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ARTICLE

Saxe as an Erosion of Individual Protections

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Abstract

This paper examines the consequences of Saxe v. State College Area School District as it affects schools in the development of anti-harassment policy. Cornel West's lens, described in Democracy Matters (2004), alleging imperialistic overtones in contemporary governance is used to frame how a well-intended policy was maligned by the Third Circuit Court of Appeals to deny constitutional protection to minority groups, especially gays. The case is provocative in that it also illustrates how courts can be manipulated to advance hegemonic political agendas. This article is timely considering recent changes to the membership of the United States Supreme Court.

Saxe v. State College Area School District (SCASD) presents a forum for considering the classic dilemma posed in legal and ethical debate when parallel claims posit liberty and equality at dichotomous ends. In *Democracy Matters* (2004), Cornel West advances a theory that American democracy has become vulnerable to the “three dominant dogmas of free-market fundamentalism, aggressive militarism, and escalating authoritarianism [which, he charges] are snuffing out the democratic impulses that are so vital for the deepening and spread of democracy” (p. 7-8). West argues that “political nihilism” described as an “intoxication with the exercise of power” and an “obsession with stifling” resultant criticisms (p. 29), has codified these canons. He asserts that jeopardized democratic principles in prevailing political ideology have given rise to an “imperialistic” state. West makes reference to how judicial activism has eroded already-compromised constitutional safeguards that were intended to protect individual rights and the outcome of *Saxe* offers eye-opening evidence to support West’s assertions.

The case involved Saxe’s objections to an ‘anti-harassment’ policy developed by SCASD in which he alleged the policy would have the effect of infringing on plaintiffs’ *First Amendment* rights to freedom of expression and religion. Using West’s lens, *Saxe* appears to offer an illustration of, if not an historical account for, a systematic undermining of democratic rights for individuals in favor of a federally sponsored imperialistic agenda. The case record provides an opportunity to illustrate how an executive branch appointed judiciary can engage in the advancement of an aggrandized political ideology vis-à-vis the long reach of the federal bench rather than functioning as an integral part of a system of checks and balances the framers of the constitution conceived.

Case History

In the interest of maintaining safe and orderly schools and in part responding to the Supreme Court’s decisions in *Faragher v. City of Boca Raton* (1998) and *Burlington v. Ellerth* (1998) which decided “that a proper defense to a sexual harassment suit required an anti-harassment policy and a designated person to whom to report harassment” (Yeagain & Wyld, 2001), in 1998 the SCASD adopted a policy which included the following operational definitions:

- *Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment.*
- *Harassment can include any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any of the characteristics described above. Such conduct includes, but is not limited to, unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, bullying, extorting or the display or circulation of written material or pictures.*

Litigation commenced when Saxe complained to a Pennsylvania Federal District Court on behalf of two student-plaintiffs that the anti-harassment policy would have the effect of infringing on their rights to freedom of expression and practice of their religion. Claiming their religion includes a world view that considers homosexuality sinful and as such is something their faith compels them to publicly speak out against, Saxe, a Christian, believed that the ability to freely express his religious convictions would have been restricted by the policy. Saxe asked the court for injunctive relief that would bar implementation of the policy alleging that plaintiffs’ feared they could be punished for “speaking out about their religious beliefs, engaging in symbolic activities reflecting those beliefs, and distributing religious literature” (*Saxe v SCASD*,

1999).

The District Court concluded that the types of conduct the policy sought to redress and its operative definition of harassment prohibited "language or conduct which is based on specified characteristics and which has the effect of substantially interfering with a student's educational performance or which creates a hostile educational atmosphere" (*Saxe v. SCASD*, 1999). In dismissing Saxe's complaint, the District Court ruled that the policy did not disallow "anything that is not already prohibited by law" (*Saxe v. SCASD*, 1999).

On plaintiffs' appeal, the *Third Circuit Court of Appeals* summarized: "The District Court dismissed 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" (*Saxe v. SCASD*, 2001). The Appellate Court reasoned:

The District Court justifies its ruling by a syllogism: (1) the SCASD Policy covers only speech that is already prohibited under federal and state anti-harassment laws; (2) such prohibited speech is not entitled to First Amendment protection; (3) therefore, the Policy poses no First Amendment problems. This reasoning is flawed in both its major and minor premises. First, the Policy - even narrowly interpreted covers substantially more speech than applicable federal and state laws. Second, the courts have never embraced a categorical 'harassment exception' from First Amendment protection for speech that is within the ambit of federal anti-discrimination laws. (*Saxe v. SCASD*, 2001)

SCASD defended their policy on grounds that it was intended to "provide all students with a safe, secure and nurturing school environment" (SCASD, 1998). Arguing that words can be construed as conduct, especially when words are hostile, offensive, harassing or otherwise intimidating, SCASD contended that restrictions on speech designed to protect individual's rights to access in public institutions was not only permissible but necessary, especially in light of the school districts' vulnerability to litigation for failing to protect those rights. Supporting their case, SCASD relied on federal statutes prohibiting discrimination in *Titles VII* and *IX* which together outlaw discrimination based on race, gender, national origin and disability. SCASD also argued that the policy was supported by Pennsylvania's anti-harassment statute which criminalizes harassing behavior.

The Court of Appeals reversed the decision of the District Court, concluding that there is no categorical harassment exception to the free speech clause. While agreeing with the lower court that preventing discrimination in schools is a compelling governmental interest, the Appellate Court questioned the broadness of the policy which included prohibitions not specifically circumscribed by statute. The Appellate Court reasoned that the policy stood in contrast to the Supreme Court's decision in *Davis v. Monroe County Board of Education* (1999) where Davis' board made its policy so broad that it prohibited teasing and name-calling. In *Davis* the Supreme Court held that "schoolchildren may regularly interact in ways that would be unacceptable among adults," and established a severity standard deciding that to be actionable, "behavior must be serious enough to have the systemic effect of denying the victim equal access to an education." The Appellate Court relied on a number of case precedents to decide *Saxe*, many of which present challenges for critical inquiry into the essence of a democracy where both liberty and equality are valued.

Drawing on *Tinker v. Des Moines Community School District* (1969) which held "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," and noting that "federal cases have made clear, *Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance," the Appellate Court could not reach a judicial standard to support the SCASD's policy. Writing for the unanimous opinion of the court, Justice Samuel A. Alito Jr., concluded:

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. (*Saxe v. SCASD*, 2001)

Case Analysis

"The District Court found that Saxe had standing to mount a facial challenge but granted SCASD's motion to dismiss on the pleadings, holding that the Policy was facially constitutional" (*Saxe v. SCASD*, 2001). A dismissal on pleadings is a judicial decision where the jury process is bypassed in favor of review by a judge. Several cases have set precedent for decisions from the bench and details are omitted here given widespread acceptance of the practice. It is important however to consider that trial by a jury lay at the cornerstone of the founders' system of justice where part of their rebellion

stemmed from recognizing a corrupt court system under the Crown's rule. Administrative forms of justice that have evolved in recent decades have paved the way for judge-made law that in many ways resembles a system the founders rejected. Where *Saxe* is concerned, one can only speculate as to whether a jury might have found differently in adjudicating the matter to conclude that restrictions on inflammatory speech could be permissible if they were connected to serving the higher democratic purpose of providing equal access to education for the diverse constituency of the school.

The term democracy can be illusive where it takes on different meaning depending on context. It may be helpful to distinguish between 'pluralistic democracy' and 'majoritarian democracy' to frame how the policy was conceived and then interpreted by the lower court. Pluralistic democracy implies mutual tolerance for the voices of all factions within a society with consideration, respect and value given to multiple perspectives. A majoritarian ideology could be expected to support conformance with mainstream conventions. One interpretation of the intent of the anti-harassment policy suggests that the school board developing it sought to protect the rights of individuals and can be construed in a pluralistic context where its clearly articulated purpose was to afford equal access to education for all students regardless of circumstance. The lower court decision can be understood in context of a majoritarian perspective where significant reliance was placed on federal and state statutes to preserve fundamental rights for classes of people who have historically been discriminated against. I infer here that legislation would be expected to reflect the voice of majoritarian values through its electorate. For the lower court, substantial weight was given to Pennsylvania's anti-harassment statute in concluding that the policy was not inconsistent with popular standards.

The decision of the Appellate Court cannot be constructed as democratic in either a pluralistic or majoritarian sense; rather, it has appearances of an imperialistic encroachment on basic civil rights. Using the Appellate Court's reasoning, the *First Amendment* shields acts a majority would find reprehensible as indicated by the court's suggestion 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" (*Saxe v. SCASD*, 2001). Applied to ordinary school settings the decision would tolerate and protect acts of teasing, name calling and harassment directed at individuals because of their race, the clothes they wear or their sexual orientation in spite of research showing the harmful effect of these behaviors on victims (Public Health, 2002 and Simons, 2002).

Where the lower court's conclusion can be constructed as reflecting a majoritarian democratic perspective in which upholding individual protections are consistent with the views of the populous that elects the legislature in Pennsylvania, evidenced by the very existence of state anti-discrimination and anti-harassment laws, the Appellate Court's ruling flies in the face of the will of the people who clearly demand unrestricted access to safe and orderly schools. The blurring boundary between states' rights to self governance (*Amendment X*) and the degree of federal intervention that is permitted to render state law impotent (Bullen, 1988) is troubling where it appears that in *Saxe* a majority would have supported protections from discrimination and harassment as illustrated by Pennsylvania's own laws and the formulation of SCASD's policy. The majoritarian view was not protected under federal scrutiny in *Saxe* where states and localities are bound to accede to the authority of federal precedent. The design of American jurisprudence as it has unfolded since the founding charters has produced questions about creating safeguards against majoritarian excesses and the role the judiciary should have in ensuring that legislatures do not betray the public trust (Bullen, 1988 and Klarmen, 1997). The instant matter illustrates how courts are also manipulated to promote minority excesses which have empowered the imperialistic ideology Cornel West (2004) wrote about.

Historically *First Amendment* protections arose through the founders' claims to religious freedom and desire to have a voice in government. It is unclear whether the freedom of speech clause meant anything more than the right to voice opinions or to be critical of government without suffering sanctions as they occurred in enforcing the *Administration of Justice Act*, one of the *Intolerable Acts* (1774, as cited in Commanger, 1949) foreshadowing the American Revolution. In *On Liberty* (1909), John Stuart Mill advances the 'libertarian' view of government's authority to restrict citizen's rights to suggest a principle based on harm, advancing a thesis that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." In a democratic state the liberty to freely express ideas, particularly criticisms of government, is most often presumed. A compelling argument that the intent of the *First Amendment* can be narrowly tailored to the free expression of ideas is possible, although throughout history it has been constructed to mean significantly more.

Since the Civil Rights Movement, numerous federal laws have been enacted to defend the rights of protected classes, *Titles VII* and *IX* among them. There are also countless state statutes and local ordinances that afford similar protections. In recent decades, expanded definitions of protected class have come to include persons with disabilities and sexual orientation; the latter of these being a pillar of *Saxe's* complaint on religious grounds. Turned around, *Saxe* has the appearance of the plaintiffs attempting to establish their religion as the correct one, a violation of the same amendment on which they based

their complaint.

The Appellate Court relied on *Tinker* (1969) to argue that in order to prohibit speech there must be a specific and significant threat of disruption. The *Tinker* court also constructed conduct, the wearing of black armbands to protest U.S. involvement in the Vietnam War, to be a form of speech. Consistent with the aims of SCASD's policy, to have safe and orderly schools, *Chaplinsky v New Hampshire* (1942) is an on-point landmark case the Appellate Court conveniently ignored in deciding *Saxe*. *Chaplinsky* dealt specifically with the extension of speech protections that have the potential to incite violence or threaten the security of others. In *Chaplinsky* the Supreme Court ruled speech which "resorts to epithets or personal abuse is not in any proper sense a communication of information or opinion safeguarded by the Constitution." Read together, *Tinker* and *Chaplinsky* offer an interpretation favoring limiting speech liberties relative to conduct where both cases considered the consequences of personal actions and the resultant costs for institutions and individuals concluding that *Tinker*'s armband was an expression of ideas that was protected and *Chaplinsky*'s defamation of individuals represented an unprotected personal attack. The SCASD policy targeted conduct directed toward persons and did not interfere with the free exchange of ideas where nothing in their policy would prevent the plaintiffs from expressing their ideas about homosexuality in the context of a classroom discussion; however, it does enjoin them from singling out gay people to make them victims of harassment.

Saxe has particular significance for schools in fashioning anti-harassment policies which attempt to regulate student speech and/or behavior, and limits the protections schools are able to extend to students for their individual rights when liberty and equality come into conflict. The SCASD anti-harassment policy was written to afford pluralistic protection for all students in the school district. Moreover, the courts have held that school districts are liable for harassment under federal law (*Davis v. Monroe County Board of Education*, 1999). The Appellate Court ruling in *Saxe* is unhelpful to school districts seeking to insulate themselves from future litigation, reduce their exposure to the problems associated with harassment that occurs on school campuses, or to protect the rights of their students because the decision offered no guidance as to how the policy might have been refashioned so as to not offend the *First Amendment*. The court observed that there is widespread disagreement in this area of law and there was no case precedent decided by the Supreme Court to provide a litmus test against which the policy could have been considered. "The outstanding fact about the *First Amendment* today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases" (Emerson, 1970, p. 15) and probably no other constitutional provision has been as open to broad variations in interpretation as the freedom of speech clause.

Saxe was a member of the Pennsylvania State Board of Education at the time he filed suit and served in the defendant district as a volunteer. Although undocumented, one can reasonably deduce that given his level of involvement in school affairs, his voice was heard during the development phases of the policy but that the majority who ultimately decided its approval rejected his position. Based on the pleadings and absence of imminent sanctions, we can infer that *Saxe* was not politically ignorant and that he pressed for an agenda supporting the doctrines of his Christian faith. Unable to prevail in local debate about the policy, *Saxe* had both the political and economic capital to advance his agenda in court. A peculiar feature about this case is that it was granted standing based on a speculative argument and not on any particular actionable claim, incident, or injury where any of the litigants had actually been harmed or threatened with a disciplinary measure necessitating judicial redress. *Saxe* illustrates how an individual or organization with social, political, and economic capital can take hold of an idea and manipulate the judiciary to effect changes in social policy, despite or even contrary to the will of the majority. Cornel West (2004) identifies this as a manifestation of "imperialism." On its face, it seems that the lower court should have been able to read into the language of the plaintiffs' pleadings to plainly reveal their objective was to advance a pro-Christian, anti-homosexual agenda that had ambitions of protecting their ability to discriminate and perpetuate a hostile environment at the expense of a protected class while simultaneously granting favor to their own religious position indeed violating, to privilege for themselves, the very freedoms they would deny to others.

The Appellate Court decision favoring *Saxe*, whose ideology conforms to the ambitions of much of the present 'body politick' can be construed as acting in consort on the *First Amendment* claim to advance a much grander agenda. In their ruling, the Appellate Court was able to achieve a number of limitations on individual rights, which at the very least have the appearance of advancing the causes of extremism by:

- Effecting policy on a much grander scale than was necessary to address the immediate Constitutional question. This was accomplished through narrowing the legal definition of 'harassment' in the decision with significant implications for how future claims by individuals attempting to assert their rights could be denied.
- Limiting the authority schools have to protect students' rights in the interest of operating safe and orderly schools.

- Limiting the civil rights of students who may become future victims of harassment.
- Fueling the school privatization agenda where schools are not given the option to act responsively, in essence creating conditions for public school failure and advancing the causes of private school privilege.
- Binding school districts and administrators in the proactive actions they might take to make for more responsive education and preventing the development of strong policies that could have the effect of reducing social problems in school and schools' exposure to litigation based on harassment claims.

The District Court was able to balance the policy in context of personal responsibility for conduct versus discourse as it is likely to occur among people and communities where divergent ideas often coexist. This case is important to conversations about policy, not as a matter of protecting the ability to speak freely about ideas, the superlative behind the *First Amendment*; rather, it concerns itself with the resultant potential for persecution of individuals whose ideas and practices do not conform to the mainstream.

The legacy of the Supreme Court is one of manipulating definitions and standards of scrutiny (Scalia, 1996 in *US v. Virginia et al*, 1996) and the history of cases cited within *Saxe* illustrate periods of liberal generosity and conservative restraint. Judicial advocacy that bows to executive authority has been non-productive for American jurisprudence, indeed across the English speaking world justice systems are under popular attack, all having been derived from largely the same source (Bullen, 1988). When fanaticism in any direction flourishes democracy becomes fragile. What seems to have been achieved through manipulation of the courts throughout history are shifts between which ideas gain privilege and who becomes oppressed by them, and through *Saxe*, important protections have lost ground. Thomas Jefferson once wrote; "the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislative and executive also, in their spheres, would make the judiciary a despotic branch" (Jefferson, 1804 as cited in Bullen, 1988). Jefferson's foresight may soon become our hindsight.

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