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COVER STORY

To permit T-shirt ban is to reward bad behavior

By Arthur Willner

A fundamental rule of parenting is that rewarding bad behavior only incentivizes more of it. This basic principle was apparently lost on the U.S. Supreme Court when it recently passed up the opportunity to both reinforce First Amendment rights in secondary schools and offer students and administrators alike a sorely needed civics lesson.

Instead, on March 30, the court denied certiorari in *Dariano v. Morgan Hill Unified School District*, 767 F.3d 764 (9th Cir. 2014), which allowed school administrators of a Northern California high school to prevent some students from wearing T-shirts depicting the American flag on Cinco de Mayo due to their concern that Mexican students celebrating the day might react negatively to the pro-America message. By not acting, the court rewarded threats of violence by letting stand a decision that effectively incorporates a "heckler's veto" into the free speech rights of secondary school students.

On May 5, 2010, Cinco de Mayo, a day on which Live Oak High School was celebrating California's Mexican heritage, a few white students wore American flag T-shirts to school. The students' apparel caused no actual violence or disturbances on campus, and no classes were delayed or interrupted. Nonetheless, school administrators had heard unspecific comments from both white and Mexican students that suggested to them that the T-shirts might lead to a physical altercation. Moreover, the school had a history of violence among students, some of which was gang-related and some between white and Mexican students, including tensions involving profanities and threats on Cinco de Mayo the year before.

In response to these vague comments, and with the history of tensions in mind, school officials directed the students wearing the T-shirts to either turn them inside out so the American flag would not be displayed or to take them off. Although a school official explained that he was concerned for their safety, the students replied that they were willing to take the risk. When the officials then offered the students the choice either to turn the T-shirts inside out or go home for the day, the students chose to go home. The following day, these students received numerous threats from other students.

The white students brought a Section 1983 action against the school officials, alleging, among other things, a violation of their First Amendment right to free expression. Applying the Supreme Court's landmark decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the 9th U.S. Circuit Court of Appeals affirmed the district court's summary judgment in favor of the school officials.

Tinker, which is best known for its observation that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," held that students' wearing of armbands to protest the Vietnam War was akin to pure speech and was protected by the First Amendment against the school's regulation prohibiting them. Tinker, however, left room for the regulation of student speech that might reasonably lead school officials to anticipate "disruption of or material interference with school activities" or "actual or nascent" interference with the school's work or with the rights of others to be secure.

In Dariano, the 9th Circuit relied on this language in finding that the school officials reasonably anticipated that the American flag T-shirts could lead to violence and a disruption of school activities. The appellate court specifically credited the officials' concerns arising from the comments communicated by other students, and the school's history of racial tensions including the problems during the previous Cinco de Mayo celebration.

In a lengthy and vociferous dissent, however, Judge Diarmuid O'Scannlain pointed out that while on this occasion the "disfavored expression" was the American flag, the appellate court's ruling "opens the door to the suppression of any viewpoint opposed by a vocal band of students ... It might be any viewpoint imaginable, but whatever it is, it will be vulnerable to the rule of the mob. The demands of bullies will become school policy."

The white students petitioned for certiorari with the Supreme Court, asserting that the 9th Circuit's decision conflicts with Tinker, incorporates a "heckler's veto" into the First Amendment, and creates a split among the circuits. The petitioners explained that Tinker did not authorize the suppression of student expression except where the speech activity itself was the potential source of substantial disorder or the material disruption of school activity. To the contrary, Tinker noted that the passive expression of opinion through the wearing of armbands was unaccompanied by any disturbance on the part of the students expressing themselves. The petitioners likened the anti-war armbands in Tinker to their passive expression of a pro-America message through the wearing of American flag T-shirts. Indeed, it is virtually impossible to find a principled basis on which to find First Amendment protection for the content and viewpoint of the former expression but not for the latter.

As the petitioners argued, it is a fundamental principle of law that the First Amendment does not countenance a "heckler's veto," i.e., the government cannot suppress speech simply because it might engender an angry response on the part of those opposed to the message. *Forsyth County v. Nationalist Movement,* 505 U.S. 123 (1992).

As Tinker explained in the public school context, "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." The petitioners further noted that the 9th Circuit's decision created a split with the 7th and 11th Circuits in which the appellate courts rejected a heckler's veto where a student wore a shirt to school on the Day of Silence bearing the slogan, "Be Happy, Not Gay," *Zamecnik v. Indian Prairie School District No. 204*, 636 F.3d 874 (7th Cir. 2011), and where a student held up a fist during the Pledge of Allegiance. Holloman ex rel. *Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004).

The respondents' opposition to certiorari asserted there was no compelling reason for the Supreme Court to either affirm or reverse the 9th Circuit's ruling. It rejected the notion that freedom of expression was even the issue in Dariano. Instead, they framed the issue as one of school safety and "whether local school officials, in the face of credible threats to the students involved and by extension danger to the entire school," acted constitutionally by asking the students to simply not wear their T-shirts on that one day of the year. They further noted that nothing in First Amendment jurisprudence precludes the deference ordinarily paid to school regulation of student dress notwithstanding the involvement of the American flag, and to the ability of administrators to make "on-the-spot decisions" regarding the safety of schoolchildren.

The respondents pointed to language in Tinker that student conduct that "for any reason" substantially or materially disrupts school order is not immunized by First Amendment guarantees of free speech. Thus, they argued that Tinker actually supports the broad proposition that a public school may regulate student speech to prevent disruption regardless of its source, even if initiated by disgruntled listeners.

The respondents further argued that given the history of tensions between white and Mexican students the potential level of disruption was much higher at Live Oak High School on Cinco de Mayo than at the Tinkers' Iowa high school and that, in any event, unlike Tinker, "there is no indication that the school's actions were part of an effort to suppress any view or controversy."

Citing at length the tragic spate of school violence in recent years, the respondents argued that the heckler's veto doctrine (assuming it applies at all in a school setting) is trumped by the legitimate safety-related decisions of the officials. Cast in this manner, the respondents' argument has at the very least a strong emotional appeal. In addition to being centers for learning, schools are justifiably expected to be safe havens for children. Unlike university campuses where most students are adults, high school students are almost all minors, some as young as 14. These students (not to mention their parents) may well not have been as willing as the petitioners to find themselves in the middle of a potential riot, regardless of the free speech interests at stake.

What was unfortunately lost on the 9th Circuit, and apparently on the Supreme Court, is the notion that the school officials had any responsibility at all to protect the free speech rights of students who, contrary to the respondents' assertion, were indisputably expressing a political message. Government regulation of speech, at a minimum, must be content neutral. Yet it is difficult to imagine a more viewpoint-based decision than one in which a public school prohibits an individual's apparel depicting the American flag solely to assuage the anger of a mob of students who find the nation's symbol objectionable.

The school officials, in making their "on-the-spot decision," actually had a choice of responses. They could have marshaled their resources and turned the moment into an educational opportunity on American democracy and freedom of expression. Instead, the officials incentivized thuggery by teaching these students that that they can silence opinions with which they disagree through threats of violence.

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