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The Court and Classroom

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Laws making it an offense for a seventeen year old to be “idle” or “immoral” or “disruptive” or “truant” raise very serious questions about the extent to which young people, as a systematically discriminated against minority, have been denied equal protection of the law. Such intolerably vague restrictions . . . represent tenacious efforts of parents, police and teachers to trap the energies of youth in a grid of adult expectations that have denied any sense of growth or life. . . . As Berger says in HAIR they're busted for their beauty!

This comment explores one particular area where the energies of youth are meshed into the web of adult expectations—the secondary schools. The focus is on the validity of this totalitarian system in view of the first amendment's guarantee of freedom of expression. It will be seen that only now, as our society approaches its two-hundredth anniversary, are the courts shifting from recognition of the states' power to compel conformity into a new and genuine concern for full, affirmative protection of the student's right to express his beliefs.

**Today's Youth and Their Schools**

The high school students of today are the youth who witnessed the fervent hope for a free and open society that was born with the Civil Rights movement of the 1960's. Yet, in their short span of life, they have seen the assassinations of three national leaders who embodied this promise of democracy for all. Today, war is for them more than another television shoot 'em up enjoyed during the evening meal. It is a frightening reality as the Doomsday of draft age approaches. Still young themselves, they have watched the nation shift from the youthful sense of unlimited expectations to the middle age habit of assessing and conserving old strengths and former gains.

Fed by the mass media, urged by parents and teachers to inquire, the students of today are sensitive to this larger world—as no other generation. Yet, for them, the typical school environment—with its goal of producing competent college board test takers, with its student council that fulfills its social duty by planning proms, with its newspaper that highlights class elections and football games—is totally inept for developing awareness and compassion for the world of real life.

Not only does the typical school system stifle the student's sensitivity to society, but it inhibits awareness of the inner world of self. As an able commentator has written:

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In adolescence they are trying to realize and clarify their identity; the school acting as a mobility ladder, assumes instead the function of inducing them to change or alter it. They want to discover who they are; the school wants to help them "make something of themselves." They want to know who they are; the school wants to help them get somewhere. They want to learn what is right for them; the school wants to teach them to give responses that will earn them rewards in the classroom or social situation.\(^8\)

The assertion that today's typical educational system stifles personal and social awareness is perhaps best illustrated by the reaction of local school boards to high school underground newspapers. Thirteen students from Long Beach High in New York City sought permission to distribute their fledgling newspaper, *Frox*, on the campus. The written request to the school board included promises "to refrain from obscenity" and "to publish views in opposition to our own."\(^4\) Standing squarely for freedom of expression, the local board responded: "It is the aim of our high schools to encourage students to freely express themselves, in writing or otherwise, as part of their educational experience."\(^5\) The board followed its policy of encouraging expression by feeling "compelled" to refuse the request to distribute *Frox*. The board added that disciplinary action was forthcoming if the students flaunted the decision.\(^6\)

In San Jose, California, the Campbell Union High School District banned the student published *Del Mar Free Press* which presented a *pot-pourri* of social and political commentary. The school district maintained that it had the right to control the ideas children are exposed to while in school.\(^7\) "The molecular structure of the students' minds will be disturbed if confronted with outside ideas covered by the newspapers."\(^8\)

John Freedberg, a student in a Seattle high school was a consistent honor student, one of three chosen by the faculty as "outstanding students." Three months before graduation, John was suspended for editing and publishing a mimeographed newspaper which expressed opposition to "the war" as well as to adult reaction to long hair. Ironically, in his junior year, Mr. Freedberg was selected regional winner of the Veterans of Foreign Wars' essay contest "What Democracy Means to Me."\(^9\)

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8 E. FREIDENBERG, COMING OF AGE IN AMERICA, 170 (1965).
6 Id.
6 Id.
7 A three judge panel of the United States Federal District Court in San Francisco, California, recently struck down the school's contention in Rowe *v.* Campbell Union High School District.
The grooming codes of the high school world are, of course, but another reflection of the regulations which stifle student expression and exploration. This comment, having alluded to the repressive and stifling nature of secondary education will now explore the remedies which the first amendment provides for the student who seeks to explore and assert his social and personal consciousness in the face of inhibiting restrictions on student behavior.


Conflicts over the validity of school regulations date back at least to 1870. These early cases held that the courts had no jurisdiction over the internal operations of the states' school systems. Because the courts were reluctant to intervene, the power of the state in the field of education was, in effect, absolute. This attitude of judicial non-intervention began to subside when, in the 1920's, some benches recognized that the courts have a legitimate function in reviewing state education regulations. However, even in such "progressive" jurisdictions the power of the state to control the school environment was, in effect, unimpeded. These courts held that if there was any reasonable relation between the rule and a legitimate educational purpose, the regulation was valid.

The plenary power of the state was so thoroughly accepted that the issue of the applicability of constitutional guarantees was not even raised in these early cases. Constitutional litigation was discouraged even at the university level by a judicial attitude that attendance at a public institution was a privilege which might be

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10 Farber, The Student As Nigger, L.A. Free Press, March 3, 1967, at 8, col. 21. "Then there is the infamous code of dress! In some high schools if your skirt looks too short, you have to kneel before the principal, in a brief allegory of fallatio. If the hem doesn't reach the floor, you go home to change. Boys in high school can't be too sharp. You'd think the school board would be delighted to see all the spades trooping to school in party shoes, suits and ties. Uh-uh, they're too visible."

11 See Hodgkins v. Rockport, 105 Mass. 475 (1870). Hodgkins held that the court has no jurisdiction to review the acts, in good faith, of the school board in matters affecting discipline. The court let stand the expulsion of a boy whose behavior was "[N]ot mutinous or gross... but consisted of... carelessness of posture in his seat... [and] tricks of playfulness... Id. at 475.


conditioned on the waiver of constitutional liberties. A typical statement of this attitude appears in an old Illinois decision upholding the regulation requiring student attendance at weekly chapel services:

By voluntarily entering the university, or being placed there by those having the right to control him, he necessarily surrenders very many of his individual rights. How this time shall be occupied; what his habits shall be; his general deportment; . . . his hours of study and recreation—in all these matters, and many others, he must yield obedience to those who, for the time being, are his masters.

In 1943, the decision of Board of Education v. Barnette indicated that the courts were at long last willing to accord some constitutional protection to high school students. In Barnette, students challenged a state statute which compelled pupils to salute the American flag in a prescribed manner. The petitioners alleged that the regulation abridged their freedom to worship in that their religious beliefs forbade homage to temporal objects. In addressing the issue of whether courts could and should intervene when liberty in public secondary schools is threatened, Mr. Justice Jackson, speaking for the Court, said: "We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed." The decision continued:

School boards have important, delicate, and highly discretionary functions, but none that they may not perform within the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

This sweeping language, on its face, strongly supports the proposition that high school students are thoroughly protected by the first amendment. Yet, Barnette was destined to mean little more

15 Hamilton v. Regents of Univ. of Calif., 293 U.S. 245 (1934) (The Court upheld the dismissal of members of a religious group who refused to participate in military training).
16 North v. Bd. of Trustees, 137 Ill. 296, 306. 27 N.E. 54, 56 (1891). In Tinker v. Des Moines Ind. School Dist., 393 U.S. 503 (1969) and W. Va. Bd. of Education v. Barnette, 319 U.S. 624 (1943), the Court narrowly interpreted Hamilton and related cases. It rejected arguments that the Court accepted the doctrine that attendance at a public secondary institution may be conditioned on a waiver of constitutional rights.
17 319 U.S. 624 (1943).
18 A stiff arm salute was required. The saluter raised his right hand with palm turned upward, a style peculiarly analogous to a salute favored by the Fascist states of Europe.
20 Id. at 637.
than educational regulations may be struck down when violative of the free exercise and establishment clauses.\textsuperscript{21}

Within a year of \textit{Barnette}, the same high court decided \textit{Prince v. Massachusetts}\textsuperscript{22} and dealt with the specific issue of the right to exercise religious convictions in the face of child labor laws. Here the Supreme Court said that, even where there is an invasion of protected freedoms, "... the power of the state to control the conduct of children reaches beyond its powers over adults ..."\textsuperscript{23} Although the case did not involve the rights of students in the secondary school environment, \textit{Prince}'s significance was that it held that children are not equals under the first amendment. The lower courts took \textit{Prince} as a cue authorizing continued state treatment of school children as second class citizens. Subsequent decisions held that the primary freedom in public schools was that of school administrators from judicial interference. Expounding the pre-\textit{Barnette} rationale, state restrictions on student conduct were upheld if there was any reasonable relation between the regulation and a legitimate educational purpose. Under this reasonable relation test, the Massachusetts Supreme Court in \textit{Leonard v. School Committee}\textsuperscript{24} upheld the suspension of a pupil for failure to comply with the board's rule regarding the "proper" length of hair. After paying lip service to the concept of student rights, the court cited the reasonable relation test and held in favor of the state, commenting:

\begin{quote}
[The unusual hair style of the plaintiff could disrupt and impede the maintenance of a proper classroom atmosphere or decorum. ... Any unusual, immodest, or exaggerated mode of dress or conspicuous departures from accepted customs in the matter of haircuts could result in the distraction of other pupils.\textsuperscript{25}
\end{quote}

In view of the long line of cases on the matter, it was quite reasonable for one commentator to conclude, in 1968, that secondary students are not, by law, proper subjects for constitutional protection, including those first amendment protections in the area of expression.\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{22} 321 U.S. 158 (1944).
\item \textsuperscript{23} Id. at 170.
\item \textsuperscript{24} 349 Mass. 704, 212 N.E.2d 468 (1965). The most recent case cited was \textit{Antell v. Stokes}, 287 Mass. 103, 191 N.E. 407 (1934), which upheld a ban on secret fraternities.
\item \textsuperscript{25} Id. at 709-10, 212 N.E.2d at 472 [emphasis added]. Cf. Raywid, \textit{The Great Haircut Crisis of Our Time}, 48 \textit{Phi Delta Kappan} 150, 153 (1966), where the author, a teacher, suggests that something may be wrong with any teacher whose classroom control breaks down over a haircut and odd clothes.
\item \textsuperscript{26} Comment, \textit{Developments-Academic Freedom}, 81 \textit{Harv. L. Rev.} 1045 (1968).
\end{itemize}
Finally, in February of 1969, the law took a significant step toward affirmative extension of constitutional guarantees to high school students. In *Tinker v. Des Moines Independent School District*, the Supreme Court, for the first time, upheld the position of a high school student solely on a freedom of expression basis. In *Tinker*, primary and secondary students sought injunctive relief against enforcement of a rule prohibiting the wearing of armbands while on campus. The challenged regulation was promulgated in response to information that students planned to wear black armbands to protest the Vietnam War.

The claimed personal right was that of symbolic speech while the state claimed plenary power to regulate student conduct. Speaking through Mr. Justice Fortas, the Court ruled in favor of the students. *Tinker* explicitly held: that the power of the state to regulate education is not absolute; that young people do not forfeit those fundamental liberties guaranteed by the Bill of Rights merely because of their status as students; and, that students are very much entitled to constitutional protection of freedom of expression. Resurrecting *Barnette*, the Court said:

It can hardly be argued that either students or teachers shed their Constitutional rights to freedom of speech at the school house gate. . . . In our system, state operated schools may not be enclaves of totalitarianism. . . . Students in school as well as out of school are "persons" . . . possessed of fundamental rights which the state must respect. . . . In our system, students may not be regarded as closed circuit recipients of only that which the state chooses to communicate. They may not be confined to the expression of those sentiments which are officially approved . . .

Thus, the *Tinker* court clearly recognized that the Constitution does in fact protect the high school student in his exercise of symbolic expression. Yet, in spite of the sweeping language on student rights and the first amendment, *Tinker* is limited by its facts. Justice Fortas excluded from the decision the most controversial areas of student exercise of non-vocal expression, stating: "The problem posed by the present case does not relate to the regulation of length of skirts or type of clothing, to hair style or deportment." Nevertheless, the lower courts are construing *Tinker* as a mandate to extend

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28 Id. at 507.  
29 Id. at 511.  
30 Id. at 506.  
31 Id. at 511.  
32 Id. at 507.
the first amendment's guarantees to all areas of non-vocal, non-intimidating expression.

**AFTERMATH OF TINKER**

*The Extent of a High School Student's Freedom of Expression—Symbolic Expression and the Press*

Today, in the aftermath of *Tinker*, the legal system is moving to accord full judicial protection to the right of high school students to symbolically communicate ideas. It is, of course, well established that symbolic expression is a right entitled to first amendment protection. As stated in *O'Brien v. United States*:

"[I]t has long been recognized that symbolic expression may be protected speech." Thus, *Tinker*’s significance in the area of symbolic expression is that the right of symbolic expression is now recognized to extend to the student in his educational environment. Although *Tinker* held that students have the right to symbolically communicate an idea, the Court failed to set a standard for determining what constitutes symbolic expression.

Unfortunately, other free speech decisions have likewise neglected to articulate a guideline for finding symbolic expression. The question has instead been resolved on a case by case basis. However, a careful reading of these cases suggests that courts find symbolic expression when communication is accomplished by passive, yet assertive, non-verbal conduct. In *Stromberg v. California*, where the court held that the display of a red flag was symbolic expression, the communication—opposition to the established government—was accomplished by the non-verbal conduct of displaying a red flag. In *Board of Education v. Barnette*, where the court held that the refusal to salute the flag was symbolic conduct, the communication—that the law of God is superior to the laws of temporal government—was accomplished by the non-verbal conduct of refusing to salute the flag. In *O'Brien v. United States*, where the burning of a draft card was recognized as symbolic expression, the communication—the draft and the war are illegal and immoral—was accomplished by the non-verbal conduct of burning a draft card. In *Tinker*, the communication—the War is immoral—was accomplished by the non-verbal conduct of the wearing of black armbands. Such decisions

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33 376 F.2d 538 (1st Cir. 1967).
34 Id. at 541. See also Adderly v. Florida, 385 U.S. 39 (1966), and Cox v. Louisiana, 379 U.S. 236 (1965).
35 283 U.S. 359 (1931).
36 319 U.S. 624 (1943).
37 376 F.2d 538 (1st Cir. 1967).
infer, then, that symbolic expression is defined as communication accomplished by passive, yet assertive, non-verbal conduct.

Today, the question of symbolic expression in the school is most often raised regarding long hair and unconventional dress. If symbolic expression may be defined as communication accomplished by means of non-verbal conduct, as suggested above, such unconventional appearance is arguably expression protected by the first amendment. Shaggy hair and nonconforming clothes may be a non-verbal means of communicating hostility towards the school administration, or a non-verbal means of communicating rejection of traditional views and values of society. Thus, because shaggy hair and freaky clothes may communicate by non-verbal conduct, such conduct is, by the proposed definition, symbolic expression protected by the first amendment.

This argument finds support in *Richards v. Thurston*. Here, a student was suspended on the sole ground that he refused to have his hair cut “in a tidy style that Albert Einstein as a scholar or master rarely displayed.” Although the court ruled for the student on other grounds, it noted that the right to wear one’s hair as he pleases might be described as one of the aspects of freedom of expression: The court then said: “[This] is the right symbolically to indicate his association with some of the younger generation in expressing their independent aesthetic and social outlook and their determination to reject many of the customs and values of the older generation.”

Some decisions entirely avoid the issue of whether long hair or unconventional dress is symbolic expression. Instead, these courts simply hold that a student’s choice of appearance is a highly protected right under the Constitution.

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39 304 F. Supp. 449 (D. Mass. 1969). This opinion includes the statement: “This court takes judicial notice that hair styles have altered from time to time throughout the ages. Samson’s locks symbolically signified his virility. Many of the Founding Fathers of this country wore wigs. President Lincoln grew a beard at the suggestion of a female admirer. Chief Justice Hughes’ beard furnished the model for the frieze over the portico of the Supreme Court of the United States proclaiming equal justice under the law! Today many of both the younger and older generations have avoided the increased cost of barbering by allowing their locks or burnsides to grow to greater lengths than when a haircut cost a quarter of a dollar.” *Id.* at 451.

40 *Id.* at 455.

41 *Id.* at 455.

42 See *Sims v. Colfax Community School Dist.*, 307 F. Supp. 485 (S.D. Iowa 1970); *Richards v. Thurston*, 304 F. Supp. 449 (D. Mass. 1969); *Breen v. Kahl*, 296 F. Supp. 102 (W.D. Wis. 1969). See also *Dunham v. Pulsifer*, 312 F. Supp. 411 (D. Vt. 1970), where the court said: “The cut of one’s hair is more fundamental to personal appearance than the type of clothing he wears. Garments can be changed at will whereas hair, once it is cut, has to remain constant for substantial periods of time. In addition to manifesting basic personality traits, hair style has been shadowed
In Griffin v. Tatum, which involved the issue of a student's right to wear long hair, the court stated:

Although there is disagreement over the proper analytical framework, there can be little doubt that the Constitution protects the freedom to determine one's own hair and otherwise to govern one's personal appearance. Indeed, the exercise of these freedoms is highly important in preserving the vitality of our traditional concepts of personality and individuality. . . . [T]his court finds and concludes that the imposition of the hair length rule to this plaintiff to the point of suppression infringes upon fundamental substantive liberties . . . .

It is, then, unsettled whether the wearing of long hair and nonconforming dress is symbolic speech entitled to first amendment protection.

Today, however, the trend is definitely toward full judicial recognition of the right of the high school student to symbolically assert his beliefs. Tinker and the earlier decision of Burnside v. Byars firmly establish that the wearing of armbands, political buttons and analogous symbols by the student is entitled to first amendment protection. A recent decision indicates that the courts are willing to fully apply the right of symbolic expression to high school students. In Frain v. Baron, students refused to stand and pledge allegiance to the flag in ceremonies at the beginning of the school day. These refusals were not based on religious grounds as in Barnette, but on the basis that the phrase "with liberty and justice for all" is not true in America today. One student testified: "As for the pledge: I believe it is untrue and I refuse to swear to a lie." The court, in accordance with the trend towards full protection of student rights held that the state's attempt to coerce participation,

with political, philosophical and ideological overtones and as such has been afforded a measure of the protection given these underlying beliefs." Id. at 419.

44 Id. at 62.
49 Id. at 29.
by excluding non-participating students from the area in which the ceremonies were held, was unconstitutional. The court, citing *Brown v. Louisiana*\(^5\) and *Tinker*, held that the Constitution's protection of non-verbal expression applied to these students. Thus, even the student's right to exercise symbolic expression in the form of active conduct, as distinguished from the passive wearing of symbols, is sometimes protected by the first amendment.

As the courts move to accord full constitutional protection to the right to symbolically communicate expression, the courts are likewise recognizing the right of students to disseminate ideas in the press. The initial decision for the recognition of the first amendment rights of students to utilize the official high school press is *Zucker v. Panitz*.\(^6\) Here, the school newspaper solicited advertisements and was otherwise a forum for expression. Basing its decision on the first and fourteenth amendments, *Zucker* upheld the right of the student petitioners to publish paid advertisements denouncing the war in Vietnam. *Zucker*'s implication is, of course, quite clear—a student newspaper must be open to all viewpoints, not solely to the opinions of those in control.

The first amendment rights of students to publish and distribute underground newspapers is likewise being established. In *Sullivan v. Houston Independent School District*,\(^7\) students edited and published an off-campus newspaper critical of school officials and their policies. Ostensibly, the students were suspended because the papers appeared in classrooms causing interruptions in class procedure. The court, after finding that the interruptions were minor and few in number, ordered reinstatement of those suspended. Noting that the conduct was first amendment activity in its purest form, *Sullivan* held that the constitutional right of free speech includes the rights of students to publish and distribute off-campus newspapers. *Sullivan* further ruled that distribution may occur on school premises so long as it does not unreasonably interfere with school activities.

Apparently noting *Sullivan*'s recognition of the right to publish and distribute off-campus newspapers, a Connecticut school district enacted a regulation requiring administrative approval before literature was distributed on school grounds. In *Eisner v. Stamford Board of Education*,\(^8\) the District Court struck down the measure on the basis that such a regulation is "... a classic example of prior re-

\(^{50}\) 383 U.S. 131 (1968).
straint of speech and press which constitutes a violation of the First Amendment...  

Limitations on the Exercise of Protected Expression—Tinker’s "Material and Substantial Disruption" Test

In view of the preceding discussion of Tinker and subsequent decisions, it is evident that the legal system is overcoming its past reluctance to extend the right of freedom of expression to high school students. However, the secondary student's right to free expression is, like the adult's right to free expression, subject to limitation.

Against a sweeping declaration of the high school student's rights under the first amendment, the Tinker Court acknowledged the need for limited state control of expressive conduct in the public schools. The Court noted that free speech is subject to reasonable restrictions as to time, place, manner and duration. Tinker recognized that where the student, in the exercise of first amendment rights, collides with the rules of the school authorities, the law must balance the competing interests. In announcing the point at which the scale tips in favor of the regulation of expression, the Court said:

[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others, is... not immunized by the constitutional guarantee of freedom of speech.

Thus, although a student's expression is a recognized first amendment right, whether a student's exercise of this right is protected depends upon Tinker's material and substantial interference test. Unfortunately, Tinker's application of this standard was limited to the unique factual situation of black armbands. As a result, there is today no definite guide for determining when expressive activity constitutes a material and substantial disruption of the educational process. At this time, then, the issue must be resolved solely on a case by case basis. However, Tinker and the few cases on student rights that follow Tinker do provide a basic guide for determining when expressive conduct cannot, by constitutional standards, materially and substantially interfere with the process of

54 Id. at 834. See also Lovell v. Griffin, 303 U.S. 44 (1938); Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931).
56 393 U.S. 503, 512-13.
57 Id. at 513.
education. The guideline indicated by these cases falls into the following categories:

1) "Speech" expressing opinions on highly controversial issues facing society. Tinker firmly establishes the rule that the educational establishment may not restrict student speech merely because it expresses opinions on issues which face the general society. The prohibition exists even when the subject matter of the speech involves highly controversial issues. The Court said that the student "...may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially' interfering with appropriate discipline in the operation of the school."58

2) Expression critical of school administration and regulations. Schwartz v. Schuker59 indicates that expression which is critical of school administration and school regulations is not, in itself, a "substantial and material" interference with the educational process.60 In Schwartz, a student's suspension was related to his publication and distribution of a newspaper criticizing the principal as "a big liar" and a "racist." The Court, citing Cox v. State of Louisiana61 noted that "...there is no constitutional right to suppress or censor speech or expression even though it may be hateful or offensive to those in authority or opposed by the majority."62

3) Apprehension of the breakdown of authority. Apprehension that the school's authority will be undermined by allowing students to exercise rights of non-vocal expression was rejected as a basis for limiting student expression in Griffin v. Tatum.63 Here, school authorities expressed a fear that school discipline would be seriously curtailed if the court ruled in favor of allowing the students to

58 Id.
62 298 F. Supp. 238, 242 (E.D.N.Y. 1969). The human propensity to curb unwanted criticism has long been noted by the theorists of freedom of expression. Thus, John Stuart Mill, early in his essay On Liberty, remarked: "The disposition of mankind, whether as rulers or as fellow citizens, to impose their own opinions and inclinations as a rule of conduct on others is so energetically supported by some of the best and some of the worst feelings incident to human nature that it is hardly ever kept under restraint by anything but want of power; and as the power is not declining but growing, unless a strong barrier of moral conviction can be raised against the mischief, we must expect, in the present circumstances of the world, to see it increase." J. S. MILL, ON LIBERTY 18 (Liberal Arts Press 1956).
“cultivate indecent hair styles.”64 Griffin ruled that such an apprehension does not justify a restriction of student rights. The court further noted that such an argument can be made in favor of any school rule and if accepted would effectively eliminate the concept of student expression. Chief Judge Johnson added: “So far as the education of young people is concerned it is important for them to appreciate the present vitality of our proud tradition that although we respect government in the exercise of Constitutional powers, we jealously guard our freedom from all attempts to exercise unconstitutional powers.”65

4) Apprehension of disruption. Administrative apprehension that some students might take physical action against students who express conflicting views is not a valid basis for a finding of a material and substantial disruption of the educational process. Griffin, citing Cooper v. Aaron,66 said: “This court recognizes that the threat of mob violence is no excuse for the failure of the court . . . to protect the Constitutional rights of private citizens.”67

Akin to this rule of Griffin is the concept expressed in Tinker that fear of general disorder is not a ground for limiting a student’s peaceful exercise of first amendment rights. The Tinker Court said: “Any word spoken in class, in the lunchroom, or on the campus, that deviates from the views of another person, may start an argument or cause a disturbance. But our Constitution says we must take this risk.”68 It may, then, be said that tolerance of the unrest intrinsic to expression is constitutionally required even in the schools.

THE TROUBLE WITH TINKER

There are, then, judicial guidelines for determining when expression cannot be found to materially and substantially interfere with the process of education. However, the fact remains that there is no definite standard for determining when expressive activity does materially and substantially interfere with the educational process. If this standard is allowed to remain in its present nebulous state, then the secondary student’s right of expression is forever threatened.

This danger is well illustrated by Scoville v. Board of Education.69 Here, two students were expelled for distributing a publica-

64 Id. at 63.
65 Id.
69 415 F.2d 860 (7th Cir. 1969). This is the advance sheet citation of the case.
tion entitled *Grass High*. *Grass High* contained poetry, essays, movie and record reviews. Included was an editorial written in response to the school administration’s pamphlet which explained the function of the school and attendance regulations. The editorial criticized the pamphlet’s value and urged students to refuse to accept or destroy “all propaganda” published by the school. Then, “... the utterly idiotic and asinine procedure parents must go through to assure that their children will be excused for their absences”70 was attacked. The editorial continued with an accusation that the senior dean had a “sick mind” and concluded with the observation that “... our whole system of education with all its arbitrary rules and schedules seems dedicated to nothing but wasting time.”71

As a result of the publication of *Grass High*, the two editors were expelled for the remainder of the school year. The expelled students brought suit for injunctive relief charging that the disciplinary action violated their right of free expression. The District Court ruled the students’ action amounted to a material and substantial disruption of the educational process and as such was not entitled to first amendment protection. This decision was rendered in spite of the fact that there were no allegations that the distribution of *Grass High* caused any disturbances, commotion or disruption of classes!

By the Seventh Circuit’s 1969 standards, *Webster’s Third New International Dictionary* is obviously mistaken in its definition of the terms “material” and “substantial.” According to *Webster* “material” means “... of great consequence...”72 and “substantial” means “... real, true ...”73 In view of the application of the *Tinker* test to the facts of *Scoville* and the resultant decision, the Seventh Circuit had other definitions in mind.

*Scoville* most certainly illustrates the threat to the high school student’s right to expression presented by the present, undefined meaning of the material and substantial disruption standard.74 Per-

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70 415 F.2d 860, 863.
71 Id.
72 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1392 (1966).
73 Id. at 2280.
74 *Scoville* does not stand alone in its questionable application of the *Tinker* standard. See *Gfell v. Rickelman*, 313 F. Supp. 364 (N.D. Ohio 1970), where the court upheld a school rule regulating the length of hair on the basis that it prevented safety hazards, led to the maintenance of discipline and order, and aided in the teaching of “proper” growing discipline and etiquette! See also *Corley v. Daunhauer*, 312 F. Supp. 811 (E.D. Arks. 1970), where the court upheld a school rule regulating the length of hair for band members on the basis that bands are characterized by regimen-
haps Tinker’s test is, as are so many judicial tests, not amenable to further clarification and, as such, must remain subject to a case by case interpretation. However, as a result of Tinker’s vagueness, student rights are forever threatened by de facto conspiracies of those student administrators and judges who seek to suppress free expression in the high schools.

That there are administrators who seek to suppress such expression may surely be inferred from the numerous cases which face the issue of restrictions on student conduct. That there are jurists who feel that student expression is undesirable and who, as a result, will deny the right to such conduct is perhaps most clearly illustrated by Stevenson v. Wheeler County Board of Education. Here the court said:

Among the things a student is supposed to learn in school . . . is a sense of discipline . . . . By accepting an education at public expense pupils at the elementary or high school level subject themselves to considerable discretion on the part of the school authorities as to the manner in which they deport themselves. Those who run the schools should be the judges in such matters not the courts. The quicker judges get out of the business of running schools the better . . . .

Our courts and, indeed, our society must reject the attitude of Stevenson. We cannot abandon the schools to those administrators who will oppress expression, even that expression which is purely symbolic. To allow oppression of such speech is to encourage the existence of an academic vacuum, an environment void of the exchange of views and the interplay of ideas—an environment denying the opportunity for full personal growth. To tolerate oppression of speech, merely because the speech occurs in the schools, is to tie
the cloak of dull conformity around our youth. To allow suppression of speech in the schools is to clog that safety valve that free expression provides. To allow oppression of responsible student expression is to deny that right which is the foundation stone of the Bill of Rights—the right to freedom of expression as guaranteed by the first amendment. And, indeed, to deny freedom of expression is to deny one of the basic tenets of our society. As aptly stated by Mr. Justice Holmes in 1919:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundation of their conduct that the ultimate good desired is better reached by free trade of ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their work can be safely carried out. That, at any rate, is the theory of our Constitution.

Indeed, then, it is imperative that the courts strictly construe the material and substantial disruption test of Tinker against restrictions on student expression. “That they are educating our young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach the young to discredit important principles of government as mere platitudes.”

TINKER’S IMPLICATIONS

How are the courts to meet the expressed necessity of fully protecting peaceful, orderly and effective expression while at the same time insuring that the school is able to fulfill its function of edu-

80 See Meyer v. Nebraska, 262 U.S. 390 (1923), where Mr. Justice McReynolds expressed this society’s repudiation of the principle that a state might conduct its schools so as to foster a homogenous people. He said: “In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching on the relation between the individual and the state are wholly different from those upon which our institutions rest: and, it will hardly be affirmed that our Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.” Id. at 402.


82 The right of the individual to freedom of expression has deep roots in our history. The concept as we know it today is essentially a product of the great intellectual and social movement beginning with the Renaissance which transformed the Western world from a feudal and authoritarian society to one whose faith rested upon the dignity, reason and freedom of the individual. See Z. CHAFFE, FREE SPEECH IN THE UNITED STATES (2d ed. 1941).

83 Abrams v. United States, 250 U.S. 616, 630 (1919) (Dissenting opinion).

cating the young within the traditional curriculum? This comment submits that a careful analysis of the language and facts of Tinker, itself, provides a very definite guide for resolving the problem "... where students in their exercise of First Amendment rights collide with the rules of school authorities."85

As previously discussed, Tinker protects expression in class and out, until that time when it "... materially disrupts classwork or involves substantial disorder or invasion of the rights of others."86 There are decisions involving the issue of the right to symbolically express an idea which might indicate that Tinker gave judges free discretion to determine when symbolic expression materially interfered with schoolwork.87 Tinker, however, said that it is difficult, if not impossible, for a court to justify a finding that mere symbolic expression, unaccompanied by other expressive conduct, materially hampers classroom and school functions. Tinker cited with definite approval Burnside v. Byars88 which decided the issue of the right of black students to symbolically communicate criticism of segregation and racism in the State of Mississippi. In spite of the tension created by the wearing of buttons advocating integration during a period of severe racial disturbances, the District Court held the expression was protected.

The court said that it does not seem likely that pure symbolic expression, unaccompanied by other conduct, would ever hamper the schools in carrying out its activities. Symbolic expression, Burnside noted, "... is certainly not in the class of those activities which inherently distract students and break down the regimentation of the classroom."89 Tinker, then, by its recurring approval of Burnside holds that pure symbolic expression—buttons, armbands, long hair, unconventional dress, medallions—enjoys virtual absolute constitutional protection where the form of the expression is not obscene.90

In cases where the asserted right to expression involves more than pure symbolic expression, the place where the conduct occurs weighs heavily in the result. States, through their school boards, may legitimately prohibit such active expression in the classroom itself. Such conduct may be a material disruption of and bring substantial disorder to instruction where free expression of thought is not considered beneficial to the traditional, structured learning process. As Tinker noted, through Burnside, expression which in-

86 Id. at 507.
87 See note 74 supra.
88 363 F.2d 744 (5th Cir. 1966).
89 Id. at 748.
herently disturbs students and breaks down the regimentation of classwork "... carrying banners, scattering leaflets, speechmaking—has no place in the orderly classroom."\textsuperscript{91}

Where the asserted right to expression involves more than pure symbolic expression and takes place away from the immediate classroom area, students are constitutionally protected in many forms of expression. Tinker recognized that an important part of the school's function is to accommodate personal intercommunication among the students. As such, the student's rights do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during authorized hours, he may express his opinions.\textsuperscript{92} This right vanishes only when the limits of the Tinker standard are reached. But, what is the guide for determining when the expression "... involves substantial disorder or invasion of the rights of others?\textsuperscript{93} The answer lies in the application of the law, facts and principles of analogous Supreme Court decisions to cases involving student right to expression. That it is proper to apply the law and facts of such decisions to cases involving secondary school students is demonstrated by Tinker's strong statement that "... it can hardly be argued that... students... shed their Constitutional rights to freedom of expression at the schoolhouse gate."\textsuperscript{94} That it is appropriate to apply decisions involving the right of adults to expression to cases involving secondary students is demonstrated by the fact that the grounds of secondary schools are but a microcosm of our society. Here, during the lunch hour and activity periods, students intermingle with one another and bring into conflict the clash of the same prejudices, beliefs, fears and hopes found in total society.

The fictitious case of Dellinger v. Lemon County School District provides an illustration of the proposed approach—the application of analogous Supreme Court decisions to cases involving students' right to expression. During the lunch hour of October 32, 1970, Rennie Dellinger spoke to a group of his classmates sitting on the senior lawn. Rennie denounced the school board's policy of inviting army recruiters to address school assemblies. Rennie pointed out that representatives of the Committee to Combat Facism were refused permission to enter the campus to offer draft counseling services. Rennie then led his classmates in a chorus of "Alice's Restaurant" and chants of "One, two, three, four—we don't want your bloody war." At this point, the principal appeared and suspended

\textsuperscript{91} 363 F.2d 744, 748 (5th Cir. 1966).
\textsuperscript{93} Id. at 513
\textsuperscript{94} Id. at 506.
Rennie for his “immature, outrageous, boisterous and disorderly conduct.” Thereafter, Rennie brought suit to enjoin enforcement of the principal’s action.

The court, citing *Tinker*, said that the right to expression is protected even on the school grounds. *Dellinger* then addressed itself to the issue of whether Rennie’s expressive conduct was protected speech. The court rejected Lemon County’s contention that Rennie’s conduct, by its boisterous nature, was substantially disruptive of the peaceful atmosphere of the school. In rendering its decision, *Dellinger* relied on *Cox v. Louisiana* where the Supreme Court overturned the conviction of the petitioner’s breach of the peace. As Cox denounced the existence of discrimination in the community of Baton Rouge, Rennie Dellinger denounced an existing condition in the community of his school. As Cox loudly expressed his discontent by speaking and leading a large crowd in singing, Rennie Dellinger expressed his discontent by speaking and leading a large crowd in singing and chanting. The court concluded that as Cox’s conduct did not constitutionally disturb the peace of Baton Rouge, Louisiana, neither then did Rennie Dellinger’s conduct cause substantial disruption of the order of his high school community.

The proposed approach is certainly not an elixir for utopia in the schools, for it addresses itself solely to the problem of expression in the schools. And, indeed, full judicial protection of first amendment rights will undoubtedly lead to increased unrest in the schools. However, as *Tinker* points out: “Tolerance of the unrest intrinsic to the expression of controversial ideas is Constitutionally required even in the schools.” And, as Mr. Justice Douglas stated in *Temínello v. City of Chicago*:

A function of free speech under our system of government is to invite dispute. It may best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. It may strike at prejudices and preconceptions and have profound unsettling effects as its presses for acceptance of an idea.

Certainly, “[o]ur history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputative society.”

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98 Id.
Conclusion

By judicial recognition and adherence to the implications of *Tinker*—that in the schools symbolic expression enjoys virtual absolute protection and that outside the classroom area other forms of expression are protected to the same extent as adult expression—the iron door, unlocked by *Barnette* and *Tinker*, will swing open to full judicial protection of the secondary student's constitutional rights. Those administrators who seek a sterile school environment and who rely on an unspoken conspiracy with like minded jurists to accomplish this goal will be frustrated in their efforts. Instead, those who long for the serenity of yesterday in the midst of the turmoil of today will be compelled to offer an atmosphere where the robust exchange of views, necessary in a free and progressive society, thrives.

Here in an environment where his beliefs and values are challenged by the constant interplay of ideas, the student will be truly able to explore and discover himself and the society in which he lives. Here, where unpopular expression is tolerated, the student will be able and encouraged to express his social, political and economic frustrations in a responsible manner—a manner which will, hopefully, educate, not only others, but the student himself. And, here, the practice of the first amendment will be consistent with its theory and spirit.

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