RECENT CASES

CONSTITUTIONAL LAW — FREEDOM OF SPEECH — NINTH CIRCUIT UPHOLDS PUBLIC SCHOOL'S PROHIBITION OF ANTI-GAY T-SHIRTS. — *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir.), *reh'g en banc denied*, 455 F.3d 1052 (9th Cir. 2006), *vacated as moot*, 75 U.S.L.W. 3472 (U.S. Mar. 5, 2007) (No. 06-595).

Although the Supreme Court decades ago announced that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[1] the full extent of those rights has never been entirely clear. Recently, in *Harper v. Poway Unified School District*,[2] the Ninth Circuit addressed the limits of students' expressive freedom when it denied a preliminary injunction in a student's First Amendment challenge to his public high school's refusal to let him wear T-shirts bearing anti-gay statements. The court's approach, by focusing on the harm that statements do to listeners, risks giving school authorities wide latitude to restrict nondisruptive political speech. A better approach, and one more consistent with precedent, would be a speaker-focused intent standard, which would create neither a right not to be offended nor a right to harass.

In 2004, Tyler Chase Harper was a sophomore at Poway High School (PHS), a public school in Poway, California.[3] That year, PHS allowed the school's Gay-Straight Alliance to hold a "Day of Silence" designed to "teach tolerance of others, particularly those of a different sexual orientation."[4] Harper, on the Day of Silence, chose to wear a T-shirt to school bearing the words "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED" on the front and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" on the back.[5] He wore a similar shirt to school the next day.[6] On the second day, one of Harper's teachers noticed the shirt and asked him to remove it; Harper refused.[7] Harper was sent to the administrative office, where administrators told him

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[1] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[2] 445 F.3d 1166 (9th Cir.), *reh'g en banc denied*, 455 F.3d 1052 (9th Cir. 2006), *vacated as moot*, 75 U.S.L.W. 3742 (U.S. Mar. 5, 2007) (No. 06-595).

[3] *Id.* at 1170–71.

[4] *Id.* at 1171 (internal quotation marks omitted).

[5] *Id.* The referenced Bible passage states: "And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet." *Romans* 1:27 (King James).

[6] *Harper*, 445 F.3d at 1171. The second shirt differed from the first only in bearing the words "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" on the front. *Id.*

[7] *Id.* at 1171–72.

his shirt was inflammatory and asked him again to remove it.[8] Harper refused and was required to stay in the school's front office for the rest of the day.[9] He was not suspended or otherwise disciplined.[10]

Harper filed suit in the United States District Court for the Southern District of California alleging violations of his rights to freedom of speech and the free exercise of religion, as well as of the Establishment, Equal Protection, and Due Process Clauses.[11] Harper moved for a preliminary injunction to prevent PHS from prohibiting him from making statements similar to those at issue in the case.[12] After being denied the injunction,[13] Harper filed an interlocutory appeal.[14]

The Ninth Circuit affirmed. Writing for a divided panel, Judge Reinhardt[15] rested his analysis on *Tinker v. Des Moines Independent Community School District*,[16] which held unconstitutional a school's suspension of students who wore black armbands in protest of the Vietnam War.[17] Judge Reinhardt interpreted *Tinker* to permit restriction of student speech that "impinges upon the rights of other students" or would cause "substantial disruption of or material interference with school activities."[18] Noting the Tenth Circuit's holding that "the 'display of the Confederate flag might . . . interfere with the rights of other students to be secure and let alone,' even though there was no indication that any student was physically accosted with the flag,"[19] the panel reasoned that "Harper's wearing of his T-shirt 'colli[des] with the rights of other students' in the most fundamental way."[20]

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[8] *Id.* at 1172. The previous year's Day of Silence had spurred a number of anti-gay comments by students that provoked "a series of incidents and altercations," at least one of which was physical and several of which led to suspensions. *Id.* at 1171. As justification for its decision to prohibit the shirt, the school cited these events, as well as Harper's verbal confrontations with other students. *Id.* at 1172.

[9] *Id.* at 72.

[10] *Id.* at 1173.

[11] Harper v. Poway Unified Sch. Dist., 345 F. Supp. 2d. 1096, 1101 (S.D. Cal. 2004).

[12] *Harper*, 445 F.3d at 1173. A previous motion to dismiss by the school district was granted for all but Harper's three First Amendment claims. *Id.*

[13] *Harper*, 345 F. Supp. 2d at 1122.

[14] *Harper*, 445 F.3d at 1173.

[15] Judge Reinhardt was joined by Judge Thomas.

[16] 393 U.S. 503 (1969).

[17] *Id.* at 514. Judge Reinhardt determined that *Tinker* governed because neither party argued that Harper's speech was school-sponsored under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988); further, since *Tinker* applied, the court did not address whether Harper's speech was "plainly offensive" under *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). *Harper*, 445 F.3d at 1176 nn.14–15.

[18] *Harper*, 445 F.3d at 1177 (quoting *Tinker*, 393 U.S. at 514) (internal quotation marks omitted).

[19] *Id.* at 1178 (omission in original) (quoting West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000)).

[20] *Id.* (alteration in original) (quoting *Tinker*, 393 U.S. at 508).

Judge Reinhardt wrote that "[p]ublic school students who may be injured by verbal assaults on the basis of a *core identifying characteristic* such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses."[21] Citing law review articles and social scientific studies for the proposition that the harassment gay students suffer in school harms their educational development and self-esteem, he reasoned that *Tinker* authorizes educational administrators to prevent such harm.[22] However, he limited the court's holding to "derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation."[23]

The court went on to reject Harper's claim that the school's refusal to allow him to wear the T-shirt despite allowing the Day of Silence was unconstitutional viewpoint discrimination, holding that the First Amendment permits viewpoint discrimination in the regulation of student speech in public schools.[24] Determining that Harper was unlikely to succeed on his other claims,[25] the court upheld the district court's refusal to grant a preliminary injunction.[26]

Judge Kozinski dissented. First, he argued that Harper's T-shirt did not "materially disrupt[] classwork"[27] because the record indicated only that students had been momentarily distracted by the T-shirt.[28] Nor was Harper's conduct likely to create "substantial disorder,"[29] since the record indicated only that he had had a "peaceful" confrontation with other students.[30] Further, Judge Kozinski argued that *Tinker*'s "rights of others" language "can only refer to traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail."[31] He criticized the majority's reliance on "a few law review articles, a couple of press releases by advocacy groups and some pop psychology" as evidence that messages like the one on Harper's T-shirt would seriously interfere with the ability of gay students to learn.[32] But what most troubled Judge Kozinski was the majority's acceptance of viewpoint discrimination, which he considered the "least justifiable" method a school could use to preserve order.[33]

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[21] *Id.* (emphasis added).
[22] *See id.* at 1178–79.
[23] *Id.* at 1183.
[24] *See id.* at 1184–86.
[25] *See id.* at 1186–92.
[26] *Id.* at 1192.
[27] *Id.* at 1193 (Kozinski, J., dissenting) (alteration in original) (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 513 (1969)) (internal quotation marks omitted).
[28] *Id.* at 1193–94.
[29] *Id.* at 1194 (quoting *Tinker*, 393 U.S. at 513) (internal quotation marks omitted).
[30] *Id.*
[31] *Id.* at 1198.
[32] *Id.* at 1198–99.
[33] *Id.* at 1197.

The full circuit denied Harper's petition for rehearing en banc.[34] Judge O'Scannlain, joined by four judges,[35] dissented, arguing that the majority in *Harper* unjustifiably created a "right not to be offended" that placed "virtually unfettered discretion" in the hands of school authorities.[36] He criticized the panel for upholding viewpoint discrimination, and for "stretch[ing] mightily to characterize Harper's message as a psychological attack that might 'cause young people to question their self-worth and their rightful place in society.'"[37]

Judge Reinhardt concurred in the denial of rehearing in order to criticize the dissenters, who he said "still don't get the message — or *Tinker*!"[38] Responding to Judge O'Scannlain's claim that Harper's shirt was not a "psychological attack," Judge Reinhardt speculated that "some of us are unaware of, or have forgotten, what it is like to be young, belong to a small minority group, and be subjected to verbal assaults and opprobrium while trying to get an education in a public school."[39] Harper filed a petition for certioriari; the Supreme Court granted the petition and vacated the judgment as moot because Harper had graduated.[40]

Tinker's meaning is elusive. The Supreme Court has largely left the development of school speech law to the lower courts, addressing the issue head-on only twice since *Tinker*.[41] Even so, the weight of legal authority counsels against the *Harper* majority's approach. No court has interpreted *Tinker*'s reference to the "rights of other students" as broadly as did the *Harper* panel;[42] instead, courts almost always treat the likelihood of "material disruption" as dispositive when considering bans on political speech and symbols.[43] Although the

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[34] Harper v. Poway Unified Sch. Dist., 455 F.3d 1052 (9th Cir. 2006).

[35] Judges Kleinfeld, Tallman, Bybee, and Bea joined Judge O'Scannlain's dissent.

[36] *Harper*, 455 F.3d at 1054 (O'Scannlain, J., dissenting from denial of rehearing en banc).

[37] *Id.* (quoting *Harper*, 445 F.3d at 1178).

[38] *Id.* at 1053 (Reinhardt, J., concurring in denial of rehearing en banc).

[39] *Id.*

[40] *See* Harper v. Poway Sch. Dist., 75 U.S.L.W. 3742 (U.S. Mar. 5, 2007) (No. 06-595).

[41] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986). The Court will soon address student speech again, as it has agreed to hear *Frederick v. Morse*, 439 F.3d 1114 (9th Cir.), *cert. granted*, 127 S. Ct. 722 (2006).

[42] Indeed, one court noted that it could not find "a single decision that has focused on [the 'rights of other students'] language in *Tinker* as the sole basis for upholding a school's regulation of student speech." Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005).

[43] *See, e.g.*, Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1249 (11th Cir. 2003) (finding ban on Confederate flags constitutional where "[s]chool officials presented evidence of racial tensions existing at the school and provided testimony regarding fights which appeared to be racially based in the months leading up to the actions underlying th[e] case"); Castorina *ex rel.* Rewt v. Madison County Sch. Bd., 246 F.3d 536, 544 (6th Cir. 2001) (holding that the constitutionality of a ban on Confederate flags depended on whether "there were no prior disruptive altercations as a result of Confederate flags" and remanding for factual determination).

court in *Harper* cited the Tenth Circuit's interpretation in *West v. Derby Unified School District No. 260*[44] as support for its own, the *West* court interpreted the "rights of other students" language as essentially implicating only "material and substantial disruption[s] of school discipline."[45] Two district courts have found school policies against anti-gay T-shirts unconstitutional, at least when the schools could not point to actual disruption created by the shirts.[46] Other courts have struck down similar anti-harassment policies.[47] Courts upholding school bans on "offensive" T-shirts have usually rested their analysis on *Bethel School District No. 403 v. Fraser*,[48] which held that school bans on "lewd" or "vulgar" speech do not violate the First Amendment,[49] rather than on *Tinker*.[50]

Lower court precedent aside, the *Harper* panel's broad interpretation of the "rights of other students" seems difficult to justify as a principled reading of *Tinker*. Although the court restricted its holding to cases of "derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation,"[51] this limiting principle is problematic. It is unclear on what the court based its suggestion that its rule would protect only "historically oppressed minority group[s]," not "group[s] that ha[ve] always enjoyed a preferred social, economic and political status."[52] As Judge Kozinski wondered, "if interference with the learning process is the keystone to the new right, how come it's limited to those characteristics that are associated with minority status?"[53] The lack of clear authority for the court's protection of "historically oppressed minorit[ies]" is troubling. The Supreme Court has declared it "axiomatic" that the First Amendment prohibits "regulat[ing] speech based on its substantive content or the

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44 206 F.3d 1358 (10th Cir. 2000).

45 *See id.* at 1366 (quoting West v. Derby Unified Sch. Dist. No. 260, 23 F. Supp. 2d 1223, 1232 (D. Kan. 1998)).

46 *See Nixon*, 383 F. Supp. 2d at 973–74 (granting preliminary injunction because "defendants . . . offered no evidence of . . . circumstances that would justify a reasonable likelihood of disruption, beyond the mere fact that there [were] groups of students and/or staff that could likely find the shirt's message offensive"); Chambers v. Babbitt, 145 F. Supp. 2d 1068, 1074 (D. Minn. 2001) (holding that school's banning of "Straight Pride" T-shirt was unconstitutional, insofar as the ban was based on the shirt's "tendency . . . to offend others").

47 *See, e.g.*, Pyle *ex rel.* Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157, 170–73 (D. Mass. 1994) (invalidating dress code "aimed directly at the content of speech").

48 478 U.S. 675 (1986).

49 *Id.* at 685.

50 *See, e.g.*, Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 468–71 (6th Cir. 2000); *Pyle*, 861 F. Supp. at 168–70.

51 *Harper*, 445 F.3d at 1183.

52 *Id.* at 1183 n.28. The court chose not to decide whether "some verbal assaults on the core characteristics of majority high school students" violate the rights of those students. *Id.* at 1183 n.28.

53 *Id.* at 1201 (Kozinski, J., dissenting).

message it conveys,"[54] yet the *Harper* court upheld a viewpoint-based restriction on the ground that minority students had a "right" to such restrictions. The *Harper* court's interpretation of *Tinker* seems all the more implausible when compared with that of the Third Circuit, which, in an opinion by then-Judge Alito, relied on *Tinker* to find unconstitutional a school's harassment policy similar to the one that the *Harper* court thought *Tinker* itself *demanded*.[55]

Judge Kozinski correctly recognized that "[a]ny speech code that has at its heart avoiding offense to others gives anyone with a thin skin a heckler's veto."[56] *Harper* allows school administrators to restrict a wide range of student speech so long as they can point to a discrete group of students that might be harmed by the speech. The aim of education in a democratic society should be to produce students who not only are knowledgable and socially adjusted, but are also prepared to participate in public debate, to which free speech is essential. Judge Reinhardt himself recognized that "the public school . . . is the key to our democracy," citing the Supreme Court's declaration in *Brown v. Board of Education*[57] that a public education forms "the very foundation of good citizenship."[58] Judge Reinhardt argued, quoting *Fraser*, that "civility" is a necessary element of democracy.[59] Yet in *Cohen v. California*,[60] the Supreme Court powerfully rebutted such an argument:

> To many, the immediate consequence of . . . freedom [of speech] may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, . . . in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.[61]

Indeed, although education is essential to democracy, it also can threaten democracy if the state uses schools "to engage in a dangerous form of political, social, or moral thought control that potentially inter-

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[54] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995).

[55] *See* Saxe v. State College Area Sch. Dist., 240 F.3d 200, 202, 216–17 (3d Cir. 2001). The harassment policy overturned by the court forbade "verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment." *Id.* at 202.

[56] *Harper*, 445 F.3d at 1207 (Kozinksi, J., dissenting).

[57] 347 U.S. 483 (1954).

[58] *Harper*, 445 F.3d at 1176 (quoting *Brown*, 347 U.S. at 493) (internal quotation mark omitted).

[59] *Harper*, 445 F.3d at 1185 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986)).

[60] 403 U.S. 15 (1971).

[61] *Id.* at 24–25.

feres with . . . individual autonomy."[62] This worry was behind the first Supreme Court decision to apply the First Amendment to students in public schools, *West Virginia State Board of Education v. Barnette*,[63] which declared that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[64] While *Barnette* involved coerced speech, *Lee v. Weisman*[65] indicated that forcing students to remain silent in the face of a message conveyed by a school may in some circumstances be equivalent to requiring positive approval.[66] *Harper* risks allowing the government to impose orthodoxy in a way barred by the First Amendment.[67]

A wiser course, and one more consistent with the Court's free speech doctrine as a whole, would have been to adopt an intent standard. The Supreme Court has dealt with issues similar to those presented by *Harper* in its hate crimes jurisprudence. In *R.A.V. v. City of St. Paul*,[68] the Court struck down on First Amendment grounds a city ordinance stating that "[w]hoever places on public or private property a symbol . . . 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 . . . shall be guilty of a misdemeanor."[69] Yet, eleven years later, the Court in *Virginia v. Black*[70] found constitutional a state law making it illegal to burn a cross "with the intent of intimidating any person or group of persons."[71] The Court distinguished the Virginia statute from the ordinance in *R.A.V.* on the grounds that the statute required an intent to intimidate, rather than mere knowledge that the action at issue might arouse resentment, and that the statute

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[62] Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 67 (2002).

[63] 319 U.S. 624 (1943).

[64] *Id.* at 642.

[65] 505 U.S. 577 (1992)

[66] *Id.* at 593.

[67] Furthermore, as Judge Kozinski opined, it is problematic to argue that tolerance is best achieved by silencing the intolerant. *See Harper*, 445 F.3d at 1197 (Kozinski, J., dissenting). And even those who accept the legitimacy of imposing tolerance through censorship should be skeptical of the *Harper* court's approach. Actions like the school's in *Harper*, to the extent that some people will see them as illegitimate attempts by government to enforce one way of thinking, could actually undermine the goal of promoting tolerance. *See, e.g.*, Kenneth Lasson, *Political Correctness Askew: Excesses in the Pursuit of Minds and Manners*, 63 TENN. L. REV. 689, 731 (1996) (arguing that "campus speech codes will not end campus racism, but may in fact exacerbate the very tensions they seek to alleviate").

[68] 505 U.S. 377 (1992).

[69] *Id.* at 380.

[70] 538 U.S. 343 (2003).

[71] *Id.* at 348.

did not "single out for opprobrium only that speech directed toward 'one of the specified disfavored topics.'"[72]

An analogous approach in *Harper* would have been to hold that where speech does not create material disruption or substantial disorder, the school may nonetheless prohibit it as interfering with the "rights of others" if it is *intended* to demean or harass other students, without limiting this prohibition to speech directed against certain specified groups. Such an approach would have alleviated Judge Kozinski's concern that harassment law is compatible with the First Amendment only when "limited to situations where the speech is so severe and pervasive as to be tantamount to conduct."[73] An intent standard would give school officials the ability to regulate abusive speech without granting them "unfettered discretion" or creating a "heckler's veto." It would also avoid the line-drawing problem of determining what counts as a minority group, since it would allow the school to prohibit speech intended to harass any student regardless of whether the speaker based his harassment on a "core identifying characteristic." Although courts may have to give some deference to school authorities in determining whether students have hostile intents, they should ensure that schools do not act under a presumption that students expressing unpopular viewpoints intend to intimidate.[74]

There are good reasons to think Judge Reinhardt is right that history will perceive the gay rights movement the same way it perceives other civil rights struggles.[75] But the rights of gay students, though powerfully suggested by the situation in *Harper*, were not directly present in the case, which centered upon a dispute between a student and school authorities over the student's right — protected by the Constitution — to advocate his political and moral beliefs, however retrograde those beliefs may appear to others. In the absence of evidence of hostile intent toward individual students, it is unwise to strip this speech of its presumptive protection.

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[72] *Id.* at 362 (quoting *R.A.V.*, 505 U.S. at 391).

[73] *Harper*, 445 F.3d at 1198 (Kozinski, J., dissenting). Judge Kozinski cited Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992), one of the most well-known arguments that some harassment law violates the First Amendment. Professor Volokh recommends that the constitutional line be drawn between "directed" and "undirected" harassing speech, *id.* at 1843–71, an approach that has much in common with the intent standard suggested here. *See also* Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/archives/archive_2006_04_16-2006_04_22.shtml#1145577196 (Apr. 20, 2006, 20:53 EST) (calling the *Harper* majority's endorsement of viewpoint discrimination "a dangerous retreat from our tradition that the First Amendment is viewpoint-neutral").

[74] A plurality in *Black* concluded that the part of Virginia's cross-burning statute providing that burning a cross was sufficient to infer an intent to intimidate was unconstitutional. *Black*, 538 U.S. at 364 (opinion of O'Connor, J., joined by Rehnquist, C.J., and Stevens and Breyer, JJ.).

[75] *See Harper*, 445 F.3d at 1181 (likening the contemporary political and social debate over homosexuality with the civil rights era debate over racial equality).