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The Public School and Freedom of Speech - Student Newspapers

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"The best test of truth is the power of the thought to get itself accepted in the competition of the market." This concept, from an early case involving freedom of speech, has recently been asserted in the federal courts by students of public high schools and state supported universities and colleges. Litigation by students against school authorities has increased rapidly within the last several years, and the occasional instances of censorship or suppression of student expression have provided the courts with new problems in the application of First Amendment rights.

The censorship of student publications, whether distributed under academic auspices or without official sanction, presents a conflict between the traditional legal attitudes toward school authority and the constitutional guarantee of freedom of speech. The law has historically exhibited great restraint and unwillingness to interfere when presented with a conflict involving school disciplinary action. This reluctance was expressed in an early case as follows:

... the maintenance of discipline, the upkeep of the necessary tone and standards of behavior in a body of students in a college ... is a task committed to the faculty and officers, not to the courts. It is a task which demands special experience, and is one of much delicacy ... .

In addition to the lack of expertise of the courts in dealing with school disciplinary problems, as expressed above, other reasons for this judicial reluctance have been given. (1) Courts have been influenced by what has been called a "contract theory." This theory assumes that when a student enters an educational institution, he impliedly promises to obey all rules and regulations and thus contracts away any substantive constitutional rights he may later wish to assert. (2) Attendance at a public educational institution has been considered a privilege conditioned upon the waiver of constitutional rights. (3) Finally, educational institutions have been said to stand "in loco parentis." Thus, the

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3 We do not concern ourselves here with the problem of teachers, non-students or the students of private institutions engaged in the same activities on public school property. While many of the same considerations would be applicable, the ultimate decision in cases of this type would not depend upon factors relevant to public school students.
5 This theory was described in an early case as follows: Every student, upon his admission into an institution of learning, impliedly promises to submit to ... all necessary and proper rules and regulations which have been, or may thereafter be adopted for the government of the institution .... State v. White, 82 Ind. 278, 286 (1882).
6 See North v. Board of Trustees, 37 Ill. 296, 27 N.E. 54 (1891). The classic application of this idea was in Anthony v. Syracuse University, 224 App. Div. 487, 231 N.Y. Supp. 435 (1928), which upheld the dismissal of a female student for not being a "typical Syracuse girl."
school is deemed to occupy the place of the parent while the student is attending classes, and the school authorities may then justifiably impose any rule or regulation with the same discretion as the parent.\(^7\)

So far as these concepts may have formerly justified school authorities in arbitrarily denying freedom of speech to students, they seem to have been rendered ineffectual by a recent decision of the Supreme Court. In *Tinker v. Des Moines Independent Community School District*,\(^8\) several high school students had worn black armbands in school to protest the hostilities in Viet Nam and to publicize their support for a truce. This action was taken several days after the school board had adopted a rule forbidding the students from wearing armbands in school. Violators were to be requested to remove them, and if they refused, were to be suspended from school. The petitioning students were sent home and forbidden from returning wearing the armbands. They sought an injunction to restrain the school authorities from so punishing them. The District Court dismissed the complaint\(^9\) after an evidentiary hearing and the U.S. Court of Appeals for the Eighth Circuit affirmed without opinion.\(^10\)

The Supreme Court held that wearing the armbands as a method of protest was "closely akin to 'pure speech'"\(^11\) and thus entitled to full protection under the First Amendment. It held this protection applicable to the situation, saying:

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.\(^12\)

The court rejected the lower court finding that the school authorities had acted reasonably because of a fear of a disturbance caused by the armbands. A fear or apprehension of disruption is not sufficient to overcome the right to freedom of expression, and the decision could not be upheld without a finding that:

... the exercise of the forbidden right would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school...'.\(^13\)

The District Court had made no such finding and the decision was reversed.

\(^7\) In Gott v. Berea College, 156 Ky. 376, 379, 161 S.W. 204, 206 (1913), the court said:

College authorities stand "in loco parentis" concerning physical and moral welfare... of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere... .

\(^8\) 393 U.S. 503 (1969).


\(^10\) 383 F.2d 988 (8th Cir. 1967).


\(^12\) 393 U.S. 503, 506 (1969).

\(^13\) 393 U.S. 503, 509 (1969).
The standard expressed in *Tinker* was expressly adopted from *Burnside v. Byars*, an earlier decision of the U.S. Court of Appeals for the Fifth Circuit made on similar facts. Although the Supreme Court has held in other controversies that denial of freedom of expression requires an "imminent danger of disruption," this standard was not used in deciding either *Tinker* or *Burnside*. It appears, however, that the result reached was the same as if the same test had been utilized. In *Tinker* the court emphasized that merely a fear or apprehension of disruption would not be sufficient to justify the denial of free expression, but that a determination that the expression would materially disrupt the operation of the school was necessary. This determination would require some foreseeability of disruption amounting to more than a fear or apprehension, and the requirement would seem to reach substantially, if not exactly, the same result as the "imminent danger" test. Thus, even though the test was not expressed as in previous non-school-related First Amendment cases, an imminent danger of substantial disruption seems to be almost a requirement to denial of student expression.

The *Tinker* case has thus far been applied by the courts to cases involving student expression with varying results. In *Zucker v. Panitz*, the right of students to buy an advertisement in their school newspaper expressing their opposition to the war in Viet Nam was held protected. The court refused to justify the school officials' action of censoring the advertisement and held that a commitment by the administrators to publish the paper also imposed an obligation to respect the students' freedom of expression. The case interpreted *Tinker* broadly enough to extend beyond black armbands to reach and protect expression in officially sanctioned school newspapers.

An underground newspaper distributed on campus which berated the student-body for apathy and urged them to "stand up and fight" the school admin-
istration by seizing campus buildings was held not protected in Norton v. East Tennessee State University Disciplinary Committee.\textsuperscript{20} The U.S. Court of Appeals for the Sixth Circuit affirmed a District Court decision which held the suspension of the offending students justifiable. The court noted that the language used in the literature was "an open exhortation to the students to engage in disorderly and destructive activity"\textsuperscript{21} and that, in view of the inflammatory nature and disruptive characteristics of the student expression, the school authorities could reasonably forecast, as required by Tinker, that it would cause disturbances and disorder. The court said:

It is not required that the college authorities delay action against the inciters until after the riot has started and the buildings have been taken over and damaged.\textsuperscript{22}

However, the court did not examine the specific circumstances surrounding the words to determine if there was any reasonable basis, outside of the expression itself, for the forecast of disruption. Mr. Justice Celebrezze vigorously dissented because of this omission. He said:

The pamphlets were not distributed in any angry crowd or in the wake of prior disturbances, but on campus of presumably tempered and rational students, and should therefore be read as merely "advocating," not "inciting," unlawful activities.\textsuperscript{23}

It is submitted that in rejecting mere fear of disruption and requiring a finding that a reasonable forecast of disruption be made, the Supreme Court in Tinker precluded censorship based solely upon the words used. The determination that a disturbance will result would seem to require a weighing of the circumstances surrounding the expression, and thus, in Norton, the court's omission resulted in a proscription of speech in a manner inconsistent with Tinker.

This conclusion is supported by a recent Seventh Circuit opinion, Scoville v. Board of Education of Joliet Township High School District 204.\textsuperscript{24} In that case several high school students were disciplined for circulating an underground newspaper which, in several articles, criticized school officials and their policies. The literature said that the Senior Dean of the school had a "sick mind" and urged the students to refuse to accept or destroy any notices distributed to them by the school in the future. Prior to the Tinker decision and on appeal from an order granting a motion to dismiss, the court held that the words used were inherently disruptive as a matter of law and thus refused to allow an evidentiary hearing to determine the imminence of possible disruption presented by the words. After the Tinker decision was rendered, the court granted a rehearing en

\textsuperscript{21} Id.
\textsuperscript{22} Id. at 2318.
\textsuperscript{23} Id.
\textsuperscript{24} 286 F. Supp. 988 (N.D. Ill.), aff'd 415 F.2d 860, reversed on rehearing, No. 17190 (7th Cir., April 1, 1970).
banc and reversed. It held that Tinker requires some inquiry into the facts surrounding student expression to justify denial of free speech and that the result of that inquiry must support a reasonable forecast that the words "would substantially disrupt or materially interfere with school procedures." The court said:

We conclude that absent an evidentiary showing, and an appropriate balancing of the evidence by the district court to determine whether the Board was justified in a ‘forecast’ of the disruption and interference, as required under Tinker, plaintiffs are entitled to the declaratory judgment, injunctive and damage relief sought.25

Thus the interpretation given the Tinker case in Scoville is substantially at variance with that given it in Norton v. East Tennessee State University Disciplinary Committee.26

Student newspapers distributed on the campus of a public educational institution represent expression that can perform a valuable service to the learning process of students as well as to society as a whole. In 1966, a group of educators met in Washington, D.C., under the auspices of the American Association of University Professors and drafted a joint statement on the rights and freedoms of students for recommended adoption by school authorities. Article IV, Section D, pertaining to student publications reads, in part, as follows:

Student publications and the student press are a valuable aid in establishing and maintaining an atmosphere of free and responsible discussion and of intellectual exploration on the campus. They are a means of bringing the students' concerns to the attention of the faculty and the institutional authorities and of formulating student opinion on various issues on the campus and in the world at large.27

The preservation of the value of free expression of opinion in public schools is dependent upon judicial action which accurately balances the harm resulting from the denial of free speech against the gravity and imminence of the disruption of school activity. The inconsistent manner of application of the Tinker decision indicates the existence of a hesitance to afford students full freedom of expression within the confines of constitutional standards as set out by the Supreme Court. Because of this, students, who have recently become so adept at asserting their rights within the accepted channels of adult society, will probably continue to strive for a less confining standard and more liberal construction of the constitutional guarantee of freedom of expression.

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25 Id.