AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Advocacy

**Saxe v. State College Area School District, 240 F.3d 200** (3rd Cir. 2001)

*In 1999, the State College Area School District (SCASD) in Pennsylvania adopted an anti-harassment policy. It defined harassment as including verbal or physical conduct based on a variety of personal characteristics and that has the purpose or effect of substantially interfering with a student’s educational performance or creating a hostile environment. Among the examples of prohibited harassment based on “other personal characteristics” were jokes or negative comments about “clothing, physical appearance, social skills, peer group, intellect, educational program, hobbies or values, etc.”*

*David Saxe was a member of the state board of education and the legal guardian of two students in the district. After the adoption of the policy, he filed a suit in federal district court contending that the harassment policy violated the First Amendment and expressed particular concern that the policy could be used to punish the Saxe students for expressions of their religious beliefs regarding homosexuality. The district court upheld the policy, but on appeal the federal circuit court reversed that ruling and struck down the policy as unconstitutional. Contrary to the district court, the circuit court emphasized that there was no harassment exception to the First Amendment and that any harassment policy had to be consistent with constitutional protections for free speech.*

JUDGE ALITO.

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The District Court dismissed the plaintiffs' free speech claims based on its conclusion that "harassment," as defined by federal and state anti-discrimination statutes, is not entitled to First Amendment protection. The Court rejected the plaintiffs' characterization of the Policy as a "hate speech code," holding instead that it merely prohibits harassment that is already unlawful under state and federal law. . . .

We disagree with the District Court's reasoning. There is no categorical "harassment exception" to the First Amendment's free speech clause. Moreover, the SCASD Policy prohibits a substantial amount of speech that would not constitute actionable harassment under either federal or state law.

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There is of course no question that non-expressive, physically harassing *conduct* is entirely outside the ambit of the free speech clause. But there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs. When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications. "Where pure expression is involved," anti-discrimination law "steers into the territory of the First Amendment." *DeAngelis v. El Paso Municipal Police Officers Association* (5th Cir. 1995).

This is especially true because, as the Fifth Circuit has noted, when anti-discrimination laws are "applied to ... harassment claims founded solely on verbal insults, pictorial or literary matter, the statute[s] impose[ ] content-based, viewpoint-discriminatory restrictions on speech." Indeed, a disparaging comment directed at an individual's sex, race, or some other personal characteristic has the potential to create an "hostile environment" — and thus come within the ambit of anti-discrimination laws — precisely because of its sensitive subject matter and because of the odious viewpoint it expresses.

This sort of content- or viewpoint-based restriction is ordinarily subject to the most exacting First Amendment scrutiny. This point was dramatically illustrated in *R.A.V. v. City of St. Paul* (1992), in which the Supreme Court struck down a municipal hate-speech ordinance prohibiting "fighting words" that aroused "anger, alarm or resentment on the basis of race, color, creed, religion or gender." . . .

Loosely worded anti-harassment laws may pose some of the same problems as the St. Paul hate speech ordinance: they may regulate deeply offensive and potentially disruptive categories of speech based, at least in part, on subject matter and viewpoint. Although the Supreme Court has written extensively on the scope of workplace harassment, it has never squarely addressed whether harassment, when it takes the form of pure speech, is exempt from First Amendment protection. . . .

SCASD relies heavily on a passage in *R.A.V.* in which the Court suggested in dictum that at least some harassing speech does not warrant First Amendment protection:

[S]ince words in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the nation's defense secrets) a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. . . . Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices. *Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.* (emphasis added).

This passage suggests that government may constitutionally prohibit speech whose *non-expressive* qualities promote discrimination. For example, a supervisor's statement "sleep with me or you're fired" may be proscribed not on the ground of any expressive idea that the statement communicates, but rather because it facilitates the threat of discriminatory conduct. Despite the purely verbal quality of such a threat, it surely is no more "speech" for First Amendment purposes than the robber's demand "your money or your life." . . . Similarly, we see no constitutional problem with using an employer's offensive speech as evidence of motive or intent in a case involving an allegedly discriminatory employment action.

The previously quoted passage from *R.A.V.,* however, does not necessarily mean that anti-discrimination laws are categorically immune from First Amendment challenge when they are applied to prohibit speech solely on the basis of its expressive content. "Harassing" or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable." *Texas v. Johnson* (1989).

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In short, we see little basis for the District Court's sweeping assertion that "harassment" — at least when it consists of speech targeted solely on the basis of its expressive content — "has never been considered to be protected activity under the First Amendment." Such a categorical rule is without precedent in the decisions of the Supreme Court or this Court, and it belies the very real tension between anti-harassment laws and the Constitution's guarantee of freedom of speech.

We do not suggest, of course, that no application of anti-harassment law to expressive speech can survive First Amendment scrutiny. Certainly, preventing discrimination in the workplace — and in the schools — is not only a legitimate, but a compelling, government interest. And, as some courts and commentators have suggested, speech may be more readily subject to restrictions when a school or workplace audience is "captive" and cannot avoid the objectionable speech. We simply note that we have found no categorical rule that divests "harassing" speech, as defined by federal anti-discrimination statutes, of First Amendment protection.

. . . . Assuming for present purposes that the federal anti-discrimination laws are constitutional in all of their applications to pure speech, we note that the SCASD Policy's reach is considerably broader.

For one thing, the Policy prohibits harassment based on personal characteristics that are not protected under federal law. . . . Insofar as the policy attempts to prevent students from making negative comments about each others' "appearance," "clothing," and "social skills," it may be brave, futile, or merely silly. But attempting to proscribe negative comments about "values," as that term is commonly used today, is something else altogether. By prohibiting disparaging speech directed at a person's "values," the Policy strikes at the heart of moral and political discourse — the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment. That speech about "values" may offend is not cause for its prohibition, but rather the reason for its protection: "a principal `function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" No court or legislature has ever suggested that unwelcome speech directed at another's "values" may be prohibited under the rubric of anti-discrimination.

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Moreover, the Policy's prohibition extends beyond harassment that objectively denies a student equal access to a school's education resources. Even on a narrow reading, the Policy unequivocally prohibits any verbal or physical conduct that is based on an enumerated personal characteristic and that "has the *purpose or effect* of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment." *Davis v. Monroe County Board of Education* (1999) (emphasis added). Unlike federal anti-harassment law, which imposes liability only when harassment has "a systemic *effect* on educational programs and activities," the Policy extends to speech that merely has the "purpose" of harassing another. This formulation, by focusing on the speaker's motive rather than the effect of speech on the learning environment, appears to sweep in those "simple acts of teasing and name-calling" that the *Davis* Court explicitly held were insufficient for liability.

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Under *Tinker v Des Moines Independent Community School District* (1969), then, regulation of student speech is generally permissible only when the speech would substantially disrupt or interfere with the work of the school or the rights of other students. As subsequent federal cases have made clear, *Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance. . . .

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Under *Bethel School District No. 403 v.* *Fraser,* a school may categorically prohibit lewd, vulgar or profane language. Under *Hazelwood School District v. Kuhlmeier* (1988)*,* a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern. Speech falling outside of these categories is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others.

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Certainly, some of these purported definitions of harassment are facially overbroad. No one would suggest that a school could constitutionally ban "any unwelcome verbal . . . conduct which offends . . . an individual because of" some enumerated personal characteristics. Nor could the school constitutionally restrict, without more, any "unwelcome verbal . . . conduct directed at the characteristics of a person's religion." The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it. *Texas v. Johnson* (1989); *Street v. New York* (1969); *Doe v. University of Michigan* (E.D. MI 1989).

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[T]he Policy, even narrowly read, prohibits a substantial amount of non-vulgar, non-sponsored student speech. SCASD must therefore satisfy the *Tinker* test by showing that the Policy's restrictions are necessary to prevent substantial disruption or interference with the work of the school or the rights of other students. Applying this test, we conclude that the Policy is substantially overbroad.

As an initial matter, the Policy punishes not only speech that actually causes disruption, but also speech that merely intends to do so. . . . This ignores *Tinker*'s requirement that a school must reasonably believe that speech will cause actual, material disruption before prohibiting it.

In addition, even if the "purpose" component is ignored, we do not believe that prohibited "harassment," as defined by the Policy, necessarily rises to the level of a substantial disruption under *Tinker.* We agree that the Policy's first prong, which prohibits speech that would "substantially interfer[e] with a student's educational performance," may satisfy the *Tinker* standard. The primary function of a public school is to educate its students; conduct that substantially interferes with the mission is, almost by definition, disruptive to the school environment.

The Policy's second criterion, however — which prohibits speech that "creat[es] an intimidating, hostile or offensive environment" — poses a more difficult problem. . . .

. . . . Because the Policy's "hostile environment" prong does not, on its face, require any threshold showing of severity or pervasiveness, it could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone. This could include much "core" political and religious speech: the Policy's "Definitions" section lists as examples of covered harassment "negative" or "derogatory" speech about such contentious issues as "racial customs," "religious tradition," "language," "sexual orientation," and "values." Such speech, when it does not pose a realistic threat of substantial disruption, is within a student's First Amendment rights.

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*Reversed*.

JUDGE REDNDELL, concurring.

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