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ANALYSIS

The Middle Finger and the Constitution

'Radwan v. Manuel' involves a rich legal playbook—First Amendment, Due Process, qualified immunity and sex discrimination—but leaves us in First Amendment stasis and a familiar qualified immunity quagmire.

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Constitutional Law

By Ilann M. Maazel | December 09, 2022 at 10:30 AM

When a college soccer player flips her middle finger at a television camera during an exuberant post-game celebration, is it protected speech or a constitutional handball? This was one of many questions the Second Circuit answered (or as we will see, failed to answer) in the recent case of *Radwan v. Manuel*, No. 20-2194, 2022 WL 17332339 (2d Cir. Nov. 30, 2022). The case involves a rich legal playbook: First Amendment, Due Process, qualified immunity and sex discrimination. And the case has not even been tried.

The Middle Finger

"In 2014, Noriana Radwan, a women's soccer player at the University of Connecticut (UConn) and recipient of a one-year athletic scholarship, raised her middle finger to a television camera during her team's post-game celebration after winning a tournament championship." Id. at *1. Radwan's scholarship covered tuition, fees, room, board and books. However, it could "be immediately reduced or canceled" if she "engage[d] in serious misconduct[.]" Id. at *2. The UConn Student-Athlete Handbook prohibited "[u]sing obscene or inappropriate language or gestures to officials, opponents, team members or spectators" and "[v]iolating generally recognized intercollegiate athletic standards or the value and standards associated with the University as determined by [the] Head Coach and approved by the Athletic Director." Id. Radwan also agreed to a "contract" created by the soccer coach to "comply with all University, Athletic Department and Women's soccer program rules concerning conduct and behavior." Id.

On Nov. 9, 2014, the UConn women's soccer team won a tournament championship game, broadcast live on ESPNU. During the on-field, post-game victory celebration, Radwan flipped her middle finger before changing it to a peace sign. The gesture "created an immediate social media and internet topic." Id. at *3.

Radwan quickly expressed her remorse and apologized to her coach and athletic director; her coached called it a "silly mistake"; and the university closed the matter with a reprimand. But after "other coaches, alumni, and fans … teas[ed]" the coach and "talked to him more about [the finger] than the team's … victory," the university changed course and canceled Radwan's scholarship, accusing her of "serious misconduct." Id. at *3-5. Radwan ultimately transferred to Hofstra University, where she joined the women's soccer team with a partial scholarship, and ultimately graduated. Id. at *6.

Radwan later sued, asserting, inter alia, First Amendment, Due Process and Title IX claims.

The First Amendment

The district court dismissed all of Radwan's claims on summary judgment. On appeal, the Second Circuit wrestled with whether Radwan's finger-flipping was expressive conduct protected by the First Amendment at this public university. The court noted that a jacket with the words "F**k the Draft" in a courthouse corridor was protected, *Cohen v. California*, 403 U.S. 15, 25-26 (1971), and raising the middle finger is protected, for example, in the context of an encounter with police. *Cruise-Gulyas v. Minard*, 918 F.3d 494, 497 (6th Cir. 2019).

Schools, however, are different. “Vulgar or offensive speech—speech that an adult making a political point might have a constitutional right to employ—may legitimately give rise to disciplinary action by a school, given the school’s responsibility for teaching students the boundaries of socially appropriate behavior.” *Doninger v. Neihoff*, 527 F.3d 41, 48 (2d Cir. 2008). But as in all First Amendment cases, context is everything. Was the speech core political expression, for example wearing a black armband to school as a war protest? Did the speech create disruption? Was it related to a school activity, for example, an article in a school newspaper? Did the speech target other students or groups of students? Was it vulgar? Was it in elementary school, where free speech rights are diminished, or in college, where free speech rights are more substantial?

In Radwan’s case, the court noted, she displayed “a vulgar or offensive gesture as an athlete on the university’s sports team, wearing the university’s jersey, during a university sports event …. [S]uch a situation is different from the use of that gesture by a student in a quad celebrating the team’s victory with classmates or wearing a vulgar T-shirt on campus” because Radwan was “(1) required to comply with the codes of conduct agreed to by student-athletes as part of their participation on a university team and ability to receive a scholarship; (2) subject to the authority of the Athletic Department; and (3) officially representing the university in inter-collegiate play at a school-sanctioned event.” *Radwan*, 2022 WL 17332339 at *13.

Qualified Immunity

Did the First Amendment protect Radwan’s gesture? We still don’t know, because the court did not answer the question. Instead, the Second Circuit dismissed the claim on the basis of qualified immunity—the doctrine that lets public officials violate federal law unless the law was “clearly established.” Many commentators, including this author, have criticized qualified immunity as a contrived doctrine rooted in nothing other than the policy preferences of the U.S. Supreme Court. See, e.g., Ilann M. Maazel, “Time To End Qualified Immunity?” *New York Law Journal* (March 23, 2018). With no textual and little historical basis, qualified immunity is, we might say, a middle finger to the Constitution. Among the insidious qualities of this doctrine: It permits courts to skirt their “emphatic” duty “to say what the law is,” as *Marbury v. Madison* so famously put it. 5 U.S. 137 (1803). Here, having spent 20 pages analyzing the First Amendment issue, the court refused to answer it because its resolution would “require an expenditure of substantial judicial resources.” *Radwan*, 2022 WL 17332339 at *17 n.14. And so, when some future college athlete raises her middle finger during a game, no one will know whether or not that is protected speech.

One can hardly fault the Second Circuit, though. The Supreme Court not only created the qualified immunity doctrine, it authorized courts in their discretion to resolve qualified immunity questions without addressing the underlying legal issue, leaving the law frozen and static. Cf. Ilann M. Maazel, “When Should Courts Address Qualified Immunity?” *New York Law Journal* (March 7, 2008).

Procedural Due Process

Radwan next claimed that defendants failed to provide sufficient process before terminating her one-year scholarship. “A procedural due process claim is composed of two elements: (1) the existence of a property or liberty interest that was deprived and (2) deprivation of that interest without due process.” *Bryant v. N.Y. State Educ. Dep’t*, 692 F.3d 202, 218 (2d Cir. 2012). The *Radwan* court held that “because Radwan’s scholarship was guaranteed for a fixed term and terminable only for cause, it was a property interest protected by the Constitution. However, because this rule was not clearly established at the time Radwan’s scholarship was terminated, … defendants are entitled to qualified immunity on this claim as well.” *Radwan*, 2022 WL 17332339 at *17. Here, at least, the court said what the law is, aptly noting: “Failing to rule on this threshold constitutional question may frustrate the development of constitutional precedent and the promotion of law-abiding behavior.” Id. at *17.

Sex Discrimination

But Radwan had one more arrow in her quiver: sex discrimination. Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]” 20 U.S.C. §1681(a). Radwan brought a selective enforcement claim, alleging that similarly situated men were not disciplined comparably, if at all, and that the university would not have terminated her athletic scholarship but for her sex.

Among other examples, Radwan cited (1) a male football player on a full athletic scholarship who “kicked a dead ball into the stands during a game,” incurring a 15-yard penalty against the team, but no discipline for himself, which not only embarrassed the university but also damaged the team’s chances of victory and potentially endangered fans; (2) four male basketball players, two with full athletic scholarships, who “missed curfew during a tournament in Puerto Rico and were sent home to Connecticut early,” then suffered no discipline; (3) a male soccer player arrested for theft, who received a warning and had to attend a workshop; and (4) a male football

player on a full athletic scholarship arrested for possession of marijuana, alcohol “and a facsimile BB gun,” who received university probation and had to participate “in an educational wellness program,” but kept his scholarship. *Radwan*, 2022 WL 17332339 at *24-25 & n.21.

The Second Court concluded that a jury, on remand, will have to determine whether these other incidents are sufficiently similar, and whether the reason for Radwan’s alleged disparate treatment was her sex.

Conclusion

Having failed to dismiss the case pre-trial, defendants may be wise to resolve it, for if jurors abhor anything, it is hypocrisy. Whatever happens to Radwan’s case, however, *Radwan* leaves us in First Amendment stasis and a familiar qualified immunity quagmire. We can only hope that Congress or the Supreme Court will one day let plaintiffs hold public officials accountable when they break the law, clearly established or not.

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