

**NJS Presents****Invited Talks****In this Issue:*****Liberty and Diversity: An Example of the Garden State Variety******Lipp v. Morris, 579 F.2d 834 (1978)***<sup>1</sup>**By Jonathan Lurie****DOI:** <http://dx.doi.org/10.14713/njs.v2i1.23>

One of the hallowed, if not hackneyed, words in the human lexicon is “liberty.” To many, the term implies a positive concept-- the freedom to do something, not as a privilege but as a right. But there are multiple dimensions to the concept of liberty. It can also imply a negative freedom, a right NOT to do something; or to decline to undertake a certain course of action or conduct. It has been a part of our history since the establishment of New Jersey. From the rich and varied history of this Garden State, thereby lies an unusual tale of liberty and diversity. Our story concerns the Pledge of Allegiance, or POA.

At the outset, some background concerning the origins of the POA is appropriate. Its immediate predecessor is a salute drafted by a former colonel in the Union army, George Balch. In 1887, concerned both about the waning of patriotism which had been so prevalent during the war years, and the large influx of immigrant children into the public schools, Balch had written a sixteen word pledge, “I give my heart and my hand to my country, one country, one language, one flag.” His pledge also included an intricate hand salute, starting with raising and extending the right hand towards the flag, followed by bringing the fingers of the hand to the forehead, and then placing them over the heart. Accompanied by the salute, the Balch pledge was intended to be

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<sup>1</sup> In its original form, this paper was presented at the New Jersey Forum at Kean University on November 21, 2014.

recited by school students at the start every school day.<sup>2</sup> However, a Christian socialist minister, Francis Bellamy, working on plans for a flag raising ceremony at the forthcoming 1892 Chicago World's Fair, considered the Balch salute complicated as well as "too juvenile, and lacking in dignity."

Bellamy reworked the 1887 pledge. He believed that it should be just that, a pledge, one that stressed allegiance to the country's flag, and involved the speaker--thus the references to both "I pledge," as well as "to **my** flag."<sup>3</sup> Further, he selected the word "Republic" because "it distinguished the form of government chosen by the founding fathers and established by the Revolution."<sup>4</sup> His reasons for rejecting the famous French motto's inclusion of "equality and brotherhood" are of interest. Bellamy concluded that "fraternity was too remote of realization, and...equality was a dubious word," especially with racial segregation already in evidence throughout the United States. However, "liberty and justice" represented undebatable values. Indeed, if they were exercised properly, they would invoke and reflect the spirit of equality and fraternity. He also had incorporated a salute that unintentionally turned out to be virtually identical to the Nazi salute of a future era. Perhaps this is why it disappeared, to be replaced by a simple hand-over-the-heart gesture, as ordered by Congress in 1942.

The Balch salute had consisted of sixteen words. Bellamy added six more, and it became the centerpiece for the opening ceremony for the Columbus Day celebration on October 12, 1892. He felt that his pledge was short, uncomplicated, and dignified. Indeed, it was intended to take all of fifteen seconds to recite. As originally published, it consisted of 22 words: "I pledge allegiance to my flag and the republic for which it stands, one nation, indivisible, with liberty and justice for

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<sup>2</sup> See: [https://en.wikipedia.org/wiki/Pledge\\_of\\_Allegiance](https://en.wikipedia.org/wiki/Pledge_of_Allegiance).

<sup>3</sup> Emphasis added.

<sup>4</sup> Ibid.

all.” In 1923, the words “my flag” became “the flag of the United States of America and to...”<sup>5</sup> In 1942, after the Japanese attack on Pearl Harbor, Congress resolved that Bellamy’s revised salute should become the “official” Pledge of Allegiance for the United States.

In 1954, widespread and growing public support called for Congress to add the words “under God” to the pledge following the words “one nation.” Among other Congressmen, two term Michigan Republican Senator Homer Ferguson, soon to be defeated for reelection and perhaps reflecting the current communist scare in the McCarthy era, urged such action. So did President Eisenhower, recently baptized as a Presbyterian. Congress acquiesced, even though the daughter of Francis Bellamy objected. Never the less, as revised, the POA has endured for more than half a century, and is enshrined in our culture.

This essay concerns an incident and its aftermath, arising from Mountain Lakes High School about thirty-seven years ago, during the era of Watergate, and the winding down of the Vietnam tragedy. The story involves the pledge to the American flag, normally recited at the beginning of each school day. In requiring that their students take such action, the local school board believed it was simply following New Jersey State Statute 18A: 36-3 “Display of and salute to flag: pledge of allegiance.” Although it mandated the daily salute to the flag, the statute also exempted certain students. These included “pupils who have conscientious scruples against such pledge or salute, or are children of accredited representatives of foreign government to whom the United States Government.” These students “shall not be required to render such salute...**but shall be required to show full respect to the flag while the pledge is being given merely by standing at attention, the boys removing the headdress [hat].**”<sup>6</sup>

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<sup>5</sup> Ibid. Bellamy objected to this change on the grounds that “it did injure the rhythmic balance of the original composition.”

<sup>6</sup> See N. J. Stat. Ann. Section 18A:36-3. (Emphasis added.)

Of course by 1977, the inability of a school board to require the flag salute was well established in American constitutional doctrine, and had been since 1943 with the landmark case of *West Virginia Board of Ed v. Barnette*.<sup>7</sup> While this case definitively barred any compulsion in public schools to salute the flag, it left other related issues unresolved, a practice not at all unusual in high court cases. Thus *Barnette* had offered no specifics on how the students who could not be compelled to recite the pledge were supposed to occupy themselves, while the rest of the class was doing so. Were they free to wander the corridors while the pledge was recited? To wait outside their classroom? To read or stand quietly at their desks? The New Jersey statute had resolved this issue in the manner just noted--by merely mandating that students stand at attention. Yet our case arose when a Mountain Lakes student **not only** declined to salute the flag, **but also** refused to stand during the pledge to it. Pointing, not unreasonably, or so they thought, to the New Jersey statute, in an all too typical move, school authorities threatened the student with various sanctions, including expulsion, unless she conformed; an option strongly recommended by her father. Undeterred, however, she contacted the American Civil Liberties Union, who eventually brought suit in federal court on her behalf.

In 1977, the sixteen year old plaintiff, one Deborah Lipp, was a straight A student at Mountain Lakes High School when she refused to stand during the Pledge of Allegiance (POA). Lipp took the position that the “words of the pledge were not true[,] and she stood only because she had been threatened if she did not do so.”<sup>8</sup> She later explained that when standing during the POA, she is “standing for a country of ‘liberty and justice for all.’ I don’t think that [this] country exists. I look around me and see every day that blacks, poor people, women, American Indians...and countless other minorities do not have equal rights under the law...Further, I can’t

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<sup>7</sup> 319 U.S. 624 (1943).

<sup>8</sup> See Lexis, “Get a Document by Docket Number--77-2435.”

bring myself to believe that my standing...will change the injustice that exists, nor can I close my eyes to that injustice ...” Accused of being unpatriotic, Lipp responded that “I don’t know how to define that word. If it means love of the Constitution, then I’m patriotic. But if it means love for the country for what it is today--with the ugliness, the poverty, and the government corruption--then I am not patriotic.”<sup>9</sup> Lipp raised an intriguing point here. How free should one be to reject a supposedly required norm of conduct, when it might appear to indicate one’s lack of patriotism? She argued that her right “not to be forced to stand springs directly from the precise First Amendment right against compelled participation in the flag pledge confronted in *Barnette*. She equated standing with the act of silent participation in the pledge even without speaking its words. Overwhelmingly, the federal courts have agreed with her.<sup>10</sup>

When Lipp’s case came to trial, Federal District Judge H. Curtis Meanor ruled that while the New Jersey statute dealing with the POA was unconstitutional, it was also severable.<sup>11</sup> In other words, the offending section- requiring one to stand during its recitation- “may be rationally severed from the statute, “without detriment to the rest of it.” He added that ordering the student to stand, even if she uttered no words, “is an unconstitutional requirement that the student engage in a form of speech and may not be enforced.” In a very short *per curiam* decision, and without any indication of dissent, the U.S. Court of Appeals for the 3rd Circuit agreed.<sup>12</sup> Today, there can be no doubt that *Lipp v. Morris* remains sound law. More than a dozen federal courts have so held,

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<sup>9</sup> Nat Hentoff: *Affirming the Bill of Rights* (New York: Harper & Row, 1998), 180-182.

<sup>10</sup> For our purposes, the most important ruling is the *Lipp* case, mentioned in the title of this paper. However, out of numerous examples, two additional cases can be cited. See the following federal cases: *Frazier v. Winn*, 535 F.3d 1279, 1282 (11th Cir. 2008), “all public school students have the right not to stand during the Pledge.” The Supreme Court, as it continues to do, refused to hear an appeal from this case. See 558 U.S. 818 (2009); *Goetz v. Ansell*, 477 F.2d 636, 637-38 (2d Cir.1973) “A student has the right to remain quietly seated during the Pledge[,] and cannot be compelled to leave the room if he chooses not to stand.”

<sup>11</sup> Appointed to the District Court by Richard Nixon, Meanor served from 1974 to 1983.

<sup>12</sup> 579 F 2d 834, (1978).

as have more than half of the circuit courts of appeals. Further, as noted above, the Supreme Court has steadfastly refused to review any of the appellate decisions striking down the requirement to stand. Indeed, the Lipp case is consistently cited when legal objection is raised to a public school that still insists on such a practice during the POA.<sup>13</sup>

In March 2012, the New Jersey Law Revision Commission noted that the final part of Section 18A: 36-3 NJSA had been declared unconstitutional in 1978. Its report stated further that “although the provision has been unenforceable for [more than] thirty years, it has never been removed from the statute. [See below for comments concerning this fact.] School officials who consult the statute may be led to believe that it is still the law and attempt to enforce it. That causes needless controversy. The Commission recommends that the unconstitutional provision be excised,” by deleting all the remaining words of the statute following the phrase “shall not be required to render such salute and pledge or to stand during it.” When I last checked, however, this section in NJSA had not been amended, and thus the unconstitutional and unenforceable portion remains part of New Jersey law. Neither fish nor fowl, as it were, the statute is still on the books. How many school superintendents realize this fact is unclear, but unless and until someone like Deborah Lipp once again actually challenges the requirement of standing during the POA, and hints at the possibility of court action, it probably continues to be widely practiced. But such conduct might have some costs associated with it.<sup>14</sup>

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<sup>13</sup> See for example, the letter from the Appignani Humanist Legal Center to the Superintendent of the Beaufort County School District, Beaufort, SC., September 25, 2014, in possession of author.

<sup>14</sup> See the letter from the American Civil Liberties Union of Minnesota to schools Superintendent Bernie Lipp, Dilworth-Glyndon-Felton School District # 2154, by ACLU executive director Charles Samuelson, May 9, 2008, copy in possession of author. Samuelson warned the Superintendent that “because the law on this matter is clearly established, we believe that school officials would likely not be protected by qualified immunity in the event of a lawsuit over this incident. In addition, if the district has a formal written policy requiring students to stand during the pledge, it is likely that the school district...would face liability for violating the student's rights.” Such litigation “could result in the school having to pay the students’ attorney’s fees and costs.”

Even though technically unenforceable, the nature of the statute and the context of conformity in a class room environment tend to make it self- enforceable, as it were. We should also remember once again that peer pressure to conform is great among high school students. The pressures applied to Lipp after her position and conduct became known illustrate the point. She was subjected to abusive language, bomb threats, and epithets such as “un American,” or “Communist.” The majority of local school officials, assuming that they are even aware of her 35 year old case, would probably oppose the court’s ruling, as many did.<sup>15</sup>

We need to say a few words, however, about Lipp’s objections to being compelled to stand, as quoted above. In her description of contemporary American society during the 1970s, is she accurate? One can surely assert without fear of contradiction that she was absolutely correct in her comments about blacks, poor people, women, and American Indians quoted earlier. Indeed, we could go much further than she did. We should look back at certain aspects of our historical past and feel lasting regret if not actual shame. The institution of slavery reaches deep into American history, while our insatiable greed for territorial expansion and the resulting virtual extermination of Native American mores and culture remains appalling. None of this can be denied, although some fair weather patriots would probably like to do so. On the other hand, to what extent does the specific focus of Lipp’s objection, i.e. the POA, speak to our historical past? Not very much, if at all.

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<sup>15</sup> See, for example, the comments of the Butler School Board President offered in 1977, after Meanor's decision. “This is just minority rule....The founding fathers would be sick if they knew about the court ruling. I’m very proud of this country but every time something comes up, there’s a state or federal ruling....It’s one more step down for the country.” [www.northjersey.com/community/history/back\\_in-the-day](http://www.northjersey.com/community/history/back_in-the-day). August 19th, 2012, Bryan LaPlaca. See also the reaction to the decision from the Jefferson Township superintendent of schools: “The ceremonial part of standing is not too much to ask of anyone...There should be a certain amount of respect shown to our flag and to our country.” Ibid.

The POA is not rooted deep in our history, far from it. We fought several major wars, including the bloodiest confrontation ever undertaken in American History (our Civil War) without it. Now, when one salutes the flag, what is the individual pledging? It is allegiance or faithfulness or loyalty to the Republic for which the flag stands, or one might say--what it represents and personifies. But the POA speaks, I would suggest, to the present and/or the future--not the past. The last part of the pledge mentions "with Liberty and justice for all." Lipp is correct when she claims that we have fallen and do fall far short of such a total reality. But these words can also refer to aspirations or goals, or hopes for which to aspire in the future-- and that may be what we seek when we recite the pledge. To paraphrase one of our greatest Supreme Court Justices, Louis Brandeis, "our faith in time should be great."

There would seem to be little room in Lipp's purview for positive accomplishments in our history, of which there have been a number, and they must be weighed in any balance or historical accounting. Of course, one of our most significant triumphs in American law has been the expansion of liberty itself. Indeed, the Lipp case and numerous similar law suits are excellent examples of this trend. The widening meaning of liberty in our own time made it possible for Lipp to succeed in her fight not to stand during the pledge.

The New Jersey Forum, of which this paper was a part, concerned liberty and diversity. In her case, Lipp used one to demonstrate the other. She insisted on the liberty to be different, not to do what her other classmates did. Her case raises difficult questions which are not new. But we can at least consider them, even if resolution-- satisfactory to all-- may not be forthcoming.

a) How far can one go when asserting one's liberty in claiming the right to be different? Where should the line be drawn? When does moving away from conformity towards diversity become disruptive? To put it another way, when is non-conformity to be encouraged, and when should it



be considered excessive? In the past, authorities have objected to messages printed on T-shirts, or the wearing of arm bands, seeking a homogenous rather than heterogeneous student body. (The courts, incidentally, struck down both of these objections.)<sup>16</sup>

b) In this case, were any other student's rights violated when Lipp declined to stand during the POA? Not really. In no way would her just sitting still while others around her stood and recited it disrupt the class. Surely her attitude cannot be said to have been contrarian or frivolous. Indeed, she appears to have taken the words of the POA very seriously. How many of us, let alone high school students, do that during the innumerable times we recite the POA together?

c) Why was it essential that Lipp's right to stay seated be protected? What made her case so important? Although, as noted above, I tend to take issue with her, she is making the point that in her judgment, as she viewed United States society in 1977, the POA did not portray reality. The right to reach such a judgment is protected by our Constitution. Thus it is not unreasonable in her case to permit her claim of exercising her liberty to prevail.

d) Having said all this, we might ask, finally, why is it not surprising that the New Jersey legislature has thus far failed to remove the unconstitutional language from the statute? [See above.] One is sorely tempted to make a snide comment here about the quality of the NJ legislature. But there is a deeper concern to consider. Legal inertia can be a powerful tool in sustaining the status quo. Perhaps the legislature leaves the offending section of the school statute in place because there is minimal public interest in its removal, also possibly because of a contrarian streak regarding the court's holding. True, Judge Meanor severed the offending section

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<sup>16</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) wearing of a black armband; and *Cohen v. California* 403 U.S. 15 (1971), wearing of a T shirt with "fuck the draft" emblazoned on it.

from the statute, but his scalpel appears to have been blunted by external factors beyond court and judge.

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