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2021 Judicial Court Case Documents

APPEALS COURT OVERVIEW

I. Statement of the Facts: Summary

ADDISON BARNES
Plaintiff–Petitioner

v.

LIBERTY HIGH SCHOOL
Defendant–Respondent

On May 22, 2018, Addison Barnes chose to wear a political shirt to her US Government class at Liberty High School. The topic of discussion in class that day would be elections and differing political agendas between candidates. Addison's shirt read, "Donald J. Trump Border Wall Construction Co." and "The Wall Just Got 10 Feet Taller". When Addison entered the room, her teacher stated, "That is a bit political for school." During the course of the student debate another student Ximena Baros indicated that she felt Barnes' shirt made an offensive racist statement. Barnes stated that the shirt simply indicated the border wall policy of the current President and made no reference to any particular group of people. After class, Barnes was approached by the Assistant Principal Bethany Degraw who asked Barnes to either cover up the messages on the shirt or change because the message conveyed offensive xenophobicpolitical statements that were offensive to students of Mexican descent. Degrawfurther stated the message could incite disruptive political conflicts on school grounds. Barnes put on her hoodie to cover up the shirt and went to her next class. At lunch Barnes removed the hoodie and was again approached by Degraw. When asked to cover up the message or change out of the shirt, Barnes stated that "It is my first amendment right to wear this t-shirt." Degrew once again asked Ms. Barnes to cover up her shirt or go home on a short term suspension for violating the school dress code. Barnes chose to go home. Degrew wrote up the suspension and cited school board dress policy code 1A 3.7.

Barnes and her mother decided to sue the school. On November 27, 2018, Barnes made a complaint at the district court saying that the school had violated her first amendment right to freedom of speech. Barnes wanted to be able to wear any piece of clothing allowing her to express herself at her public school without being disciplined. Liberty believed that the student had violated the dress code by wearing "inappropriate attire". Thereafter both Barnes and Liberty filed for a summary judgment. The district court denied Barnes's motion and sided with Liberty. The court stated that Barnes had violated the school dress code and had "intimidated" the other student on the "basis of race and ethnicity" with her shirt. The Barnes family then appealed the case. On appeal,

the full circuit court of the Court of Appeals of the 10th Circuit affirmed the decision of the district court.

You will be representing Addison Barnes (Petitioner) or Liberty High High (Respondent) before the Supreme Court of New Mexico. The issues on appeal are whether the Court of Appeals properly granted summary judgment related to two issues:

1. Does the Tinker Rule Apply?
    - Was the shirt reasonably understood to have been worn intentionally to offend the student?
    - Is the shirt violent, lewd, or offensive in any way?
2. School Dress Code
    - Did the school have the jurisdiction to correct the student attire?
    - Did the student directly violate the school dress code?

Liberty High School Dress Code and Policy

Vulgar/Obscene/Inappropriate: School Board Dress Code Policy 1A 3.7 Students are prohibited from wearing clothing and accessories with drug/alcohol/violence/gang-related messages or sexual innuendo that have slogans, comments or designs that are obscene, lewd, vulgar, are directed towards or intended to harm, harass, threaten, intimidate or demean individual groups or individuals on the basis of sex, gender, sexual orientation, race, color, ancestry, national origin, ethnicity, religion, age disability, genetic information, gender identity or marital status

Our values are:

- All students should be able to dress comfortably for school without fear of or actual unnecessary discipline or body shaming.
- All students and staff should understand that they are responsible for managing their own personal "distractions" without regulating individual students' clothing/self expression.
- Teachers can focus on teaching without the additional and often uncomfortable burden of dress code enforcement.
- Students should not face unnecessary barriers to school attendance.
- Reasons for conflict and inconsistent discipline should be minimized whenever possible.

89 S.Ct. 733

Supreme Court of the United States

John F. TINKER and Mary Beth Tinker, Minors, etc., et al., Petitioners,

v.

DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT et al.

No. 21.
|
Argued Nov. 12, 1968.
|
Decided Feb. 24, 1969.

Synopsis

Action against school district, its board of directors and certain administrative officials and teachers to recover nominal damages and obtain an injunction against enforcement of a regulation promulgated by principals of schools prohibiting wearing of black armbands by students while on school facilities. The United States District Court for the Southern District of Iowa, Central Division, 258 F.Supp. 971, dismissed complaint and plaintiffs appealed. The Court of Appeals for the Eighth Circuit, 383 F.2d 988, considered the case en banc and affirmed without opinion when it was equally divided and certiorari was granted. The United States Supreme Court, Mr. Justice Fortas, held that, in absence of demonstration of any facts which might reasonably have led school authorities to forecast substantial disruption of, or material interference with, school activities or any showing that disturbances or disorders on school premises in fact occurred when students wore black armbands on their sleeves to exhibit their disapproval of Vietnam hostilities, regulation prohibiting wearing armbands to schools and providing for suspension of any student refusing to remove such was an unconstitutional denial of students' right of expression of opinion. Reversed and remanded.

Opinion

Mr. Justice FORTAS delivered the opinion of the Court. Petitioner John F. Tinker, 15 years old, and petitioner
Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school. In December 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired—that is, until after New Year's Day.

This complaint was filed in the United States District Court by petitioners, through their fathers. It prayed for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages. After an evidentiary hearing the District Court dismissed the complaint. It upheld the constitutionality of the school authorities' action on the ground

that it was reasonable in order to prevent disturbance of school discipline.

I.
The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.

In West Virginia State Board of Education v. Barnette, supra, this Court held that under the First Amendment, the student in public school may not be compelled to salute the flag. Speaking through Mr. Justice Jackson, the Court said:

'The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.'

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

II.
The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to 'pure speech.'

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system were the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the

right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.

In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption.

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth `out of a multitude of tongues, rather than through any kind of authoritative selection.

But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

If a regulation were adopted by school officials forbidding discussion of the Vietnam

conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school.

In the circumstances of the present case, the prohibition of the silent, passive 'witness of the armbands,' as one of the children called it, is no less offensive to the constitution's guarantees.

III

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.

Reversed and remanded

767 F. 3d 764

Supreme Court of the United States

John DARIANO and Dianna Dariano, Minors, etc., et al., Petitioners,

v.

MORGAN HILL UNIFIED SCHOOL DISTRICT et al.

No. 11.

Decided Feb. 27, 2014.

Background

This case arose out of the events of May 5, 2010, Cinco de Mayo, at Live Oak High School ("Live Oak" or "the School"), part of the Morgan Hill Unified School District in Northern California. The Cinco de Mayo celebration was presented in the "spirit of cultural appreciation." It was described as honoring "the pride and community strength of the Mexican people who settled this valley and who continue to work here." The school likened it to St. Patrick's Day or Oktoberfest. The material facts are not in dispute.

Live Oak had a history of violence among students, some gang-related and some drawn along racial lines. In the six years that Nick Boden served as principal, he observed at least thirty fights on campus, both between gangs and between Caucasian and Hispanic students. A police officer is stationed on campus every day to ensure safety on school grounds.

On Cinco de Mayo in 2009, a year before the events relevant to this appeal, there was an altercation on campus between a group of predominantly Caucasian students and a group of Mexican students.2 The groups exchanged profanities and threats. Some students hung a makeshift American flag on one of the trees on campus, and as they did, the group of Caucasian students began clapping and chanting "USA." A group of Mexican students had been walking around with the Mexican flag, and in response to the white students' flag-raising, one Mexican student shouted "f* * * them white boys, f* * * them white boys." When Assistant Principal Miguel Rodriguez told the student to stop using profane language, the student said, "But Rodriguez, they are racist. They are being racist. F* * * them white boys. Let's f* * * them up." Rodriguez removed the student from the area.

At least one party to this appeal, student M.D., wore American flag clothing to school on Cinco de Mayo 2009. M.D. was approached by a male student who, in the words of the district court, "shoved a Mexican flag at him and said something in Spanish expressing anger at [M.D.'s] clothing."

A year later, on Cinco de Mayo 2010, a group of Caucasian students, including the students bringing this appeal, wore American flag shirts to school. A female student approached M.D. that morning, motioned to his shirt, and asked, "Why are you wearing that? Do you not like Mexicans[?]" D.G. and D.M. were also confronted about their clothing before "brunch break."

As Rodriguez was leaving his office before brunch break, a Caucasian student approached him, and said, "You may want to go out to the quad area. There might be some-there might be some issues." During the break, another student called Rodriguez over to a group of Mexican students, said that she was concerned about a group of students wearing the American flag, and said that "there might be problems." Rodriguez understood her to mean that there might be a physical altercation. A group of Mexican students asked Rodriguez why the Caucasian students "get to wear their flag out when we [sic] don't get to wear our [sic] flag?"

Boden directed Rodriguez to have the students either turn their shirts inside out or take them off. The students refused to do so.

Rodriguez met with the students and

explained that he was concerned for their safety. The students did not dispute that their attire put them at risk of violence. Plaintiff D.M. said that he was "willing to take on that responsibility" in order to continue wearing his shirt. Two of the students, M.D. and D.G., said they would have worn the flag clothing even if they had known violence would be directed toward them.

School officials permitted M.D. and another student not a party to this action to return to class, because Boden considered their shirts, whose imagery was less "prominent," to be "less likely [to get them] singled out, targeted for any possible recrimination," and "significant[ly] differen[t] in [terms of] what [he] saw as being potential for targeting."3

The officials offered the remaining students the choice either to turn their shirts inside out or to go home for the day with excused absences that would not count against their attendance records. Students D.M. and D.G. chose to go home. Neither was disciplined.

In the aftermath of the students' departure from school, they received numerous threats from other students. D.G. was threatened by text message on May 6, and the same afternoon, received a threatening phone call from a caller saying he was outside of D.G.'s home. D.M. and M.D. were likewise threatened with violence, and a student at Live Oak overheard a group of classmates saying that some gang members would come down from San Jose to "take care of" the students. Because of these threats, the students did not go to school on May 7.

The students and their parents, acting as guardians, brought suit under 42 U.S.C. § 1983 and the California Constitution against Morgan Hill Unified School District ("the District"); and Boden and Rodriguez, in their official and individual capacities, alleging violations of their federal and California constitutional rights to freedom of expression and their federal constitutional rights to equal protection and due process.

On cross-motions for summary judgment, the district court granted Rodriguez's motion on all claims and denied the students' motion on all claims, holding that school officials did not violate the students' federal or state constitutional rights. The district court did not address claims against Boden, because he was granted an automatic stay in bankruptcy. The district court dismissed all claims against the District on grounds of sovereign immunity, a ruling not challenged on appeal. The question on appeal is thus whether Rodriguez, in his official or individual capacity, violated the students' constitutional rights.

The students, through their guardians, brought this § 1983 action alleging violations of their First and Fourteenth Amendment rights. Id. at 23–24.

I

In Tinker v. Des Moines Independent Community School District, a group of high school students was suspended for wearing black armbands as a way of protesting the Vietnam War. 393 U .S. 503, 504 (1969). In what has become a classic statement of First Amendment law, the Supreme Court declared, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Id. at 506. Of course, as the Court has subsequently made clear, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986). Nonetheless, Tinker established that, "where students in the exercise of First Amendment rights collide with the rules of the school authorities," Tinker, 393 U.S. at 507, students' free speech rights "may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.' " Morse v. Frederick, 551 U.S. 393, 403 (2007) (quoting Tinker, 393 U.S. at 513).

Invoking Tinker, the panel holds that the school acted properly to prevent a substantial and material disruption of school activities. Dariano, amended slip op. at 26–28, 33. In the panel's view, school officials acted reasonably given the history of ethnic violence at the school, the 2009 Cinco de Mayo incident, and the indications of possible violence on the day in question. Id. at 28. Because the officials tailored their actions to address the threat, the panel held that there was no violation of the students' free speech rights. Id. at 31. The panel also granted summary judgment with regard to the students' equal protection and due process claims. Id. at 32–35.

II

With respect, I suggest that the panel's opinion misinterprets Tinker's own language, our precedent, and the law of our sister circuits. The panel claims that the source of the threatened violence at Live Oak is irrelevant: apparently requiring school officials to stop the source of a threat is too burdensome when a more "readily-available" solution is at hand, id. at 28, namely, silencing the target of the threat. Thus the panel finds it of no consequence that the students exercising their free speech rights did so peacefully, that their expression took the passive form of wearing shirts, or that there is no allegation that they threatened other students with violence.2 The panel condones the suppression of the students' speech for one reason: other students might have reacted violently against them. Such a rationale contravenes fundamental First Amendment principles.

II.A

The panel claims to be guided by the language of Tinker, Dariano, amended slip op. at 28, but in fact the panel ignores such language. Indeed Tinker counseled directly against the outcome here: relying on the earlier heckler's veto case of Terminiello v. Chicago, 337 U.S. 1 (1949), the Court explained that students' speech, whether made "in class, in the lunchroom, or on the campus," cannot be silenced merely because those who disagree with it "may start an argument or cause a disturbance." 393 U.S. at 508 (citing Terminiello). Tinker made clear that the "Constitution says we must take th[e] risk" that speech may engender a violent response. Id. Yet, rather than heed Tinker's guidance, the panel undermines its holding, and, in the process, erodes the "hazardous freedom" and "openness" that "is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." Tinker, 393 U.S. at 508–09.

What the panel fails to recognize, and what we have previously held, is that Tinker went out of its way to reaffirm the heckler's veto doctrine; the principle that "the government cannot silence messages simply because they cause discomfort, fear, or even anger." Ctr. for Bio–Ethical Reform, Inc. v. Los Angeles Cnty., 533 F.3d 780, 788 (9th Cir.2008) (citing Tinker, 393 U.S. at 508). Quoting Tinker, we have explained:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk.

Bio–Ethical Reform, 533 F.3d at 788 (quoting Tinker, 393 U .S. at 508).3 Our precedents take the position, then, that far from abandoning the

heckler's veto doctrine in public schools, Tinker stands as a dramatic reaffirmation of it.4 Given the central importance of the doctrine to First Amendment jurisprudence, that should come as no surprise.5

II.B

The heckler's veto doctrine is one of the oldest and most venerable in First Amendment jurisprudence. See Terminiello v. City of Chicago, 337 U.S. 1, 5 (1949). Indeed, the Court has gone far to protect speech where it might incur a hostile and even violent reaction from an audience. In Street v. New York, for example, a man was convicted for "publicly defy[ing] . or cast[ing] contempt upon (any American flag) by words." 394 U.S. 576, 590 (1969). The Court invalidated the conviction, rejecting the state's justification that the man's speech had a "tendency . to provoke violent retaliation." Id. at 592. The heckler's veto doctrine also protected a civil rights leader's peaceful speech during a lunch counter sit-in protest, despite the state's alleged fear that " 'violence was about to erupt' because of the demonstration." Cox v. Louisiana, 379 U.S. 536, 550 (1965). As the Court said in Cox, "[T]he compelling answer . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise." Id. at 551 (internal quotation marks omitted).

Of course, this doctrine does not apply to all categories of speech. The Court has recognized that there are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); see also United States v. Alvarez, 132 S.Ct. 2537, 2544 (2012) (listing types of speech that are not part of "the freedom of speech").

Where, for instance, speech constitutes " 'fighting' words-those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," Chaplinsky, 315 U.S. at 572; is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action," Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); or is a "true threat," Virginia v. Black, 538 U.S. 343, 358–60 (2003), such speech may be prohibited, subject to certain limitations, see R.A. V. v. City of St. Paul, 505 U.S. 377, 383–86 (1992). But apart from these well-recognized categories, "the government may not give weight to the audience's negative reaction" as a basis for suppressing speech. Ctr. for Bio–Ethical Reform, Inc., 533 F.3d at 789; see also Texas v. Johnson, 491 U.S. 397, 408–09 (1989) ("[A] principal function of free speech under our system of government is to invite dispute.") (internal quotation marks omitted) (quoting Terminiello) (citing Tinker).

II.C

Despite Tinker's emphasis on the actions of the speaker and its reaffirmation of the heckler's veto doctrine, the panel ignores these foundational precepts of First Amendment jurisprudence and condones using the heckler's veto as a basis for suppressing student speech.

The established First Amendment principles that the panel disregards exist for good reason. Rather than acting to protect the students who were peacefully expressing their views, Live Oak decided to suppress the speech of those students because other students might do them harm. Live Oak's reaction to the possible violence against the student speakers, and the panel's blessing of that reaction, sends a clear message to public school students: by threatening violence

> against those with whom you disagree, you can enlist the power of the State to silence them. This perverse incentive created by the panel's opinion is precisely what the heckler's veto doctrine seeks to avoid.
>
> In this case, the disfavored speech was the display of an American flag. But let no one be fooled: by interpreting Tinker to permit the heckler's veto, the panel opens the door to the suppression of any viewpoint opposed by a vocal and violent band of students. The next case might be a student wearing a shirt bearing the image of Che Guevara, or Martin Luther King, Jr., or Pope Francis. It might be a student wearing a President Obama "Hope" shirt, or a shirt exclaiming "Stand with Rand!" It might be a shirt proclaiming the shahada, or a shirt announcing "Christ is risen!" 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. That is not the law.

III

The Seventh and Eleventh Circuits agree that a student's speech cannot be suppressed based on the violent reaction of its audience. Thus the panel is simply wrong that our sister circuits' cases "do not distinguish between 'substantial disruption' caused by the speaker and 'substantial disruption' caused by the reaction of onlookers." Dariano, amended slip op. at 29. In Zamecnik v. Indian Prairie School District No. 204, a student wore a t-shirt to school on the Day of Silence bearing the slogan, "Be Happy, Not Gay." 636 F.3d 874, 875 (7th Cir.2011). The school sought to prohibit the student from wearing the shirt based, in part, on "incidents of harassment of plaintiff Zamecnik." Id. at 879. The Seventh Circuit squarely rejected that rationale as "barred by the doctrine . of the 'heckler's veto.' " Id. Zamecnik made clear that Tinker "endorse[s] the doctrine of the heckler's veto" and described the rationale behind that doctrine:

> Statements that while not fighting words are met by violence or threats or other unprivileged retaliatory conduct by persons offended by them cannot lawfully be suppressed because of that conduct. Otherwise free speech could be stifled by the speaker's opponents' mounting a riot, even though, because the speech had contained no fighting words, no reasonable person would have been moved to a riotous response. So the fact that homosexual students and their sympathizers harassed Zamecnik because of their disapproval of her message is not a permissible ground for banning it.

Id. The court affirmed the grant of summary judgment to Zamecnik. Id. at 882.

The Eleventh Circuit is of the same opinion. In Holloman ex rel. Holloman v. Harland, a school punished a student for silently holding up a fist rather than reciting the Pledge of Allegiance. 370 F.3d 1252, 1259 (11th Cir.2004). School officials justified their actions, in part, by citing "concern that [the student's] behavior would lead to further disruptions by other students." Id. at 1274. The Eleventh Circuit acknowledged that Tinker governed its analysis, and in an impassioned paragraph, the court invoked the heckler's veto doctrine:

> Allowing a school to curtail a student's freedom of expression based on such factors turns reason on its head. If certain bullies are likely to act violently when a student wears long hair, it is unquestionably easy for a principal to preclude the outburst by preventing the student from wearing long hair. To do so, however, is to sacrifice freedom upon the alter [sic] of order, and allow the scope of our liberty to be dictated by the inclinations of the unlawful mob.

Id. at 1275. Particularly relevant here, the Eleventh Circuit squarely rejected the claim that the heckler's veto doctrine does not apply in public schools:

> While the same constitutional standards do

not always apply in public schools as on public streets, we cannot afford students less constitutional protection simply because their peers might illegally express disagreement through violence instead of reason. If the people, acting through a legislative assembly, may not proscribe certain speech, neither may they do so acting individually as criminals. Principals have the duty to maintain order in public schools, but they may not do so while turning a blind eye to basic notions of right and wrong.

Id. at 1276. The court reversed the district court's grant of summary judgment to the school and reinstated Holloman's claims. Id. at 1294–95.

The panel's holding, then, represents a dramatic departure from the views of our sister circuits.6 Yet, one would never know it from reading the panel's opinion, since the contrary decisions of those circuits are barely mentioned and completely mis-characterized.

IV

Finally, the panel attempts to analogize this case to those involving school restrictions on Confederate flags. See Dariano, amended slip op. at 30–31. But these cases, dealing solely with a symbol that is "widely regarded as racist and incendiary," Zamecnik, 636 F.3d at 877, cannot override Tinker here.

The panel takes the Confederate flag cases to be a single "illustrat[ion]" of the much broader "principle" that the heckler's veto doctrine does not apply to schools. Dariano, amended slip op. at 30. But as that broad "principle" is incorrect, the Confederate flag cases cannot illustrate it. Indeed, what the cases actually illustrate is a permissive attitude towards regulation of the Confederate flag that is based on the flag's unique and racially divisive history.8 Whether or not this history provides a principled basis for the regulation of Confederate icons, it certainly provides no support for banning displays of the American flag.

V

The panel's opinion contravenes foundational First Amendment principles, creates a split with the Seventh and Eleventh Circuits, and imperils minority viewpoints of all kinds. Like our sister circuits, I would hold that the reaction of other students to the student speaker is not a legitimate basis for suppressing student speech absent a showing that the speech in question constitutes fighting words, a true threat, incitement to imminent lawless action, or other speech outside the First Amendment's protection. See Zamecnik, 636 F.3d at 879 (rejecting the heckler's veto "because the speech had contained no fighting words"); Holloman, 370 F.3d at 1275–76 (citing Street for the proposition that "the possible tendency of appellant's words to provoke violent retaliation is not a basis for banning those words unless they are 'fighting words' " (internal quotation marks omitted)).

I respectfully dissent from our regrettable decision not to rehear this case en banc.

OPINION

We are asked again to consider the delicate relationship between students' First Amendment rights and the operational and safety needs of schools. As we noted in Wynar v. Douglas County School District, 728 F.3d 1062, 1064 (9th Cir.2013), "school administrators face the daunting task of evaluating potential threats of violence and keeping their students safe without impinging on their constitutional rights." In this case, after school officials learned of threats of race-related violence during a school-sanctioned celebration of Cinco de Mayo, the school asked a group of students to remove clothing bearing images of the American flag.1

The students brought a civil rights suit against the school district and two school officials, alleging violations of their federal and state constitutional rights to freedom of expression, equal protection, and due process. We affirm the district court's grant of summary

judgment as to the only defendant party to this appeal, Assistant Principal Miguel Rodriguez, and its denial of the students' motion for summary judgment, on all claims. School officials anticipated violence or substantial disruption of or material interference with school activities, and their response was tailored to the circumstances. As a consequence, we conclude that school officials did not violate the students' rights to freedom of expression, due process, or equal protection.

106 S.Ct. 3159
Supreme Court of the United States
BETHEL SCHOOL DISTRICT NO. 403, et al., Petitioners
v.
Matthew N. FRASER, a Minor and E.L. Fraser, Guardian Ad Litem.
No. 84–1667.
|
Argued March 3, 1986.
|
Decided July 7, 1986.

Synopsis
Student filed civil rights action after he was disciplined for language used in nominating speech at student assembly. The United States District Court for the Western District of Washington, Jack E. Tanner, J., issued declaratory judgment that school district violated student's rights and awarded student $278 in damages and $12,750 as costs and attorney fees. School District appealed. The Court of Appeals, 755 F.2d 1356, affirmed. Following grant of certiorari, the Supreme Court, Chief Justice Burger, held that: (1) school district acted entirely within its permissible authority in imposing sanctions upon student in response to his offensively lewd and indecent speech, which had no claim to First Amendment protection, and (2) school disciplinary rule proscribing obscene language and free speech admonitions of teachers gave adequate warnings to student that his lewd speech could subject him to sanctions. Reversed.

Opinion
Chief Justice BURGER delivered the opinion of the Court. We granted certiorari to decide whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.

I
On April 26, 1983, respondent Matthew N. Fraser, a student at Bethel High School in Pierce County, Washington, delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students, many of whom were 14-year-olds, attended the assembly. Students were required to attend the assembly or to report to the study hall. The assembly was part of a school-sponsored educational program in self-government. Students who elected not to attend the assembly were required to report to study hall. During the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.

Two of Fraser's teachers, with whom he discussed the contents of his speech in advance, informed him that the speech was "inappropriate and that he probably should not deliver it," and that his delivery of the speech might have "severe consequences."

During Fraser's delivery of the speech, a school counselor observed the reaction of students to the speech. Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech. One teacher reported that on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class.

A Bethel High School disciplinary rule prohibiting the use of obscene language in the school provides:

"Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."

The morning after the assembly, the Assistant Principal called Fraser into her office and notified him that the school considered his speech to have been a violation of this rule. Fraser was presented with copies of five letters submitted by teachers, describing his conduct at the assembly; he was given a chance to explain his conduct, and he admitted to having given the speech described and that he deliberately used sexual innuendo in the speech. Fraser was then informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises.

Fraser sought review of this disciplinary action through the School District's grievance procedures. The hearing officer determined that the speech given by respondent was "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly." The examiner determined that the speech fell within the ordinary meaning of "obscene," as used in the disruptive-conduct rule, and affirmed the discipline in its entirety. Fraser served two days of his suspension, and was allowed to return to school on the third day.

The District Court held that the school's sanctions violated respondent's right to freedom of speech under the First Amendment to the United States Constitution, that the school's disruptive-conduct rule is unconstitutionally vague and overbroad, and that the removal of respondent's name from the graduation speaker's list violated the Due Process Clause of the Fourteenth Amendment because the disciplinary rule makes no mention of such removal as a possible sanction.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, holding that respondent's speech was indistinguishable from the protest armband in *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). The court explicitly rejected the School District's argument that the speech, unlike the passive conduct of wearing a black armband, had a disruptive effect on the educational process. The Court of Appeals also rejected the School District's argument that it had an interest in protecting an essentially captive audience of minors from lewd and indecent language in a setting sponsored by the school, reasoning that the School District's "unbridled discretion" to determine what discourse is "decent" would "increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools." Finally, the Court of Appeals rejected the School District's argument that, incident to its responsibility for the school curriculum, it had the power to control the language used to express ideas during a school-sponsored activity. We reverse.

II

This Court acknowledged in *Tinker v. Des Moines Independent Community School Dist., supra,* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court of Appeals read that case as precluding any discipline of Fraser for indecent speech and lewd conduct in the school assembly. That court appears to have proceeded on the theory that the use of lewd and obscene speech in order to make what the speaker considered to be a point in a nominating speech for a fellow student was essentially the same as the wearing of an armband in *Tinker* as a form of protest or the expression of a political position.

The marked distinction between the political "message" of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals. In upholding the students' right to engage in a nondisruptive, passive expression of a political viewpoint in *Tinker,* this Court was careful to note that the case did "not concern speech or action that intrudes upon the work of the schools or the rights of other students."

It is against this background that we turn to consider the level of First Amendment protection accorded to Fraser's utterances and actions before an official high school assembly attended by 600 students.

III

The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic .... It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."

These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and

classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences. In our Nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate.

The First Amendment guarantees wide freedom in matters of adult public discourse. A sharply divided Court upheld the right to express an antidraft viewpoint in a public place, albeit in terms highly offensive to most citizens. It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." *Tinker,* 393 U.S., at 508, 89 S.Ct., at 737. The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. Some students were reported as bewildered by the speech and the reaction of mimicry it provoked.

We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker,* the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondents would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicitmonologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education. Justice Black, dissenting in *Tinker,* made a point that is especially relevant in this case:

"I wish therefore, ... to disclaim any purpose ... to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students."

IV

Respondent contends that the circumstances of his suspension violated due process because he had no way of knowing that the delivery of the speech in question would subject him to disciplinary sanctions. This argument is wholly without merit. We have recognized that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions. Two days' suspension from school does not rise to the level of a penal sanction calling for the full panoply of

procedural due process protections applicable to a criminal prosecution. The school disciplinary rule proscribing "obscene" language and the pre-speech admonitions of teachers gave adequate warning to Fraser that his lewd speech could subject him to sanctions.

The judgment of the Court of Appeals for the Ninth Circuit is *Reversed*.

Resources for Participants:

Article by Guest Speaker David Hudson - Student Free Speech
https://www.mtsu.edu/first-amendment/post/138/david-hudson-student-speech-case-over-trump-t-shirt-worth-watching

Article on This Year's Judicial Case
https://www.oregonlive.com/washingtoncounty/2018/07/student_with_banned_trump_shir.html

List of Freedom of Speech Cases
https://mtsu.edu/first-amendment/encyclopedia/case/115/students-rights

* You are welcome to use any of these sources as needed to help build your case and understanding. This year you will also be able to find your own cases and provide them in your arguments as long as the cases are properly cited and referenced.