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Forum

School Suppression

By G. Arthur Meneses

It has always struck me as somewhat anomalous that our most important rights are set forth in succinct and ill-defined terms, but that we painstakingly detail every conceivable aspect of other laws that are, by comparison, relatively pedestrian. Take, for example, the so-called “freedom of speech,” which is fully and completely set out in just 10 words: “Congress shall make no law ... abridging the freedom of speech.” Compare this with, say, the Internal Revenue Code, which details such vitally important concepts as the limitations on the use of cash accounting in the ornamental tree industry over the course of several pages, complete with definitions of terms, special rules and numerous subparts. 26 U.S.C. Section 448.

Aside from being a sad reflection on our true priorities as a society, this circumstance also leaves us relatively uncertain about the true extent and meaning of our “rights.” The fact is that although our legislators may spend considerable time scratching out the finer points of income tax law for obscure and exotic businesses, the lawmaking that shapes our everyday lives is crafted by a handful of judges holding lifetime appointments. Although we are taught that our rights emanate from broad concepts of natural law, the opinions of those judges often reflect merely the collective reactionary sense of things at any given moment. This phenomenon is aptly illustrated by the 5th Circuit Court of Appeal’s recent decision in *Ponce v. Socorro Independent School District*.

In *Ponce*, a high school sophomore kept a notebook diary written in the first person in which he described the “author’s” creation of a pseudo-Nazi group, its commission of violent acts against homosexual and minority students and a plan to commit Columbine-type shootings at several schools on his graduation day years later. The sophomore told another student about the notebook and showed him some of its contents.

The other student told a teacher, who in turn told an assistant principal. The assistant principal first questioned the informing student and then met with the author, who denied

making any threats and claimed the writing was a work of fiction. The assistant principal called the student’s mother, who also maintained the notebook was fiction and explained that she too engaged in creative writing. The assistant principal found the notebook alarming, determined that it posed a “terroristic threat” and suspended the student for three days and recommended he be placed in the school’s alternative education program. The local police arrested the student but did not bring any charges against him. Fearing that the referral to the alternative education program would affect the student’s ability to gain admission to the college of his choice, his parents sued the district under 42 U.S.C. Section 1983.

The trial court issued a preliminary injunction, finding that the school district had failed to justify the student’s discipline by showing “facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.” This was the standard for restricting student speech set by *Tinker v. Des Moines Indep. Comty. School District*, 393 U.S. 503 (1969). The 5th Circuit reversed and, relying on the Supreme Court’s recent decision in *Morse v. Frederick*, 127 S.Ct. 2618 (2007), held that “speech advocating a harm that is demonstrably grave and derives that gravity from the ‘special danger’ to the physical safety of students arising from the school environment is unprotected.”

In so holding, the court in *Ponce* embraced the notion that there is something unique about the school setting that elevates the risk of harm to students and that in turn, warrants a special rule. This is understandable given the recent years of highly publicized school violence, which the court in *Ponce* specifically identified as the motivation for its holding. What is less understandable is the reason for departure from the more objectively verifiable standard of *Tinker* that focuses on a “reasonable forecast” of “substantial disruption of or material interference with school activities.”

In *Morse*, the Supreme Court approved the suspension of a student who unfurled a banner that read “Bong Hits 4 Jesus” at a school function. In *Ponce*, the 5th Circuit noted that

the Supreme Court’s holding in *Morse* was limited, and that it stood as precedent only as to speech that advocated drug use or other illegal activities and provided no support for restricting speech that could plausibly be interpreted as commenting on social issues. The 5th Circuit even reiterated Justice Samuel Alito’s concern that the holding in *Morse* would be “extended to other kinds of regulations of content.” Despite this, the 5th Circuit found no incongruity in doing just that by finding that the fictional account before it fell well within permissible restriction of speech under the First Amendment.

The court in *Ponce* even went so far as to reject the application of the *Tinker* standard to fictional accounts of violence as had occurred in *Boim v. Fulton County School District*, 494 F.3d 978 (11th Cir. 2007). In *Boim*, the 11th Circuit had no difficulty in finding that a student’s fictional account of her shooting her sixth-period math teacher “clearly caused and was reasonably likely to further cause a material and substantial disruption to the ‘maintenance of order and decorum’” at her school. The court in *Ponce* said that this threat, which was “relatively discrete” and “directed at adults,” did “not amount to the heightened level of harm” that was the focus of the majority in *Morse* and that “the harm of a mass school shooting is, by contrast, so devastating and so particular to schools that *Morse* analysis is appropriate.”

Zero tolerance is an anomaly. We are by law a tolerant nation, or at least we are supposed to be. When we react to perceived threats, however, we sometimes show our willingness to tolerate less freedom, less clarity and less understandable rules. What someone thinks or imagines may well reflect what that person is capable of actually doing. On the other hand, it may not. Requiring schools to demonstrate a reasonable basis for believing that speech has or will substantially disrupt its functions seemed a rational way to describe the extent of our tolerance in that context. Leaving such determinations to the opinion of the reader seems significantly less so, and reflects a sense that it is truly the content of that speech that is at issue, not the heightened risks of harm affiliated with the circumstances in which that speech is expressed.

G. Arthur Meneses is an associate in the Los Angeles office of Liebert Cassidy Whitmore, a labor, education and employment law firm that represents management.