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Freedom of Expression in the Public Schools

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Freedom of Expression in the Public Schools

Petitioners, following a plan formulated by their parents and other students, wore black armbands to school in protest against the war in Vietnam. Several days earlier, the school board had adopted a policy[1] providing that any student wearing an armband in school would be asked to remove it, and upon failing to do so, would be suspended from school until he returned without it. As a result of this policy, the petitioners were suspended from school. A federal district court dismissed a complaint[2] in which petitioners sought nominal damages and injunctive relief.[3] The court found that the action of the school authorities was constitutional, being reasonable to prevent disruption of the school's function. The Court of Appeals for the Eighth Circuit affirmed without opinion.[4] The United States Supreme Court granted certiorari.[5] *Held, reversed*: An expression of opinion by students in public school which does not materially and substantially interfere with appropriate discipline in the operation of the school is entitled to the protection of free speech afforded by the first amendment, and may not be prohibited by public school officials because of an undifferentiated fear or apprehension of disturbance. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

I. The Power of School Authorities To Regulate Student Conduct

Historically, judicial review of the regulatory and disciplinary acts of school authorities has been limited to a determination of whether the officials have exceeded their authority or have abused their discretion.[6] School regulations have been upheld on the mere finding that a rational basis existed for their adoption.[7] Likewise, the legitimate authority of school officials has been held to encompass the discipline of students and the limitation of their activities in the interest of maintaining the "singleness of purpose" of running a school.[8] Under this "abuse of discretion" test, the courts have upheld regulations prohibiting membership in school fraternities,[9] the wearing of cosmetics,[10] the wearing of long hair by male

[1] The Court refers to the banning of the armbands both as a *policy* and as a *regulation*. The term *policy* is probably the more appropriate of the two in that the prohibition was directed toward a specific program of protest (*i.e.*, the wearing of armbands in connection with the Vietnam protest).

[2] The complaint was filed by petitioners, through their fathers, under 42 U.S.C. § 1983 (1964).

[3] Tinker v. Des Moines Ind. Community School Dist., 258 F. Supp. 971 (S.D. Iowa 1966).

[4] Tinker v. Des Moines Ind. Community School Dist., 383 F.2d 988 (8th Cir. 1967).

[5] Tinker v. Des Moines Ind. Community School Dist., 390 U.S. 942 (1968).

[6] Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923); Leonard v. School Comm. of Attleboro, 349 Mass. 704, 212 N.E.2d 468 (1965). Both cases concerned dress regulations, holding that review by the court is limited in view of the school board's broad discretionary powers and that the court will not pass on the wisdom or desirability of a school regulation, but merely on whether the board has exceeded its authority.

[7] Board of Directors v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967).

[8] Waugh v. Board of Trustees, 237 U.S. 589 (1915).

[9] *Id.*

[10] Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923).

students,[11] the wearing of "freedom buttons,"[12] and the participation by married students in extracurricular activities.[13]

Restrictions of this type have been based on two premises. The first is the obvious necessity of maintaining order in the school.[14] The second is the concept that school attendance is not a right, but a privilege, and that compliance with rules and regulations established by school authorities is a condition of attendance.[15]

Public school pupils have been acknowledged to retain their constitutional rights while in school.[16] Nevertheless, most cases have not dealt with the conflict between the constitutional rights of public school students and the authority of school officials to maintain discipline. With the exception of several recent cases,[17] this is particularly true with respect to the right of free speech or free expression guaranteed by the first amendment. The extent to which students in public schools are protected in the exercise of their right to free expression cannot be determined without considering the power of a state to protect valid governmental interests. There can be no valid governmental interest in the suppression of free expression itself. However, this does not mean that free expression cannot be curtailed in the course of protecting an otherwise valid governmental interest. The United States Supreme Court has held that when speech and nonspeech elements are combined in one course of conduct, a sufficiently important governmental interest affected by the nonspeech element can justify regulation of the speech element of the same activity.[18]

It is evident that there is a valid governmental interest in operating a school and in maintaining appropriate discipline therein. However, in order to curtail conduct which contains speech as well as nonspeech elements, it apparently must be shown that the governmental interest cannot be protected unless the activity is curtailed. This apparent standard often has been applied in cases involving picketing[19] and other forms of conduct containing both speech and nonspeech elements.[20] When "pure" speech is involved, however, the limits of permissible regulatory power are more narrow and the danger to the governmental interest must be more apparent than when speech and nonspeech elements combine.[21]

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[11] Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968).

[12] Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966).

[13] Board of Directors v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967).

[14] Waugh v. Board of Trustees, 237 U.S. 589 (1915); Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966).

[15] Waugh v. Board of Trustees, 237 U.S. 589 (1915).

[16] West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Meyer v. Nebraska, 262 U.S. 390 (1923).

[17] Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

[18] United States v. O'Brien, 391 U.S. 367 (1968).

[19] Teamsters Union v. Vogt, Inc., 354 U.S. 284 (1957); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Hague v. CIO, 307 U.S. 496 (1939).

[20] United States v. O'Brien, 391 U.S. 367 (1968); Adderley v. Florida, 385 U.S. 39 (1966); Brown v. Louisiana, 383 U.S. 131 (1966).

[21] Feiner v. New York, 340 U.S. 315 (1951); Terminiello v. Chicago, 337 U.S. 1 (1949); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

The test of a regulation curtailing the constitutional rights of public school students is one of balancing the authority of the school officials to maintain order and discipline, and the constitutional rights of the students. If the exercise of an individual's constitutional rights materially and substantially disrupts the operation of the school, the exercise may be validly regulated or curtailed by school authorities.[22] *Burnside v. Byars*[23] and *Blackwell v. Issaquena County Board of Education*,[24] two cases decided by the Court of Appeals for the Fifth Circuit on the same day, applied this "material and substantial disruption" test. Both cases involved the right of public school students to wear "freedom buttons" in school. That right was upheld in *Burnside* but was denied in *Blackwell*. The opposite holdings were the result of different degrees of disruption. In *Burnside* there was no evidence of disruption of school activities or harassment of other students. However, in *Blackwell* the students who wore the buttons harassed those who did not and tried to force others to wear the buttons. In upholding the right to wear the buttons, the court, in *Burnside* held that school officials may not infringe on students' rights of free expression unless the exercise of those rights materially and substantially interferes with the discipline required in operating the school.[25]

II. TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT

In *Tinker*[26] the Supreme Court held that an expression of opinion by public school students which does not materially and substantially interfere with appropriate discipline in the operation of the school is protected by the first amendment and may not be prohibited by school officials because of an undifferentiated fear or apprehension of disturbance. In so holding the Court did not establish any radically different rules regarding the rights of students, but rather, applied pre-established constitutional doctrine to the immediate fact situation. The Court reaffirmed the principle that students retain their constitutional rights while in school. The wearing of armbands was found to be "symbolic speech," entitled to first amendment protection. Although the Court did find that the armbands would cause controversy, it did not find that the activity in this instance

[22] Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966). The disruption test has been applied often in the past, although it has not always been expressly applied. In some cases applying the "abuse of discretion" test (*see* note 6 *supra*, and accompanying text) the power of school officials to prevent disruption has been presumed to be a part of their discretionary powers. Most of the earlier cases dealt with matters of dress which were not considered in a free expression context, or at least not to the degree the wearing of armbands was considered as free expression in *Tinker*. Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503, 508 (1969); Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923); Leonard v. School Comm., 349 Mass. 704, 212 N.E.2d 468 (1965).

[23] 363 F.2d 744 (5th Cir. 1966).

[24] 363 F.2d 749 (5th Cir. 1966).

[25] Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966), cited in *Tinker* at 393 U.S. at 505. One type of disruption which has been held to be within the scope of regulation is that not created by the acts of the students being regulated but rather, disruption caused by other students hostile to them. In this respect, *see* Justice Tuttle's dissenting opinion in Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968), in which he states that the offending students should be restrained, *not* those students who are exercising their rights. Although this case involved personal appearance, the opinion is equally applicable to cases involving conduct in a purely expressionary sense.

[26] Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503 (1969).

was of such a disruptive nature, interfering with the work of the school or with the interest of the other students in being left alone, as to justify curtailment.[27] The Court noted that fear of controversy was the prime motivating factor behind the school board's action in prohibiting the armbands. This factor was not considered to be a valid basis for establishing the policy. The Court stated that the risk of controversy is an inherent part of the right of free speech,[28] and found that mere controversy does not conflict with the purpose of education. Indeed, the Court stated that one of the integral parts of school attendance is personal intercommunication between the students,[29] and that controversy is part of the process of education. The Court held that intercommunication is not limited to a particular place within the school, except as is necessary for maintaining proper discipline. However, the Court did affirm the principle that expression materially disrupting classwork, creating disorder, or invading the rights of other students, may legitimately be curtailed.[30]

The Court did not set forth any clear guidelines with respect to the extent to which school authorities may take action to *prevent* disruption. Although the Court has made it clear that physical disruption of school activities may be prohibited, and that action may be taken to prevent such disruption, it merely held that an undifferentiated fear or apprehension of disorder will not justify such a prohibition. Moreover, the Court did not define "undifferentiated fear or apprehension." This standard creates a problem which is illustrated by the *Burnside* and *Blackwell* cases, both of which were cited by the Court. In these cases, the actions of the school officials were very similar before the buttons were worn. The distinction, if any, was that in *Blackwell* there had been some small disorder before the prohibition took effect. Nonetheless, the prohibitions by the school officials involved in those cases were upheld and overruled, respectively, on the basis of what took place *after* the students violated the prohibition. The result was that two prohibitions, seemingly alike on their faces, and promulgated by similar fears on the part of school authorities were later reviewed apparently in light of what actually developed, instead of in terms of what might reasonably have been expected to happen, a result the Court seems to approve in the instant case. Although the Court found in *Tinker* that the school board had no reason to anticipate substantial disruption and prohibited the armbands in an attempt to avoid controversy, it did not set forth a clear standard by which to measure the validity of prohibitory measures.[31]

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[27] The Court seemed to be influenced in its decision by the fact that the particular act of wearing armbands had been singled out for prohibition. The Court noted that other forms of political expression, such as political buttons worn during national political campaigns, had not previously been prohibited.

[28] The Court cited Terminiello v. Chicago, 337 U.S. 1 (1949), which held that free speech serves its best and highest purpose when it causes controversy, and even anger.

[29] Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503, 512 (1969).

[30] *See* Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

[31] In a concurring opinion, Mr. Justice Stewart stated that he could not share the Court's assumption that children's first amendment rights are co-extensive with those of adults. 393 U.S. 503, 515. In a dissenting opinion, Mr. Justice Black felt that diverting the minds of school students