determined that the school's finding of serious misconduct for having dreadlocks and wearing a hat infringed on the student's constitutional right of human dignity. Provincial regulations defined serious misconduct in schools as a student who had been sentenced to prison for a criminal offense, had in his or her possession intoxicating liquor or other drugs, was guilty of assault, theft or immoral conduct, has been repeatedly absent from school, or conducts him/herself in a disgraceful, improper, or unbecoming manner.³¹ Since the emphasis in this explanation of serious misconduct is on conduct that is "akin to immoral, promiscuous or shockingly inappropriate behaviour," the court reasoned that it would be "a blatant absurdity to categorise the growing of dreadlocks or wearing of a cap . . . as serious misconduct."³²

Lessons from Danielle Antonine for American Law

Danielle Antonine with its marriage of free expression and human dignity affords to American courts encouragement to reconsider the manner in which they have addressed student expression cases. For over thirty-five years since the Supreme Court's decision in *Tinker v. Des Moines Independent School District*,³³ United States courts have had numerous occasions to design tests to be applied to student expressive activity, all of which have an objective quality to them: substantial and material likelihood of disruption test (*Tinker*);³⁴ neutrality of school rules regarding expressive content;³⁵ the school as a nonpublic forum;³⁶ expression in the context of school curriculum;³⁷ and, furtherance of a school's educational mission.³⁸

29. *Id.*

30. *Id.*

31. Provincial Notice 372 (Oct. 31, 1997).

32. *Antonine Danielle*, 2002 (4) SA at 743.

33. 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

34. *See, e.g., Nixon v. Northern Local Sch. Dist of Educ.*, 383 F.Supp.2d 965 [201 Ed. Law Rep. [904]] (S.D. Ohio 2005) (permitting student to wear T-shirt critical of homosexuality, Islam and abortion where no disruption).

35. *See, e.g., Isaacs v. Board of Education of Howard County*, 40 F.Supp.2d 335 [134 Ed. Law Rep. [166]] (D.Md. 1999) (holding that a African American student's desire to wear a headwrap as part of her Jamaican heritage

did not constitute protected free expression).

36. *See, e.g. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617 [202 Ed.Law Rep. [512]] (2d Cir. 2005) (holding that elementary school was nonpublic forum but that school may have exercised religious animus in student artwork).

37. *See, e.g., Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208 [193 Ed.Law Rep. [78]] (11th Cir. 2004) (panels available for students to paint located in school hallway were nonpublic forum and school could control content).

38. *See, e.g., Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 [32 Ed.Law Rep. [1243]] (1986) (upholding discipline of student for vulgar speech where it

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The obvious difficulty with all of the above tests is that they are not equally objective for, as soon as one departs from *Tinker*, the student's expression becomes measured against tests created by schools. In a sense, the non-*Tinker* tests can become like self-fulfilling prophecies; the school creates a standard (e.g., nonpublic forum) that then precludes (or, at least severely limits) student expression.

In *Danielle Antonine*, the South African court looked only at a *Tinker*-like effects test (disruption), and failing to find a violation, the court refused to accept the school's attempt at creating an objective standard by invoking its attempt at an objective standard ("serious misconduct"). South Africa's constitutional concept of human dignity suggests a subjective dimension not only as to how courts might consider free expression, but also how schools could draft and enforce codes of conduct. In essence, once a school can produce no evidence that a student's expression has been disruptive, it cannot undignify the student's expression by then permitting the school to circumvent the disruption standard by creating its own objective standard of "serious misconduct." Although the Code of Conduct in *Danielle Antonine* did not specifically prohibit dreadlocks, one can hope that even if they had been prohibited the court would have been consistent with its rationale and, in the absence of disruption, not permitted the school to merely substitute one effort at an objective standard ("serious misconduct") for another (prohibiting dreadlocks). To decide otherwise would negate the purpose of human dignity in South Africa which is "the right to have [one's] dignity respected and protected."

CONCLUSION

Human dignity is as much an individual right as it is a response to the indignity of eight decades of South African apartheid imposed on all non-whites. What South Africa's core constitutional right of human dignity can offer to the United States is that permitting public schools to prohibit or deny non-disruptive expression is, in effect, an assault on individual differences. One has difficulty arguing that schools are respecting the dignity of individual students when schools either create codes of conduct with broad categories of prohibited activities that preclude individual expression or invoke judicially created categories, such as a nonpublic forum, that allow for suppression of individual forms of expression. Invoking the concept of human dignity in the free expression debate in American schools could have the effect of creating a new center of gravity for assessing not only how permitting student expression will affect the school but how prohibiting the expression will affect the student.

was contrary to school's educational mission).