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Tinkering with the Rights of Others: *Harper v. Poway Unified School District* 445 F.3d 1166 (9th Cir. 2006)

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At issue before the Ninth Circuit in *Harper v. Poway Unified School District*[1] was whether the Southern District of California correctly denied a preliminary injunction requested by Tyler Harper,[2] a Poway public high school student seeking to compel his school to allow him to wear a hand-made t-shirt condemning homosexuality."[3] Harper claimed that any school action restraining him from wearing such clothing violated his constitutional rights to freedom of speech, freedom of religious exercise, and freedom from state establishment of religion.[4] In a 2-1 decision the Ninth Circuit affirmed the district court's order denying the student's motion for a

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1 445 F.3d 1166 (9th Cir. 2006), *reh'g en banc denied*, 455 F.3d 1052 (9th Cir. 2006).

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

3 *Harper*, 445 F.3d at 1170-71. Harper's shirts contained the slogans "I will not accept what God has condemned," "Homosexuality is shameful Romans 1:27," and "Be ashamed, our school embraced what God has condemned." *Id.* at 1171.

4 *Id.* at 1173. Harper originally alleged federal Equal Protection and Due Process claims which did not survive a motion to dismiss. *Id.*

preliminary injunction and ruled that Harper failed to prove a likelihood of success on his Free Speech, Free Exercise, and Establishment Clause claims.[5]

Poway High School allowed one of its student organizations to organize an in-school demonstration designed to "teach tolerance . . . of those of a different sexual orientation."[6] The school had experienced heightened tensions among the student body in a similar demonstration during the previous school year.[7] On the day of the demonstration, and the day immediately following the demonstration, Poway student Harper chose to wear hand-made shirts bearing slogans expressing his strongly held religious belief that homosexuality was immoral.[8] After his classroom teacher sent him to discuss his shirt with school officials, Harper spent the rest of the day in the office.[9] While detained there, Harper discussed the shirt with the school principal and two assistant principals.[10] The school administration did not force him to remove the shirt.[11] Instead, they required that he remain in the office for the remainder of the school day and directed him to leave school grounds immediately after the final class period.[12] They also instructed Harper not to wear the shirt or any like it on school grounds again.[13] The school chose

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[5] *Id*. at 1171.

[6] *Id*.

[7] *Id.* at 1171-72.

[8] *Id.* at 1171.

[9] *Harper*, 445 F.3d at 1172.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

not to take any formal disciplinary action against Harper, and he maintained a respectful and courteous demeanor throughout his stay in the school office.[14]

Because Harper's three claims survived a motion to dismiss, he was assumed to have shown the irreparable harm necessary to obtain a preliminary injunction.[15] To complete the analysis, the court analyzed each of his claims in turn to determine if the lower court abused its discretion in ruling that Harper was not likely to succeed on any of his constitutional claims.[16]

I. Freedom of Speech Claim

The Ninth Circuit affirmed the lower court's ruling that Harper was not likely to succeed on the merits of his free speech claim.[17] Writing for the majority, Judge Reinhardt began the free speech analysis with the observation that Harper's slogans were precisely the sort of speech that would enjoy the protection of the First Amendment outside of the school setting.[18] However, "in light of the special characteristics of the [public] school environment[,]"[19] free speech analysis within the school setting is governed by a separate test, enunciated in *Tinker v. Des Moines Independent Community School District*.[20] Under *Tinker*, "a school may regulate student speech

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[14] *Id.* at 1173.

[15] *Harper,* 445 F.3d at 1174.

[16] *Id.*

[17] *Id.* at 1175.

[18] *Id.* at 1176.

[19] *Id.* (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988)).

[20] 393 U.S. 503 (1969). *Harper,* 445 F.3d at 1176. The court chose not to apply *Hazelwood's* test for student speech because the speech at issue here was clearly not school sponsored.

that would 'impinge on the rights of other students' . . . [or] . . . result in 'substantial disruption of or material interference with school activities' without violating a student's free speech."[21] After finding that *Tinker's* "rights of others" prong embodies a right of students to be "secure and let alone" in a psychological as well as a physical sense,[22] the court concluded that Harper's speech failed the first prong and was open to regulation by school officials.[23] Recognizing a problem with a holding construing *Tinker* to allow regulation of *any* student speech that could be classified as "offensive," the court expressly limited its holding to instances of derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation."[24] Because the court found Harper's speech wanting under the "rights of others" prong of *Tinker*, it chose not to review the district court's ruling that the speech was also open for regulation under the "substantial disruption" prong.[25]

II. Free Exercise Claim

Harper, 445 F.3d at 1176, 1176 n.15. Additionally, the court chose not to address whether Harper's speech was "plainly offensive" under *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986), because it determined the free speech claim on the basis of *Tinker*. *Harper*, 445 F.3d at 1176 n.14.

[21] *Harper*, 445 F.3d at 1177 (quoting *Tinker,* 393 U.S. at 509, 514).

[22] *Id.* at 1177.

[23] *Id.* at 1183.

[24] *Id.* at 1182-83 ("Engaging in controversial political speech, even when it is offensive to others, is an important right of all Americans and learning the value of such freedoms is an essential part of a public school education . . . . Limitations on student speech must be narrow, and applied with sensitivity and for reasons that are consistent with the fundamental First Amendment mandate . . . .").

[25] *Id. at* 1183-84.

The court also determined that the school did not violate Harper's free exercise rights, even under strict constitutional scrutiny.[26] Recognizing that a proper free exercise analysis of the school's prohibitions would begin with the resolution of which level of constitutional scrutiny to apply, the Ninth Circuit concluded that even under the strict scrutiny test of *Sherbert v. Verner*,[27] no constitutional violation occurred.[28]

Under *Sherbert*'s strict scrutiny test, "state action that substantially burdens a religious belief or practice must be justified by a compelling state interest and must be narrowly tailored to serve that interest."[29] The court reasoned that, under strict scrutiny, no student has the right to engage in the disruptive practice of continuously proclaiming his religious beliefs throughout the school day, even if the tenants of his religion direct him to do so.[30] In addition, Harper was not punished for his actions and was not required to denounce his religious beliefs in any way.[31] Observing the absence of any of these restraints on Harper's religious exercise, the court concluded that his religious exercise was not substantially burdened, and, therefore, the school's actions passed strict scrutiny under the Free Exercise Clause.[32]

III. Establishment Clause Claim

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[26] *Id.* at 1190.

[27] 374 U.S. 398 (1963).

[28] *Harper*, 445 F.3d at 1187-88.

[29] *Id.* at 1186 (quoting *Sherbert*, 374 U.S. at 402-03).

[30] *Id.* at 1188-89.

[31] *Id.* at 1188.

[32] *Id.* at 1190.

The court dealt swiftly with Harper's establishment claim, choosing to recognize it as little more than an attempt to re-form his free exercise claim under the guise of the Establishment Clause.[33] Under both the coercion test of *Lee v. Weisman*[34] and the *Lemon* test,[35] the court found that the school's conduct was constitutionally permissible because it was based on the entirely secular purposes of promoting tolerance among the student body and maintaining a safe learning environment.[36]

With Harper's free speech, free exercise, and establishment claims all addressed in favor of the School District, the Ninth Circuit ruled that the lower court did not abuse its discretion in denying Harper's motion for a preliminary injunction and affirmed the lower court's opinion that Harper was unlikely to succeed on the merits of each of these claims.[37]

IV. Criticisms of *Harper*

In dissent, Judge Kozinski argued vigorously against the majority's conclusion that Harper's speech failed the "rights of others" prong of the *Tinker* analysis for three reasons. First, he took issue with the majority's claim that the slogans were plainly injurious to homosexual students by pointing out that no party in the case attempted to argue or prove this point.[38] Because this assertion would require specific proof before the court, the majority's unquestioned

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[33] *Id.*

[34] 505 U.S. 577 (1992).

[35] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[36] *Harper*, 445 F.3d at 1191.

[37] *Id.* at 1192.

[38] *Id.* at 1199 (Kozinski, J., dissenting).

assumption of these facts was improper.[39] Second, Judge Kozinski attacked the majority's decision to limit its "rights of others" analysis to derogatory statements made toward minority students.[40] He pointed out the problems of classification associated with having to determine which students enjoy minority status.[41] Finally, he observed that the net result of the majority's ruling was to allow school officials the power to suppress controversial or unpopular opinions on hotbed political issues.[42]

Underlining all of Judge Kozinski's attacks on the majority opinion was his telling observation that the ruling was "entirely a judicial creation" with "no anchor anywhere in the law."[43] The majority freely admitted as much in distinguishing Harper's slogans from other seemingly similar slogans based on political preference ("Young Republicans Suck"),[44] or possibly even gender.[45] This is not to say that the majority's distinctions are absent any basis whatsoever. In fact, Judge Reinhardt consistently pointed to the potential for serious psychological harm to homosexual students as the rationale behind anchoring the school's

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[39] *Id.*

[40] *Id.* at 1200-01.

[41] *Id*. at 1201 ("In defining what is a minority – and hence protected – do we look to the national community, the state, the locality or the school? . . . And at what level of generality do we define a minority group?").

[42] *Harper*, 445 F.3d at 1201

[43] *Id*.

[44] *Id.* at 1182.

[45] *Id.* at 1183 n.28.

actions into *Tinker's* "rights of others" prong which includes the right "to be secure and to be let alone."[46]

The problem with the majority's argument is that its chain to the "right to be let alone" anchor is constructed of observations concerning the human psyche which are sufficiently outside the bounds of a court's psychological expertise to warrant an ample level of judicial restraint. While it is hard to fault the court for wanting to prevent possible psychological damage to vulnerable students, its willingness to engage in the quasi-medical analysis that its policy-making opinion requires is troubling, especially where opposing rights of a Constitutional magnitude are at stake. The halls of our legislative and administrative bodies, including our school boards, are filled with policy makers tasked with the responsibility of debating the medical and social necessities of policies like the one the Ninth Circuit has attempted to institute in this case. Ironically, it is the free speech to which students like Harper are entitled which often serves to fuel these debates.

[46] *Id.* at 1177-80.