AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

**McCauley v. University of the Virgin Islands, 618 F. 3d 232** (3rd Cir. 2010)

*Stephen McCauley was an undergraduate student at the University of the Virgin Islands. In 2005, he went with a group of friends to a local beach. While there, two members of the group broke off from the rest, and the next day one member of that couple accused the other of sexual assault. McCauley went to the female student’s dorm room to ask about what had had happened. She later complained that McCauley harassed her. McCauley was told by university officials to avoid further contact with the female student. He was subsequently charged with violating a provision of the student code of conduct prohibiting any act that is “likely to cause serious physical or mental harm or which tends to injure or actually injures, frightens, demeans, degrades or disgraces any person.”*

*McCauley in turn filed suit in federal district court contending that the provision of the code of student conduct violated his First Amendment rights. He was then criminally charged with witness tampering. After those criminal charges were resolved, he was again charged in 2009 under the student code of conduct. He was found guilty and ordered to pay a fine and write a letter of apology. At that point, his federal lawsuit came to trial, and some of his claims were dismissed. The provision of the code of conduct that banned acts that “frightens, demeans, degrades or disgraces any person” was struck down by the trail court as unconstitutional, and the university did not challenge that finding. McCauley filed an appeal, and the circuit court reversed in part on the grounds that additional components of the student code of conduct were also unconstitutional. In upholding those provisions, the district court had relied on the Supreme Court’s cases involving student speech rights in secondary schools, but the circuit court emphasized that students in a college setting should be understood to have more expansive speech rights than students in a high school.*

JUDGE SMITH.

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The First Amendment overbreadth doctrine states that:

A regulation of speech may be struck down on its face if its prohibitions are sufficiently overbroad — that is, if it reaches too much expression that is protected by the Constitution. [A] policy can be found unconstitutionally overbroad if "there is a `likelihood that the statute's very existence will inhibit free expression'" to a substantial extent.

*Sypniewski v. Warren Hills Regional Board of Education* (3rd Cir. 2002). . . . We "vigorously enforce[] the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep" in an attempt to "strike a balance between competing social costs." . . .

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Our application of the overbreadth doctrine in this case is informed by the "critical importance" free speech has in our public universities:

[O]n public university campuses throughout this country, . . . free speech is of critical importance because it is the lifeblood of academic freedom. As the Supreme Court in *Healy v. James* explained, "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, `the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"

*DeJohn v. Temple University* (3rd Cir. 2008). “It is well recognized that [t]he college classroom with its surrounding environs is peculiarly the marketplace of ideas[,] and [t]he First Amendment guarantees wide freedom in matters of adult public discourse."

Indeed, for this reason . . . our Circuit recognizes that "there is a difference between the extent that a school may regulate student speech in a public university setting as opposed to that of a public elementary or high school." . . .

We reach this conclusion in light of the differing pedagogical goals of each institution, the *in loco parentis* role of public elementary and high school administrators, the special needs of school discipline in public elementary and high schools, the maturity of the students, and, finally, the fact that many university students reside on campus and thus are subject to university rules at almost all times.

First, the pedagogical missions of public universities and public elementary and high schools are undeniably different. While both seek to impart knowledge, the former encourages inquiry and challenging *a priori* assumptions whereas the latter prioritizes the inculcation of societal values. Public universities encourage teachers and students to launch new inquiries into our understanding of the world. *Sweezy v. New Hampshire* (1957). . . . The university atmosphere of speculation, experiment, and creation is essential to the quality of higher education. Our public universities require great latitude in expression and inquiry to flourish. . . . Free speech "is the lifeblood of academic freedom." Public elementary and high schools, on the other hand, are tasked with inculcating a "child [with] cultural values, [to] prepar[e] him for later professional training, and [to] help[] him to adjust normally to his environment." . . .

Second, "public elementary and high school administrators," unlike their counterparts at public universities, "have the unique responsibility to act *in loco parentis.*" . . .

Public university administrators, officials, and professors do not hold the same power over students. . . . The public university has evolved into a vastly different creature. Modern day public universities are intended to function as marketplaces of ideas, where students interact with each other and with their professors in a collaborative learning environment. Indeed, students "often have values, views, and ideologies that are at war with the ones which the college has traditionally espoused or indoctrinated." . . .

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. . . . Unlike the strictly controlled, smaller environments of public elementary and high schools, where a student's course schedule, class times, lunch time, and curriculum are determined by school administrators, public universities operate in a manner that gives students great latitude: for example, university students routinely (and unwisely) skip class; they are often entrusted to responsibly use laptops in the classroom; they bring snacks and drinks into class; and they choose their own classes. In short, public university students are given opportunities to acquit themselves as adults. Those same opportunities are not afforded to public elementary and high school students.

. . . . Considerations of maturity are not nearly as important for university students, most of whom are already over the age of 18 and entrusted with a panoply of rights and responsibilities as legal adults. . . .

Finally, university students, unlike public elementary and high school students, often reside in dormitories on campus, so they remain subject to university rules at almost all hours of the day. The concept of the "schoolhouse gate," and the idea that students may lose some aspects of their First Amendment right to freedom of speech while in school does not translate well to an environment where the student is constantly within the confines of the schoolhouse. "Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact." Yet this is exactly what would occur for students residing on university campuses were we to grant public university administrators the speech-prohibiting power afforded to public elementary and high school administrators. Those students would constantly be subject to a circumscription of their free speech rights due to university rules.

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McCauley challenges Paragraph R [of the student code of conduct], which states:

R. Misbehavior at Sports Events, Concerts, and Social-Cultural Events:

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(3) Displaying in the Field House, softball field, soccer field, cafeteria and Reichhold Center for the Arts any unauthorized or obscene, offensive or obstructive sign.

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The District Court's reliance on *Hazelwood School District v. Kuhlmeier* (1988) to justify Paragraph R's punishment of "offensive" or "unauthorized" signs fails on both fronts. First, Paragraph R's use of "offensive" is, "on its face, sufficiently broad and subjective that [it] could conceivably be applied to cover any speech ... th[at] offends someone.” "Absent any requirement akin to a showing of severity or pervasiveness — that is, a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual's work [or study] — [Paragraph R] provides no shelter for core protected speech." "[T]he mere dissemination of ideas-no matter how offensive to good taste — on a state university campus may not be shut off in the name alone of `conventions of decency.'" *Papish v. Board of Curators of the University of Missouri* (1973). . . . Second, the *Hazelwood* decision does not speak to the issue of authorization. Neither UVI nor McCauley discuss what procedures must be followed for a sign to be "authorized" and the University Student Handbook does not contain any procedures for authorization. Based on the record before us, Paragraph R's authorization requirement lacks any criteria for determining whether authorization should be granted and, thus, permits arbitrary, unpredictable enforcement that is violative of the First Amendment. . . .

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There is no limiting, constitutional construction for Paragraph R. The lack of any procedures explaining how signs may be authorized for display is a procedural failure that is not susceptible to a constitutional construction and the ban on "offensive" signs is hopelessly ambiguous and subjective. Paragraph R's prohibition on "obscene" speech is unproblematic, but the deficiencies in the paragraph overwhelm the legitimacy of the ban on such speech. Its prohibitions on "offensive" and "unauthorized" speech have no plainly legitimate sweep and may be used to arbitrarily silence protected speech. As such, we conclude that the paragraph is facially overbroad in violation of the First Amendment.

McCauley also challenges Paragraph H, which states:

H. Conduct Which Causes Emotional Distress:

This includes conduct which results in physical manifestations, significant restraints on normal behavior or conduct and/or which compels the victim to seek assistance in dealing with the distress.

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"Conduct" is a broad term that encompasses all "personal behavior" of a student. Speech protected by the First Amendment is a type of "conduct," as it is a personal behavior, and is therefore regulated by Paragraph H. Notably, the paragraph also regulates other conduct, such as "non-expressive, physically harassing conduct [that] is entirely outside the ambit of the free speech clause."

Paragraph H, like Paragraph R, is entirely subjective and provides no shelter for core protected speech. "Emotional distress" is a very loose concept. The term "emotion" can mean anything from simply "a state of feeling," to "a conscious mental reaction (as anger or fear) subjectively experienced as strong feeling." The term "distress" similarly could connote an exceedingly minimal threshold of harm, as in "to cause to worry or be troubled," but it can also be defined as requiring more, such as "pain or suffering affecting the body, a bodily part, or the mind." Even taking a narrow understanding of "emotional distress," it is clear that the term is driven by the subjective experience of the individual. The best example of the subjectivity is the last prong of the paragraph — "conduct ... which compels the victim to seek assistance in dealing with the distress." This prong prohibits speech without any regard for whether the speech is objectively problematic. The fact that the provision only lists a few non-exclusive examples of when it may be invoked does not help its case for constitutionality. Emotional distress for purposes of Paragraph H "includes" the examples listed in the paragraph, but it also includes other scenarios that are not illustrated in the paragraph.

The scenarios in which this prong may be implicated are endless: a religious student organization inviting an atheist to attend a group prayer meeting on campus could prompt him to seek assistance in dealing with the distress of being invited to the event; minority students may feel emotional distress when other students protest against affirmative action; a prolife student may feel emotional distress when a pro-choice student distributes Planned Parenthood pamphlets on campus; even simple name-calling could be punished. The reason all these scenarios are plausible applications of Paragraph H is that the paragraph is not based on the speech at all. It is based on a listener's reaction to the speech. "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." While "[t]he precise scope of *Tinker*'s `interference with the rights of others' language is unclear" it is "certainly not enough that the speech is merely offensive to some listener." *Saxe v. State College Area District* (3rd Cir. 2001).

Given that Paragraph H may be used to punish *any* protected speech, without forewarning, based on the subjective reaction of the listener, we conclude that its overbreadth is substantial in an absolute sense and relative to its plainly legitimate sweep. In doing so, we do not deny that there are instances where Paragraph H may be invoked and the First Amendment is not implicated: for example, where a student engages in "non-expressive, physically harassing conduct," that causes emotional distress, or where a student engages in obscene speech that causes emotional distress. But the blanket chilling of all protected speech is still substantial in relation to these other types of conduct that may be prohibited under the paragraph. Every word spoken by a student on campus is subject to Paragraph H. Every time a student speaks, she risks causing another student emotional distress and receiving punishment under Paragraph H. This is a heavy weight for students to bear. Moreover, other provisions of the Code could be invoked to punish students for non-expressive conduct or unprotected speech that causes emotional distress: for example, Major Infraction Paragraph B prohibits assault and infliction or threat of bodily harm to a person; General Infraction Paragraph A prohibits negligent bodily harm; and Major Infraction Paragraph D prohibits sexual harassment. On top of the Code, there are numerous Virgin Islands statutes that prohibit conduct that may cause emotional distress. Because these other avenues for punishment exist, in striking a "balance between competing social costs," — the chilling of protected speech in a university setting, which is harmful to the core mission of the university, balanced against the harm caused by the subset of conduct that causes emotional distress and cannot be punished under other Code provisions or Virgin Islands law (if any even exist) — we conclude that the harm done to students' speech rights is substantial and requires vindication.

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