The Washington Post Print

Not safe to display American flag in American high school

By Eugene Volokh, Updated: February 27 at 2:35 pm

Today's *Dariano v. Morgan Hill Unified School Dist.* (9th Cir. Feb. 27, 2014) upholds a California high school's decision to forbid students from wearing American flag T-shirts on Cinco de Mayo. (See here and here for more on this case.)

The court points out that the rights of students in public high schools are limited — under the Supreme Court's decision in *Tinker v. Des Moines Indep. Comm. School Dist.* (1969), student speech could be restricted if "school authorities [can reasonably] forecast substantial disruption of or material interference with school activities" stemming from the speech. And on the facts of this case, the court concludes, there was reason to think that the wearing of the T-shirts would lead to disruption. There had been threats of racial violence aimed at students who wore such shirts the year before:

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. 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.

Indeed, something similar happened the day of the 2010 incident that led to the lawsuit. After the principal 2010 ordered the students to change their shirts (or to go home with an excused absence), the students got threats of violence:

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 court therefore concluded that, under *Tinker*, the principal's restriction of the students'

speech was permissible:

Here, both the specific events of May 5, 2010, and the pattern of which those events were a part made it reasonable for school officials to proceed as though the threat of a potentially violent disturbance was real. We hold that school officials, namely Rodriguez, did not act unconstitutionally, under either the First Amendment or Article I, § 2(a) of the California Constitution, in asking students to turn their shirts inside out, remove them, or leave school for the day with an excused absence in order to prevent substantial disruption or violence at school.

This is a classic "heckler's veto" — thugs threatening to attack the speaker, and government officials suppressing the speech to prevent such violence. "Heckler's vetoes" are generally not allowed under First Amendment law; the government should generally protect the speaker and threaten to arrest the thugs, not suppress the speaker's speech. But under *Tinker*'s "forecast substantial disruption" test, such a heckler's veto is indeed allowed.

The 9th Circuit decision may thus be a faithful application of *Tinker*, and it might be that *Tinker* sets forth the correct constitutional rule here. Schools have special responsibilities to educate their students and to protect them both against violence and against disruption of their educations. A school might thus have the discretion to decide that it will prevent disruption even at the cost of letting thugs suppress speech.

Yet even if the judges are right, the situation in the school seems very bad. Somehow, we've reached the point that students can't safely display the American flag in an American school, because of a fear that other students will attack them for it — and the school feels unable to prevent such attacks (by punishing the threateners and the attackers, and by teaching students tolerance for other students' speech). Something is badly wrong, whether such an incident happens on May 5 or any other day.

And this is especially so because **behavior that gets rewarded gets repeated**. The school taught its students a simple lesson: If you dislike speech and want it suppressed, then you can get what you want by threatening violence against the speakers. The school will cave in, the speakers will be shut up, and you and your ideology will win. When thuggery pays, the result is more thuggery. Is that the education we want our students to be getting?

Incidentally, a California statute, Cal. Educ. Code § 48950, seems to offer the flag-wearing students *more* protection than the First Amendment, under *Tinker*, provides:

(a) School districts operating one or more high schools … shall not make or enforce a rule subjecting a high school pupil to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus, is protected from governmental restriction by the First Amendment ….

(d) This section does not prohibit the imposition of discipline for harassment, threats, or intimidation, unless constitutionally protected ….

(f) The Legislature finds and declares that free speech rights are subject to reasonable time, place, and manner regulations.

The "time, place, and manner regulations" provision doesn't apply here, because the restriction here was justified with reference to the content of the expression (and the supposed harm that it might cause). Time, place and manner regulations must be unrelated to content, and focused instead on matters such as noise, blockage of hallways and other effects

of speech that don't stem from the message that the speech communicates. But apparently § 48950 wasn't brought up in the 9th Circuit litigation.

Thanks to Louis Bubala for the pointer to the decision.