

Garden State CLE presents:

The Law of Hate Speech in New Jersey



Lesson Plan

Introduction

Amendment I - United States Constitution -

[ratified December 15, 1791.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.



Scope

New York Times v. Sullivan, 376 US 254, 270-71 (1964)



Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection.

The question is whether [speech] forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent. Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. The constitutional protection does not turn upon ‘the truth, popularity, or social utility of the ideas and beliefs which are offered. As Madison said, ‘Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.’

Application to State Action

Federal case law has evolved to require that there must be “state action” to enforce [First Amendment] rights against private entities. *Marsh v. Alabama*, 326 U.S. 501, 66 (1946) is recognized as the leading case in this area of law.

The First Amendment was designed by its framers to foster unfettered discussion and free dissemination of opinion dealing with matters of public interest and governmental affairs. It embraces the freedom to distribute information and materials to all citizens, a freedom “clearly vital to the preservation of a free society. The guarantees of the First Amendment are effectuated against potential state interference through the Fourteenth Amendment by limiting the extent to which states can restrict individuals in the exercise of rights of speech and assembly. The First Amendment, however, does not similarly protect rights of speech and assembly against interference or impairment by private individuals. The Amendment imposes no limitations upon “the owner of private property used non-discriminatorily for private purposes only,” even though such use may trench upon the speech and assembly activities of other persons. *State v. Schmid*, 84 NJ 535, 542 (1980)

NJ Constitution of 1947

Article I, paragraph 6

Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact

[This section was copied word for word from the 1944 New Jersey Constitution.]



Applicable beyond State Action

We conclude, therefore, that the State Constitution furnishes to individuals the complementary freedoms of speech and assembly and protects the reasonable exercise of those rights. These guarantees extend directly to governmental entities as well as to persons exercising governmental powers. They are also available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property. The State Constitution in this fashion serves to thwart inhibitory actions which unreasonably frustrate, infringe, or obstruct the expressional and associational rights of individuals exercised under **Article I, paragraphs 6 and 18 thereof.**

State v. Schmid, 84 NJ 535, 560 (1980)

Accord:

NJ Coalition against war v. JBM Realty, 138 NJ 326 (1994) (Leaflets at Mall protected);

Green Party v. Hartz Mountain, 164 NJ 127 (2000) (No insurance required for leaflet activity at mall)



But see - Amato v. Wilentz, 753 F. Supp. 543 (1990) (Bonfire of the Vanities case - The scene, involving black persons acting in a riotous, lawless and life-threatening manner, could very easily raise questions concerning why a New Jersey courtroom would be used for such a purpose.) Reversed on other grounds, 952 F. 2d 742 (1991).



The Bonfire of the Vanities - Property of Warner Home Video

Rules of Professional Conduct

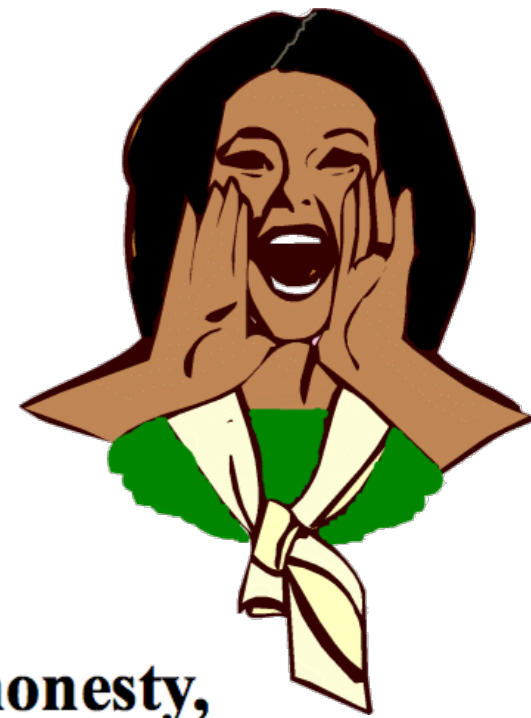
RPC 8.4(b) and RPC 8.4(g)

RPC 8.4. Misconduct

It is professional misconduct for a lawyer to:

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.



In re Geller, 177 NJ 505 (2003) (Reprimand)

Finally, *RPC* 8.4(g) provides that an attorney shall not engage in conduct involving discrimination. He exhibited ethnic bias, however, when he remarked that “Monmouth County Irish have their own way of doing business,” referring to Judge Cavanaugh's rulings. *See In re Vincenti*, 114 N.J. 275, 283 (1989) (“In the context of either the practice of law or the administration of justice, prejudice both to the standing of this profession and the administration of justice will be virtually conclusive if intimidation, abuse, harassment, or threats focus or dwell on invidious discriminatory distinctions.”)



In re Pinto, 168 NJ 111 (2001) (Reprimand)

Respondent argued that he did not violate RPC 8.4(g) because he did not intend to harm [the victim]. However, the rule also prohibits an attorney from engaging in discriminatory conduct likely to cause harm. According to the comments to the rule, the term discrimination is intended to be construed broadly. It includes sexual harassment, derogatory or demeaning language, and, generally, any conduct towards the named groups that is both harmful and discriminatory.



State Efforts to Ban Hate Speech - In General



R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992)

“Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor”

Applying these principles to the St. Paul ordinance, we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. Although the phrase in the ordinance, “arouses anger, alarm or resentment in others,” has been limited by the Minnesota Supreme Court’s construction to reach only those symbols or displays that amount to “fighting words,” the remaining, unmodified terms make clear that the ordinance applies only to “fighting words” that insult, or provoke violence, “on the basis of race, color, creed, religion or gender.” Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use “fighting words” in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

Other SCOTUS examples of statutory hate speech

Texas v. Johnson, 109 S. Ct. 2533 (1989) (Flag-burning as protest)

Spence v. Washington, 418 US 405 (1974) (placing of peace symbol on flag to protest invasion of Cambodia and killings at Kent State)

Tinker v. Des Moines School District, 393 US 503 (1969) (wearing of black armbands to protest war in Vietnam)

Cohen v. California, 91 S. Ct. 1780 (1971) ("F* the draft" written on jacket worn in court house) ([California Penal Code s 415](#) which prohibits 'maliciously and willfully disturbing the peace or quiet of any neighborhood or person by offensive conduct')**



***Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50-51 (1988) (Hustler's editors chose respondent as the featured celebrity and drafted an alleged "interview" with him in which he states that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. The Hustler parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk.)**

***Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to "special protection" under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt.)**

The placards read displayed at a private military funeral read, "God Hates the USA/ Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Fag Troops," "Semper Fi Fags," "God Hates Fags," "Maryland Taliban," "Fags Doom Nations," "Not Blessed Just Cursed," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," and "God Hates You." While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import.

***Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). (Approved an injunction requiring a buffer zone between protesters and an abortion clinic entrance.)**

New Jersey Hate Speech Statutes

2C:33-10. Causing fear of unlawful bodily violence, crime of third degree; act of graffiti, additional penalty

A person is guilty of a crime of the third degree if he purposely, knowingly or recklessly puts or attempts to put another in fear of bodily violence by placing on private property of another a symbol, an object, a characterization, an appellation or graffiti that exposes another to threats of violence. A person shall not be guilty of an attempt unless his actions cause a serious and imminent likelihood of causing fear of unlawful bodily violence.

A person convicted of an offense under this section that involves an act of graffiti may, in addition to any other penalty imposed by the court, be required either to pay to the owner of the damaged property monetary restitution in the amount of the pecuniary damage caused by the act of graffiti or to perform community service, which shall include removing the graffiti from the property, if appropriate. If community service is ordered, it shall be for either not less than 20 days nor less than the number of days necessary to remove the graffiti from the property.

Ruled unconstitutional in 1994. - Amended in 1995 following Supreme Court's decision in *State v. Vawter*, 139 NJ 56 (1994). Court's holding was based upon *R.A.V.*

See also NJSA 2C:33-11

A person is guilty of a crime of the fourth degree if he purposely defaces or damages, without authorization of the owner or tenant, any private premises or property primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, or for assembly by persons for purpose of exercising any right guaranteed by law or by the Constitution of this State or of the United States by placing thereon a symbol, an object, a characterization, an appellation, or graffiti that exposes another to threat of violence.

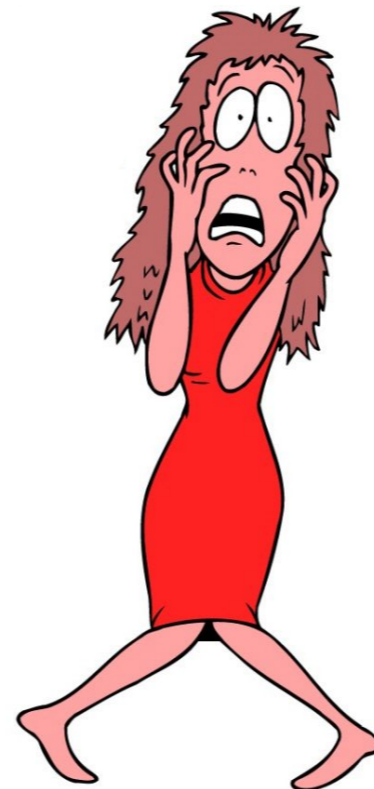


NJSA 2C:33-8

A person commits a disorderly persons offense if, with purpose to prevent or disrupt a lawful meeting, procession or gathering, he does an act tending to obstruct or interfere with it physically.

State v. Charzewski, 356 NJ Super. 151, 156 (2002)

"Nothing in defendant's words demonstrates beyond a reasonable doubt a purpose to disrupt the meeting. Nor did his words have any such effect. Defendant was obviously frustrated and possibly angry, but his words were aimed at substantive conduct by the governing body that he believed was bad government."



2C:33-2(b). Disorderly conduct

b. Offensive language. A person is guilty of a petty disorderly persons offense if, in a public place, and with purpose to offend the sensibilities of a hearer or in reckless disregard of the probability of so doing, he addresses unreasonably loud and offensively coarse or abusive language, given the circumstances of the person present and the setting of the utterance, to any person present.

Ruled unconstitutional: State in the Interest of H.D., 206 NJ Super. 58 (App. Div. 1985).



2C:33-4(a). Harassment

Except as provided in subsection e., a person commits a petty disorderly persons offense if, with purpose to harass another, he:

a. Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;

State v. Duncan, 376 NJ Super. 253, 263-64 (App. Div. 2005)

Based on these circumstances, we are convinced an inference cannot be drawn that defendant had the conscious intent to harass the dispatcher or, indirectly, the police officers involved in the roadblock. That is not to say that defendant's conduct was not impolite or vexatious, or that his repetitive use of what is commonly termed a "curse word" was within socially recognized bounds of appropriate language. We are concerned, however, with the dangers of overextending a criminal statute to rude behavior which is not directed towards anyone specifically but only towards *264 an institution in general. Defendant's mere venting of frustration or irritation at the situation is insufficient by itself to constitute harassment under the statute.

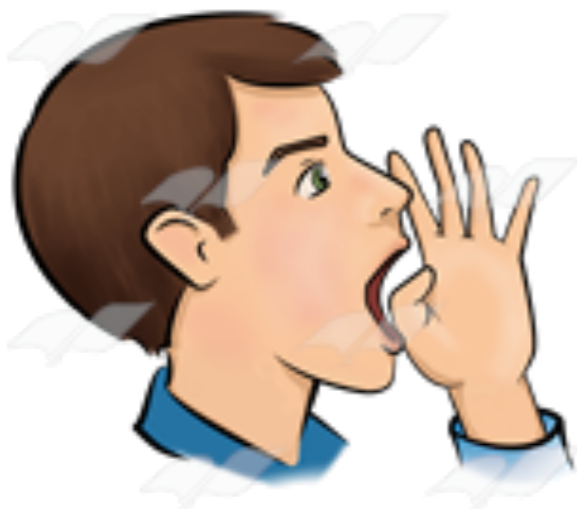
NJSA 2C:44-3(e)

Hate-crimes sentence enhancer requiring an extended term if the defendant acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity.

Repealed in 2001 following:

New Jersey v. Apprendi v. New Jersey, 120 S. Ct. 2348 (2000)

This decision overrules State v. Apprendi, 159 NJ 7 (1999)



Bias-Intimidation - In General

Bias-intimidation statutes punish bias in the motivation for a crime by enhancing the penalty for that crime

In general, a statute increasing penalty for selecting target of crime based on race, religion, color, disability, sexual orientation, national origin, or ancestry of person is aimed at conduct unprotected by the First Amendment. See *Wisconsin v. Mitchell*, 508 US 2194 (1993).



2C:16-1. Bias intimidation



a. Bias Intimidation. A person is guilty of the crime of bias intimidation if he commits, attempts to commit, conspires with another to commit, or threatens the immediate commission of an offense specified in chapters 11 through 18 of Title 2C of the New Jersey Statutes; **N.J.S.2C:33-4; N.J.S.2C:39-3; N.J.S.2C:39-4 or N.J.S.2C:39-5,**

(1) with a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity; or

(2) knowing that the conduct constituting the offense would cause an individual or group of individuals to be intimidated because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity; or

(3) under circumstances that caused any victim of the underlying offense to be intimidated and the victim, considering the manner in which the offense was committed, reasonably believed either that (a) the offense was committed with a purpose to intimidate the victim or any person or entity in whose welfare the victim is interested because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity, or (b) the victim or the victim's property was selected to be the target of the offense because of the victim's race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity.

b. Permissive inference concerning selection of targeted person or property. Proof that the target of the underlying offense was selected by the defendant, or by another acting in concert with the defendant, because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity shall give rise to a permissive inference by the trier of fact that the defendant acted with a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity.

c. Grading. Bias intimidation is a crime of the fourth degree if the underlying offense referred to in subsection a. is a disorderly persons offense or petty disorderly persons offense. Otherwise, bias intimidation is a crime one degree higher than the most serious underlying crime referred to in subsection a., except that where the underlying crime is a crime of the first degree, bias intimidation is a first-degree crime and the defendant upon conviction thereof may, notwithstanding the provisions of paragraph (1) of subsection a. of [N.J.S.2C:43-6](#), be sentenced to an ordinary term of imprisonment between 15 years and 30 years, with a presumptive term of 20 years.



d. Gender exemption in sexual offense prosecutions. It shall not be a violation of subsection a. if the underlying criminal offense is a violation of chapter 14 of Title 2C of the New Jersey Statutes and the circumstance specified in paragraph (1), (2) or (3) of subsection a. of this section is based solely upon the gender of the victim.

e. Merger. Notwithstanding the provisions of [N.J.S.2C:1-8](#) or any other provision of law, a conviction for bias intimidation shall not merge with a conviction of any of the underlying offenses referred to in subsection a. of this section, nor shall any conviction for such underlying offense merge with a conviction for bias intimidation. The court shall impose separate sentences upon a conviction for bias intimidation and a conviction of any underlying offense.

f. Additional Penalties. In addition to any fine imposed pursuant to [N. J.S.2C:43-3](#) or any term of imprisonment imposed pursuant to [N.J.S.2C:43-6](#), a court may order a person convicted of bias intimidation to one or more of the following:

- (1) complete a class or program on sensitivity to diverse communities, or other similar training in the area of civil rights;**
- (2) complete a counseling program intended to reduce the tendency toward violent and antisocial behavior; and**
- (3) make payments or other compensation to a community-based program or local agency that provides services to victims of bias intimidation.**

g. As used in this section “gender identity or expression” means having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth.

h. It shall not be a defense to a prosecution for a crime under this section that the defendant was mistaken as to the race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity of the victim.



Section (a)(1)(3) ruled unconstitutional

State v. Pomianek, 221 NJ 66, 69-72 (2015)



At issue in this appeal is the constitutionality of *N.J.S.A. 2C:16-1(a)(3)*, a bias-crime statute that allows a jury to convict a defendant even when bias did not motivate the commission of the offense. Under the statute, a defendant may be convicted of bias intimidation if the victim “reasonably believed” that the defendant committed the offense on account of the victim's race. Unlike any other bias-crime statute in the country, *N.J.S.A. 2C:16-1(a)(3)* focuses on the victim's, not the defendant's, state of mind. The defendant's fate depends not on whether bias was the purpose for the commission of the crime but on whether the victim “reasonably believed” that was the purpose. Whether a victim reasonably believes he was targeted for a bias crime will necessarily be informed by the victim's individual experiences and distinctive *70 cultural, historical, and familial heritage—all of which may be unknown or unknowable to the defendant.

We hold that *N.J.S.A. 2C:16-1(a)(3)*, due to its vagueness, violates the Due Process Clause of the Fourteenth Amendment. In focusing on the victim's perception and not the defendant's intent, the statute does not give a defendant sufficient guidance or notice on how to conform to the law. That is so because a defendant may be convicted of a bias crime even though a jury may conclude that the defendant had no intent to commit such a crime. We are therefore constrained to reverse defendant's bias-intimidation convictions as well as his official-misconduct conviction, which was predicated on the bias-crime finding. Last, we disagree with the Appellate Division that we can rewrite *N.J.S.A. 2C:16-1(a)(3)* to impose the same state-of-mind requirements found in *N.J.S.A. 2C:16-1(a)(1)*. That level of judicial tinkering with legislation exceeds the bounds of our authority

Conclusion

The people of the State of New Jersey have a 172-year history of providing enhanced protections to speech by people within its borders. Statutory and other governmental efforts to outlaw speech for being hateful, disagreeable, hurtful, unacceptable or critical have generally been ruled to be unconstitutional.



Current-day, non-statutory attacks on speech cite the societal need for trigger-warnings to avoid injury to sensitive feelings, the avoidance of micro-aggressions and political correctness. However, our New Jersey traditions provide protection to speech, not hurt feelings. Simply stated, the answer to objectionable speech is more speech.

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