

BUSTED TEES:  
EXPRESSIVE T-SHIRTS AND A REEXAMINATION OF THE *TINKER*  
FRAMEWORK

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To My Dad:  
Thank you for all your love and support over the years.

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CHAPTER ONE  
EXPRESSIVE T-SHIRTS, BLACK ARMBANDS, AND SCHOOL NEWSPAPERS:  
THE LAW OF STUDENT SPEECH

On April 21, 2004, student Tyler Chase Harper wore a t-shirt expressing his opposition to his high school's "Day of Silence" event, which promoted toleration of homosexuality. Harper's homemade t-shirt read, "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED" on the front and, "HOMOSEXUALITY IS SHAMEFUL. ROMANS 1:27" on the back.<sup>1</sup> School officials asked Harper to remove the shirt, he refused, and eventually filed suit claiming a violation of his free speech. The district court denied his request for an injunction which would allow him to wear the shirt, and Harper appealed to the Ninth Circuit Court of Appeals, which affirmed the lower court's decision.

The Ninth Circuit's decision in *Harper v. Poway Unified School District* hinges on an interpretation of the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*. *Tinker* was a landmark free speech decision which held that "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>2</sup> Although this decision acknowledged student speech rights, it also established a limiting

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<sup>1</sup> *Harper v. Poway Unified School District*, 445 F. 3d 1166, 1171 (9th Cir. 2006).

<sup>2</sup> *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505 (1969).

principle on these rights, which has come to be known as the “disruption test” of student speech. Simply stated, this test allows all student speech, until the speech “materially disrupts class work or involves substantial disorder or invasion of the rights of others.”<sup>3</sup> The phrase “material and substantial disruption” would become the keystone of hundreds of other student speech cases.

The *Harper* case is just one of many cases in recent years in which students have taken school districts to court for limiting their freedom of speech. Since the 1969 *Tinker* decision which favored student speech, this precedent has been eroded and manipulated into today’s standard which barely resembles the Supreme Court’s original intentions. This thesis will argue that in recent expressive t-shirt cases, the application of *Tinker* and its exceptions has yielded in inconsistent results. It will propose a two-tiered solution to the inherent problems of *Tinker*, with the ultimate goal of reforming how student speech in America’s public schools is evaluated.

Any discussion of this topic must start with an examination of the two types of student speech: pure speech, in which the student makes a personal statement of their beliefs; and school-sponsored speech, in which the views expressed in the speech are assumed to reflect those of the school. Under the umbrella of pure speech, *Tinker v. Des Moines Independent Community School District* is the precedent. The *Tinker* standard and its exceptions will be thoroughly examined. The second line of student speech is school-sponsored speech. *Hazelwood School District v. Kuhlmeier*, the major decision in

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<sup>3</sup> 393 U.S. 503, 509 (1969).

school-sponsored speech will be briefly addressed. The rest of this thesis will pertain only to pure speech cases.

### **Pure Student Speech**

#### *Tinker v. Des Moines Independent Community School District*

In the realm of pure student speech, the seminal Supreme Court ruling was issued in the 1969 case *Tinker v. Des Moines Independent Community School District*. John F. Tinker, 15 years-old, and Christopher Eckhardt, 16 years-old, were high school students in Des Moines, Iowa, while John's younger sister Mary Beth, 13 years-old, attended the junior high. The arm bands were worn as part of a national protest against the hostilities in Vietnam and in support of a truce for the holiday season. In anticipation of the armbands, the principals in Des Moines schools established a new school policy. Any student who wore an armband to school would be asked to remove it, and if they refused, they would be suspended until they returned to school without the armband. The Tinkers and Eckhardt were aware that in wearing the armbands, they were violating the policy. On December 16, Mary Beth and Christopher wore their armbands, and John followed suit the next day. All three were suspended from school and stayed home until planned the end of the protest (New Years Day).

The parents of the three students filed for an injunction barring the school district from punishing the students, and sought nominal damages. A federal district court

dismissed the case, upholding the school board's right to prevent disturbances of school discipline, and stating that the school officials were reasonable in anticipating that the armbands might cause a disturbance. This court did not see the armbands as political speech worthy of First Amendment protection.<sup>4</sup>

Not to be deterred, the Tinkers and Eckhardt appealed to The Eighth Circuit Court of Appeals, which heard the case en banc. However, the final vote was a tie, thereby affirming the lower court's decision.<sup>5</sup> Finally, the students appealed to the Supreme Court of the United States, which issued the most important decision ever in the realm of student speech rights. In a 7-2 vote, the highest court in the land overturned the lower courts' decisions that the regulation of the students' speech was within the School Board's power. As the Supreme Court saw it, the armbands were symbolic political speech worthy of First Amendment protection. *Tinker's* signature passage which acknowledged student speech as constitutionally protected is as follows: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>6</sup> This passage marks the first time that student speech was regarded as valuable and worthy of First Amendment protection.

Although the *Tinker* ruling granted students speech rights, it also qualified this

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<sup>4</sup>*Tinker v. Des Moines Independent Community School District*, 258 F. Supp. 971 (S.D. Iowa 1966).

<sup>5</sup>*Tinker v. Des Moines Independent Community School District*, 383 F.2d 988 (8<sup>th</sup> Cir. 1967).

<sup>6</sup>393 U.S. 503, 505 (1969).

affirmation by adding two exceptions- instances when school officials *can* suppress student speech.

First, the Supreme Court established the “disruption standard.” Specifically, only speech or conduct which “materially disrupts class work or involves substantial disorder or invasion of the rights of others” may be regulated.<sup>7</sup> The language of this standard raises an important question in its application: whether actual disruption must occur, or whether merely a school administrator’s anticipation of disruption is enough to warrant suppression of student speech. The difference between actual and theoretical disruption was not clearly elaborated upon in the *Tinker* standard. Additionally, the language of *Tinker* does not elucidate exactly what kind of behavior constitutes “material” and “substantial” disruption. The decision establishes these words as the threshold of impermissible speech, but it doesn’t elaborate on a tangible definition of the terms. Consequently, courts have struggled with how to translate this passage into concrete, applicable rules that make sense in a real-world school environment.

Second, the court indicated that student speech should be evaluated according to whether it intrudes on “rights of other students to be secure and to be let alone.”<sup>8</sup> Since the court offered little clue as to how school officials should guard against violations of the rights of others, it is important to understand the context in which this phrase was written. Peter J. Jenkins elaborates on the intended meaning of “the rights of others”:

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<sup>7</sup> 393 U.S. 503, 509 (1969).

<sup>8</sup> 393 U.S. 503, 508 (1969).

While the *Tinker* majority opinion does refer to the permissibility of regulating certain speech under a theory that some speech causes a “collision with the rights of others students to be secure and to be let alone,” it is far from clear that such a right extends beyond traditional protection from battery, defamation, and such individualized intrusions to a general right to be free from offensive messages.<sup>9</sup>

As it is usually regarded in the eyes of the law, the “right to be left alone” implies protection only from malicious personal attacks, and not speech which merely offends.

The reason that the Tinkers’ and Eckhardt’s armbands were permissible under the standard set forth in *Tinker* is that they violated neither of the exceptions designated by the court. The armbands were described by the court as passive, silent political speech which in no way disrupted the classroom environment. Furthermore, the armbands in no way intruded on the traditional rights of others. Because the black armbands passed these two qualifications, the court mandated that they be allowed in school. The students’ armbands have since come to represent the quintessential example of passive political student speech.

Although the Supreme Court offered little in the way of how to apply its test of student speech in the real world, they did offer one clue to their intentions as to how their standard should be put into practice. They explicitly stated that speech which merely expresses an unpopular viewpoint is protected: “In order for the state in the person of school officials to justify prohibition of a particular expression of opinion, it must be able

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<sup>9</sup> Peter J. Jenkins, “Morality and Public School Speech: Balancing the Rights of Students, Parents and Communities,” *Brigham Young University Law Review* 2008 (2008), 606.

to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>10</sup> The *Tinker* decision was necessary to ensure that unpopular viewpoints are protected in America’s schools. Also, the justices did not intend for school administrators to be the final authorities on student speech. The original idea behind *Tinker* was that school administrators should defer to the courts in evaluating student speech.

Justice Black penned the dissenting opinion in the case, which criticized the Court’s coronation of itself, rather than elected public school officials, as the supreme judge of student speech. He describes the majority decision as the “beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary.”<sup>11</sup> He criticized that as a result of the *Tinker* majority ruling, students would be “ready, able, and willing to defy their teachers on practically all orders.”<sup>12</sup> Justice Black concludes his dissent by painting a picture of complete lawlessness, with students running wild, and school officials helplessly standing by, having no authority over their pupils.

The irony of the *Tinker* decision is that since the ruling was passed down in 1969, students have won virtually no cases in the arena of student speech. In fact, in most cases, the logic of Justice Black’s dissenting opinion has guided the courts applying *Tinker*. Rather than recognizing the *Tinker* ruling as liberating for student speech rights, some have read the decision in light of Black’s dissenting opinion. Some school officials have

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<sup>10</sup> 393 U.S. 503, 509 (1969).

<sup>11</sup> 393 U.S. 503, 518 (1969).

<sup>12</sup> 393 U.S. 503, 525 (1969).

refused to cede control of speech rights to the courts and have instead liberally interpreted the disruption test. Such a liberal interpretation has resulted in rulings which are completely contrary to the intentions of the majority in *Tinker*. This is the main problem with the *Tinker* standard as it exists today.

To sum up the *Tinker* majority opinion, it established student speech as worthy of First Amendment protection. It set the bar for suppression of speech which is “materially and substantially disruptive.” It also called for the censorship of speech which threatens the “rights of others,” but there is no indication that the court intended for offensive speech to be silenced. Finally, it explicitly warned against school officials engaging in viewpoint discrimination.

#### *Bethel School District v. Fraser*

Within the realm of pure student speech, the Supreme Court has carved out two exceptions to the *Tinker* standard. In these cases, the court designated two specific areas in which student speech may be unprotected, even without necessarily being disruptive. The first of these exceptions, *Bethel School District v. Fraser* occurred in 1983 and pertains to speech which is sexual in nature. Student Matthew Fraser delivered a speech nominating a classmate, Jeff Kuhlman, for an office in student government. This speech occurred at a school-sponsored assembly during school hours. Throughout the speech, Fraser referred to his classmate with an elaborate, graphic and explicit sexual metaphor. Following are some excerpts from his speech:

‘I know a man who is firm -- he’s firm in his pants, he’s firm in his shirt, his character is firm -- but most . . . of all, his belief in you, the students of Bethel, is firm... Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts -- he drives hard, pushing and pushing until finally -- he succeeds... Jeff is a man who will go to the very end -- even the climax, for each and every one of you... So vote for Jeff for A. S. B. vice-president -- he’ll never come between you and the best our high school can be.’<sup>13</sup>

Fraser had been warned prior to delivering the speech that it was in conflict with the school’s “disruptive-conduct rule” but he chose to give the speech anyway. After the speech, Fraser admitted he deliberately used sexual innuendo and was sentenced to three days suspension, of which he served two. His father decided to seek legal redress, claiming a violation of his son’s First Amendment right to free speech.

A federal district court sided in favor of Fraser, finding the school’s “disruptive-conduct rule” unconstitutionally vague and overbroad. Fraser was awarded monetary damages.<sup>14</sup> The school board then appealed to the Ninth Circuit Court of Appeals, which affirmed the lower court’s decision. The school cited the assembly audience’s applause, laughing and noise as evidence of disruption. However, it was established that “the

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<sup>13</sup> *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 687 (1968).

<sup>14</sup> *Fraser v. Bethel School District No. 403*, 755 F.2d 1356, 1358 (9<sup>th</sup> Cir. 1986).

administration had no difficulty maintaining order during the assembly and Fraser's speech did not delay the assembly program."<sup>15</sup> The court could not see how,

we can distinguish this case from *Tinker* on the issue of disruption. Just as the record in *Tinker* failed to yield evidence that the wearing of black armbands resulted in a material interference with school activity, the record now before us yields no evidence that Fraser's use of a sexual innuendo in his speech materially interfered with the activities at Bethel High School.<sup>16</sup>

Furthermore, the Ninth Circuit found that the school could not punish indecent speech, and therefore found his speech worthy of First Amendment protection.

The school board continued its appeal to the Supreme Court. In a 7-2 ruling, the highest court overturned the Ninth Circuit Court of Appeals' decision. The Supreme Court drew a distinction between the political message of the *Tinker* armbands and the sexually-suggestive nomination speech of Fraser. The majority called Fraser's speech trivial in comparison to the deep-seated political belief expressed through the *Tinker* armbands. The *Bethel* decision states that the First Amendment does not protect "offensively lewd and indecent speech."<sup>17</sup> This ruling also allowed school officials the right to restrict speech which "would undermine the school's basic educational mission" even if it is not materially and substantially disruptive.<sup>18</sup> The court's ruling in *Bethel*

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<sup>15</sup> 755 F.2d 1356, 1360 (9<sup>th</sup> Cir. 1986).

<sup>16</sup> 755 F.2d 1356, 1360 (9<sup>th</sup> Cir. 1986).

<sup>17</sup> 478 U.S. 675, 676 (1968).

<sup>18</sup> 478 U.S. 675, 685 (1968).

narrowed the *Tinker* precedent and empowered school administrators to censor student speech if they anticipate the possibility of the speech undermining the school's basic educational mission. Justice Brennan wrote an eloquent concurring opinion warning that the majority opinion in no way grants school officials limitless power to regulate speech with which they disagree.

It is important to address the question of age-appropriateness when discussing *Bethel v. Fraser*. The majority opinion deemed the sexual nature of Fraser's speech inappropriate for a high school context, because the "speech could well have been seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality."<sup>19</sup> The dissenting opinions, however, especially that of Justice Thurgood Marshall, were more permissive. Marshall adheres to the disruption test of *Tinker*, and says that the Bethel School District failed to demonstrate that the threshold of disruption was met. He asserts: "where speech is involved, we may not unquestioningly accept a teacher's or administrator's assertion that certain pure speech interferes with education."<sup>20</sup> Justice Marshall's opinion implies that the sexual nature of Fraser's speech was permissible in a high school context. Hence, only if disruption occurred as a result of that speech could it be censored.

In brief, *Bethel School District v. Fraser* allows school officials to restrict non-disruptive student speech which is vulgar, lewd and sexual in nature. Aside from the majority opinion which narrowed student speech rights, two Justices made an effort to

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<sup>19</sup> 478 U.S. 675, 683 (1968).

<sup>20</sup> 478 U.S. 675, 690 (1968).

pen opinions to preserve student rights. Justice Brennan's concurring opinion warns against giving school officials limitless power to silence views they disagree with. Justice Marshall's dissenting opinion does not regard lewd and vulgar sexual speech as an exception to *Tinker*. He remains faithful to the disruption test.

*Morse v. Frederick*

The other exception to the standard established in *Tinker* occurred in a controversial 2007 ruling, *Morse v. Frederick*. When the Olympic torch passed through Juneau, Alaska in 2002, the students at Juneau-Douglas High School were released from school to watch the torch pass from off-campus property across the street. As the torch passed, senior Joseph Frederick unfurled a banner reading "BONG HiTS 4 JESUS" just in time for national television cameras to capture. The school principal, Deborah Morse crossed the street, confiscated the banner, and suspended Frederick for ten days. Frederick in turn filed suit, claiming that the torch relay viewing was not a school-sponsored activity, and that his rights to free speech had been violated.

The district court found that the relay was in fact a school-sponsored event. It also held that Frederick's speech was unprotected, since it violated the school's basic educational mission, as established in *Bethel*. The court saw Frederick's banner as pro-drug, and an affront to the school's basic educational mission, namely its' anti-drug policy.<sup>21</sup> Frederick appealed to the Ninth Circuit Court of Appeals. The higher court held

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<sup>21</sup> *Frederick v. Morse*, 2003 U.S. Dist LEXIS 27270, 4 (D. Ala 2003).

that the district court had misapplied *Bethel*, and should have instead evaluated Frederick's speech under *Tinker*. The court ruled that under *Tinker*, Frederick's speech could not be punished because no disruption occurred. The court accused Morse of punishing the speech simply because she disagreed with its message: "under *Tinker*, a school cannot censor or punish students' speech merely because the students advocate a position contrary to government policy."<sup>22</sup> The court also stated that speech about marijuana is not as easily dismissed as non-political as was Fraser's sexual speech. This point is especially relevant given the context of Alaska, where the issue of marijuana legalization is continually debated. In summary, the Ninth Circuit assessed Frederick's speech under *Tinker* and found that speech non-disruptive.

Principal Morse subsequently appealed to the Supreme Court, and in a controversial 6-3 decision, the Supreme Court ruled in favor of the principal. The five judges in the majority opinion established this case as a student speech case, despite the fact that the incident occurred off school property. This majority believed that the banner advocated illegal drug use and was therefore subject to school censorship, even though material and substantial disruption did not occur. To elaborate, when the pro-drug speech of a student conflicted with a school's anti-drug policy, it could be restricted, even without material disruption. With this ruling, the court followed the example of the *Bethel* ruling, which carved out a new exception to the *Tinker* standard for evaluating student speech.

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<sup>22</sup> *Frederick v. Morse*, 439 F.3d 1114, 1118 (9<sup>th</sup> Cir. 2006).

Although the majority opinion of *Morse* agreed that pro-drug speech should be an exception to the *Tinker* standard, it was a 6-3 decision and two justices filed a concurring opinion to clarify their views on student speech rights and the legitimacy of *Tinker*. Justices Alito and Kennedy filed an opinion, which cautioned that pro-drug messages are one of the very few areas in which *Tinker* should be set aside. Also, they specify that the *Morse* opinion is a narrow holding which “(a) goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue.”<sup>23</sup> The concurring opinion also states that the majority opinion is a reaffirmation of *Tinker*, not the establishment of a new precedent altogether. Alito and Kennedy’s concurring opinion concludes with a reminder that student speech *is* still worthy of protection, even if advocacy of illegal drug use is not.

The dissenting opinion of *Morse v. Frederick* claimed that the banner was a nonsensical statement and therefore did not advocate illegal drug use. It then applied the logic of the *Tinker* standard, found no evidence of material or substantial disruption, and emphasized that *Tinker* has historically protected unpopular viewpoints. The dissenting justices also warned that the majority opinion set a dangerous precedent which threatened the marketplace of ideas:

Even in high school, a rule that permits only one point of view to be expressed is less likely to produce correct answers than the open discussion of countervailing

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<sup>23</sup> *Morse v. Frederick*, 551 U.S. \_\_\_\_ (2007).

views... In the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment.

Whatever the better policy may be, a full and frank discussion of the costs and the benefits of the attempt to prohibit the use of marijuana is far wiser than the suppression of speech because it is unpopular.<sup>24</sup>

In short, the *Morse* decision is a limited exception to the *Tinker* standard, which states that material and substantial disruption need not be proved in cases involving pro-drug speech.

The precedent for evaluating pure student speech was set in the 1969 decision *Tinker v. Des Moines Independent Community School District*. This case was the first time public school students were afforded First Amendment rights under the law. The “disruption test” was instituted as the means by which student speech should be judged. Since 1969, other cases designated certain speech as not allowed in a public school setting, regardless of whether disruption occurred. These two exceptions to the *Tinker* disruption text are cases involving sexually explicit or pro-drug messages. In regards to school-sponsored speech, a 1988 decision mandated that school-sponsored speech can be judged more narrowly than personal, pure student speech.

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<sup>24</sup> 551 U.S. \_\_\_\_ (2007).

## School-Sponsored Speech

Apart from the major cases which pertain to pure speech, a 1988 Supreme Court decision addressed speech which is school-sponsored. In *Hazelwood School District v. Kuhlmeier*, the student speech under question involved a student newspaper issued as part of the curriculum of a high school journalism class. The school principal objected to *Spectrum* (the paper)'s articles about teen pregnancy and the effect of divorce on teens. Believing there was no time to edit the objectionable articles out of the paper before it went to press, the principal instead removed two entire pages from the six page paper, therefore removing other non-controversial articles from the final publication. Three members of the *Spectrum* sued the principle of the high school for a violation of their First Amendment rights.

The district court sided in favor of the school district. The court distinguished the case at hand from *Tinker* in that the speech in *Tinker* was private and non-school-sponsored. They held that *Spectrum* was part of the curriculum, and therefore inferred to advocate the views of the school. It was not created as “an open or public forum of free expression by its students.”<sup>25</sup> Consequently, censorship was justified if there was a reasonable explanation. In regard to the pregnancy article, the principle's fear that three pregnant students anonymity could be jeopardized was deemed a legitimate reason for censorship. It was also determined that the article on divorce did not hold up to

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<sup>25</sup> *Kuhlmeier v. Hazelwood East School District*, 607 F. Supp. 1450, 1465 (E.D. Mo. 1985).

journalistic standards of fairness. Finally, the court denied the students allegation that the censorship would have a chilling effect.

The members of *Spectrum* took their case before the Eighth Circuit Court of Appeals, which ruled in their favor. The court based its judgment on the basis that *Spectrum* was a public forum, and so the *Tinker* disruption standard should apply. The distinction of a public forum is significant. When the court identified the paper as a public forum, it likened it to a public park where any citizen can freely speak their views.<sup>26</sup> This designation allowed the students limitless free speech, whether or not the school board sanctioned their views.

The Eighth Circuit ruling was appealed to the Supreme Court. In a 5-3 ruling, the court stated that *Spectrum* was not a public forum as the students and the lower court claimed, but rather part of the curriculum and therefore entitled to administrative regulation. The court differentiated the personal expression of *Tinker* and the school-sponsored nature of the publication in this case, saying, “The question whether the First Amendment requires a school to tolerate a particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote a particular student speech.”<sup>27</sup> The court described how students, parents and members of the public might attribute the views expressed in *Spectrum* to be those espoused by the school. The court established a new

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<sup>26</sup> *Kuhlmeier v. Hazlewood School District*, 795 F.2d 1368 (8<sup>th</sup> Cir. 1986).

<sup>27</sup> *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 270-271 (1988).

standard to govern school-sponsored speech: “legitimate pedagogical concerns.”<sup>28</sup> For instance, censorship of a school-sponsored publication is allowed to protect the identities of individuals or shield younger students from inappropriate content.

Justice Brennan issued a dissenting opinion to the *Hazelwood* majority opinion. He encouraged schools to tolerate unpopular views in the name of student expression. He also asserted that there was no precedent in the law for drawing a distinction between school-sponsored and personal speech. He maintained that *Tinker* strikes a balance between learning and disruption, a balance that need not be skewed by other standards for evaluating student speech. But, in the end the majority opinion held, and school-sponsored speech was deemed another exception to the *Tinker* test.

### **Whither *Tinker*? The Challenge to Student Speech**

In recent years, the realm of student speech governed by *Tinker* has widened greatly. New technology has raised issues about when and where the line of student speech is drawn. For instance, the world wide web has presented problems when students make hate websites against principles. Off-campus speech has left courts grappling with just how far the authority of school officials extends. As a result of innovative forms of student speech, the historic framework of *Tinker* and its exceptions is now under attack. Recently, courts have been much more sympathetic to Justice Black’s dissenting opinion than to the original intentions of the majority in *Tinker*, which placed great value on

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<sup>28</sup> 484 U.S. 260, 273 (1988).

student speech. In light of the fact that students' speech rights haven't won a major victory since *Tinker* 1969, many wonder whether *Tinker* is still a viable standard. The question addressed in this thesis is how to make the historic framework of student speech law work in today's society.

Chapter Two it will use a variety of examples of expressive t-shirt cases to show the three most striking problems with the modern application of the *Tinker* standard. T-shirts have been the popular manner of student expression recently. Cases involving expressive t-shirts have garnered attention from both the media and the scholarly legal community. The t-shirt cases described are especially pertinent because they illuminate particular problems with the real-world application of the *Tinker* framework.

Chapter Three will offer a twofold solution to reform student speech rights. The cases addressed in Chapter Two will be revisited and reinterpreted according to the proposed new standards of evaluating student speech. In conclusion, the new standard will be extended to judge not just expressive t-shirts, but student speech as a whole. Finally, the essential value of student speech in America's classrooms will be reinforced.

## CHAPTER TWO

### THE THREAT TO *TINKER*: MODERN TRENDS IN STUDENT SPEECH

The problem with the *Tinker* framework in recent years is that its application has yielded inconsistent results. The disruption test and the “rights of others” were written with good intentions, but *Tinker* lacked a concrete rubric for how these standards should be carried out in schools. Consequently, school officials and courts across America have interpreted *Tinker* very differently. The unfortunate result of this variability is that today the impression is that student speech rights are afforded on a “luck of the draw” basis. This chapter will examine a variety of recent student speech cases involving expressive t-shirts. Each of these cases will illustrate a major flaw with the practical application of the *Tinker* standard.

#### **Disruption Test**

##### *Subjectivity*

The first problem with the *Tinker* test is that it is intrinsically subjective. The test requires school officials to police student speech for any violations of either the disruption test or the “rights of others.” In turn, school officials are in virtually complete control over what speech breaches the premises of *Tinker* and what speech doesn’t. The problem with this practice arises when school officials either consciously or

subconsciously abuse this power. Any speech which school administrators may not agree with could be censored in the name of “disruption.” The problem with placing too much authority in the hands of school officials as the subjective judges of student speech is that it can ultimately lead to viewpoint discrimination.

A case which exemplifies this problem is *Gillman v. School Board for Holmes County*. The case arose in 2007 after administrators at Ponce de Leon High School in Florida instituted a policy which banned apparel and accessories that advocated tolerance of homosexuality. “Banned from the school are rainbows, pink triangles, and the following slogans: “Equal, Not Special Rights,” “Gay? Fine By Me,” “Gay Pride” or “GP,” “I Support My Gay Friends,” “I Support Gays,” “God Loves Me Just the Way I Am,” “I’m Straight, But I Vote Pro-Gay,” “I Support Equal Marriage Rights,” “Pro-Gay Marriage,” “Sexual Orientation is Not a Choice. Religion, However, Is.””<sup>1</sup>

The ban was put into place after a twelfth-grader, identified as Jane Doe, reported being harassed about her sexual orientation by a group of middle school students. Jane was called to meet with Principal David Davis to discuss the incident. After informing Davis she was a lesbian, the Principal told her that it wasn’t “right” to be homosexual. He also took it upon himself to call her parents and inform them of her sexual orientation. After other students found out about the incident, they reacted in support of Jane. Among other actions, they wore t-shirts in support of gay rights, and circulated petitions in support of gay rights. Principal Davis responded by organizing an investigation of the “Gay Pride” movement Ponce de Leon. He interviewed about thirty students and

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<sup>1</sup> *Gillman v. Sch. Bd. for Holmes County*, 567 F. Supp. 2d 1359, 1362 (N.D. Fl 2008).

questioned them about their sexual orientations. He told students who identified themselves as homosexual that being gay was against the Bible. Finally, he suspended eleven students for five days each as punishment for their participation in the “Gay Pride” movement. To justify the suspension, Davis claimed the students had participated in a “secret society” or “illegal organization,” as prohibited by school board policy.

Later that week, Heather Gillman wore a homemade shirt with the slogan, “I Support Gays.” She did not cause any disruption, and she was also not punished at this point. However, Gillman also sought clarification from the school board about the policy instituted by Principal Davis. She sent a legal letter to the school board, in which she petitioned for the right to display the slogans listed above. The school board responded that none of the above slogans or symbols were permissible. It claimed that the aforementioned phrases and symbols indicated membership in an “illegal organization” and were disruptive to the educational process. Gillman took her case to court for the right to display the messages which promote toleration of homosexuality. She alleged that the school board’s ban on such items violated her right to free speech and constituted viewpoint discrimination.

A U.S. District Court evaluated the speech under *Tinker* and ruled in favor of Gillman: “The Holmes County School Board has imposed an outright ban on speech by students that is not vulgar, lewd, obscene, plainly offensive, or violent, but which is pure, political and expresses tolerance.”<sup>2</sup> Any disruptions which occurred at Ponce de Leon in

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<sup>2</sup> 567 F. Supp. 2d 1359, 1370 (N.D. Fl 2008).

September 2007 were concluded to be not a result of the students' speech, but rather a reaction against Principal Davis' anti-homosexual views. The school board was found liable for viewpoint-based discrimination, and the judge went on to admonish Davis' behavior as "deplorable." The court acknowledged that although Davis is entitled to his personal beliefs about homosexuality, but he was wrong when he tried to silence the opposite opinion. In summary, after applying *Tinker*, the court ruled in favor of the students' First Amendment rights.

Although *Gillman v. School Board for Holmes County* was an eventual victory for students' speech rights, the fact that litigation was even necessary in this case is disturbing. The rule regarding the students' political speech should have been obvious: since the students engaged in passive political speech which was non-disruptive and non-intrusive upon the rights of others, it was permissible. Instead, what should have been a clear decision was clouded by the principal's desire to abuse his power in order to assert his own personal agenda. While it is understandable that the occasional school official may occasionally unintentionally let his or her own opinions cloud their judgments, it is unacceptable that the School Board of Holmes County supported Principal Davis' actions in this case. Principal Davis and the School Board's conduct is indicative of a problem with the practical application in *Tinker*: it is too subjective and too dependent upon the personal judgment of school administrators. It is clear that the general sentiment in Holmes County is opposition to homosexuality, but the First Amendment protects political speech for all Americans, regardless of their specific location in the country. In order to combat the problem of the *Tinker* standard's subjectivity, the test must be

clarified and narrowed to ensure for maximum objectivity. Chapter Three of this essay will elaborate upon such a solution.

### *Actual vs. Theoretical Disruption*

The second problem in recent application of the *Tinker* test for evaluating student speech is that the test does not fully explain the difference between “actual” and “theoretical” disruption. Nowhere does it state whether school officials can silence student speech when they believe disruption is imminent, or whether they must simply sit back and wait for genuine disruption to occur. If school officials are allowed to silence speech which they believe could be disruptive sometime in the near future, once again the problem of too much reliance on subjective judgments persists. In many cases, the chaotic nature of the high school environment has made it difficult for courts to assess what specific student reactions were a result of what specific student speech. School administrators often reach to cite “disruptions” which may have in fact had little or no relation to the speech in question. On the other hand, if officials have no authority until the speech results in real disruption, schools could be left somewhat lawless. Students might run wild with their student speech rights if they believe school administrators have no authority over them until disruption occurs as a result of their speech.

*Miller v. Penn Manor School District* deals with this very discrepancy. In 2007, Pennsylvania high school student Donald Miller wore a t-shirt printed with the phrases “Terrorist Hunting Permit” and “Homeland Security Volunteer.” The t-shirt also

contained images of automatic handguns. After a female student in Miller's math class alerted her teacher via a note that she was uncomfortable with the shirt, the teacher initiated a conversation with Miller about the shirt. The teacher, Ms. Baireuther, explained to Miller that his t-shirt might not be appropriate for school since it promoted the hunting and killing of other human beings and also because there had been past incidents of students bringing guns to Penn Manor High School. Ms. Baireuther informed both Miller and the female student who had written the note that she would check with the school administration as to whether the shirt was a violation of the school district's policy. After speaking with the principal, Ms. Baireuther was informed that the shirt did violate the school policy. Although Penn Manor School District did not have a specific school uniform policy, it does have a Student Expression policy which prohibits "expression which incites violence, advocates the use of force or urges violations of the law."<sup>3</sup>

When Miller wore the shirt again a few days later, Ms. Baireuther informed him that the shirt was in violation of school policy and that if he wore it again she would send him to the principal's office. She did in fact send him to the principal's office after he wore the shirt to school a third time. Assistant Principal Christopher Moritzen instructed Miller to turn the shirt inside-out, and told Moritzen his parents would "freak out" if they found out he was not allowed to wear the shirt. (Miller's uncle who had purchased the shirt for him was then serving in Iraq). Miller's parents went to the school the next day,

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<sup>3</sup> *Miller v. Penn Manor School District*, 588 F. Supp. 2d 606, 613 (E.D. Pa. 2008).

met with Assistant Principal Moritzen, and advised him that they would be seeking legal counsel regarding the matter.

On January 7, 2008, the Board of Directors held a meeting to address the situation. Although the Board determined Miller's shirt did not constitute protected student speech under the school policy, they also decided that Miller would not be disciplined until the matter was resolved. After Miller's parents decided to sue, the case received much local and some national media coverage. The Millers claimed the school's policy was unconstitutionally vague and overbroad because it would punish "anything that is a distraction to the educational environment."<sup>4</sup> The Millers claimed that the shirt did not promote violence and that there was no evidence that any individual believed the message on the shirt was directed at them personally. Furthermore, they asserted that the message of the shirt was not illegal because of the Department of State's Bureau of Diplomatic Security's "Rewards for Justice" program, which places bounties on terrorists. They contend that this program enables all persons to identify themselves as terrorist hunters. The Millers also asserted that the speech on Donald's shirt was political and patriotic support of the troops in Iraq.

The School Board claimed that Miller's shirt "collides with the rights of others in the most fundamental way because it undermines the sense of safety and bodily security essential to promoting and maintaining an effective learning environment."<sup>5</sup> The defense also cited *Morse v. Frederick*, claiming that demonstrating substantial disruption is not

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<sup>4</sup> 588 F. Supp. 2d 606, 617 (E.D. Pa. 2008).

<sup>5</sup> 588 F. Supp. 2d 606, 619 (E.D. Pa. 2008).

necessary when the speech advocates a violation of law. This interpretation of *Morse* broadens the actual ruling in that decision, which in fact explicitly limited the restriction of student speech to only pro-drug messages.

The district court took into account both the Millers' and the School Board's opinions on the validity of the t-shirt. The Court acknowledged that the discussion in any student speech case must begin with an evaluation under *Tinker*. However, the district judge dismissed *Tinker* as "not the final discussion of free speech in the school setting."<sup>6</sup> The judge framed his analysis of Miller's t-shirt by presenting *Fraser*, *Hazelwood*, and *Morse* as more than just exceptions to *Tinker*. He used *Morse* as a way to prohibit speech which promotes illegal behavior, beyond just illegal drug use. Furthermore, the ruling in *Miller* even cited Justice Alito's concurring opinion as evidence that safety, not free speech, should be the paramount concern in schools. *Miller* neglected to mention that Alito wrote the concurring opinion in *Morse* in order to clarify that the majority opinion was a narrow exception to *Tinker*, and Alito emphasized that *only* pro-drug messages may be censored under *Morse*. In *Miller v. Penn Manor School District*, the judge makes the leap of extending *Morse* beyond just speech which advocates illegal drug use, to speech which advocates illegal activity in general. He concludes that, "there is no constitutionally protected political message in Donald's shirt but there is a message of use of force, violence and violation of law in the form of illegal vigilante behavior."<sup>7</sup> In

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<sup>6</sup> 588 F. Supp. 2d 606, 620 (E.D. Pa. 2008).

<sup>7</sup> 588 F. Supp. 2d 606, 625 (E.D. Pa. 2008).

conjunction with this assertion, he concludes that no demonstration of material or substantial disruption is necessary.

However, although Miller lost on his claim that his shirt was political speech, he won on his assertion that the phrase “anything that is a distraction to the education environment” is overbroad and constitutionally restricts speech. This is where the important difference between “actual” and “theoretical” disruption comes into play. As the judge notes, ““any thing that is a distraction to the education environment” could encompass speech that is both protected and unprotected by the First Amendment.”<sup>8</sup> The problem courts have experienced in assessing whether “material and substantial disruption” occurred is that *Tinker* failed to explain when to draw the line between real, visible disruption, and speech which school officials anticipate may cause disruption. In the case of *Miller*, the school board took its policy too far in suppressing speech prior to any actual disruption occurring. Given the lack of explanation as to “material and substantial disruption” by the Supreme Court in *Tinker*, it is no wonder that courts have struggled with whether anticipation of disruption is enough to warrant the suppression of student speech. The district court judge in *Miller* decided that the phrase “anything that is a distraction to the education environment” was too quick to silence student speech prior to any evidence of real disruption. However, despite the fact that the judge felt this phrase was overbroad, he still felt that due to the violent nature of Miller’s shirt, he did not demonstrate a likelihood of success on his claim of overbreadth.

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<sup>8</sup> 588 F. Supp. 2d 606, 626 (E.D. Pa. 2008).

Despite the fact that the district court judge, admitted in his decision that no disruption occurred, he was not willing to let Miller's shirt slide. To evade ruling under the disruption test, the judge chose instead to rule against the shirt by greatly expanding the scope of *Morse v. Frederick*. That case, which was merely an isolated example of one exception to the overarching standard established by *Tinker*, was stretched to become its own standard, one which allows no speech advocating illegal activity or violence. *Tinker*, meanwhile, was quickly dismissed. In Chapter Three, a solution to the quandary of what constitutes disruption will be proposed. Speech advocating illegal activity will also be dealt with.

### *Counterintuitive Results*

Two of the major problems with recent applications of the *Tinker* standard have already been addressed: its inherent subjectivity at the hands of school officials, and its lack of explanation as to what constitutes disruption. One final crucial problem with the *Tinker* framework in recent years is the tendency toward the creation of schools which are completely devoid of any dialogue or controversy. School boards have established policies so extreme that *Tinker* has at times been completely inverted. A case which protected student speech rights has been twisted into a precedent that allows school administrators to censor speech. In some cases, the very core political speech which *Tinker* was intended to protect has instead been suppressed.

The case of *Palmer v. Waxahachie Independent School District* exemplified this trend. Texas high school Student Pete Palmer filed a lawsuit after he was sent home from Waxahachie High School for wearing a John Edwards 2008 t-shirt. On Friday, September 21, 2007, Palmer wore a t-shirt with the words “John Edwards 08” and “www.johndwards.com.” Assistant Principle Brenda Johnson told Palmer his shirt “promoted a political candidate” and was therefore unacceptable. Waxahachie Independent School District had a policy which prohibited the expression of messages that did not concern colleges, universities or the school district’s “clubs, organizations, sports, or spirit.” Palmer was given a choice between in-school suspension for the rest of that day, leaving school for the day, or putting on an acceptable t-shirt. Palmer chose to put on an acceptable t-shirt.<sup>9</sup> After Palmer’s parents tried unsuccessfully to resolve the matter through the school district’s grievance process, they decided to seek legal redress.

Waxahachie Independent School District admitted that the speech on Palmer’s shirt posed no concrete threat of material or substantial disruption to school activities. It also acknowledged that the message of the shirt was not sexually explicit, did not promote illegal drug use, and was not part of a school sponsored activity. However, they still maintained that the shirt violated their policy against expressing political messages. The Palmers filed a lawsuit seeking an injunction seeking redress for the violation of his First Amendment rights to freedom of expression. At the hearing for the injunction, the School Board informed the court that it had amended the dress code for the following

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<sup>9</sup> *Palmer v. Waxahachie Independent School District*, 2008cv00558 (N.D. Tx., filed July 2, 2008).

year. The new dress code stated that although political messages were not allowed on t-shirts, this restriction did not apply to polo shirts. In response, the court dismissed the Palmer's request for an injunction and mandated that the school district finalize and submit its new dress code.

After the school changed its dress code, Pete Palmer began wearing a polo shirt that said "John Edwards '08." The school allowed him to wear the shirt until May 23, 2008, when Palmer was notified that students could no longer wear apparel concerning colleges or universities. Under the new dress code, only "campus principal Waxahachie Independent School District sponsored curricular clubs and organizations, athletic teams, or school 'spirit' collared shirts or t-shirts" and shirts with "manufacturer's logo 2" x 2" or smaller." Furthermore, "student clothing should be free of any slogans, words or symbols except those that promote the school district and its instruction programs."<sup>10</sup>

Palmer again petitioned through his lawyer to wear three different t-shirts, including the original John Edwards t-shirt, the John Edwards polo shirt, and another polo shirt with excerpts from the First Amendment written on it. He was informed that all these shirts violated the dress code, and that if he petitioned for exemptions to the dress code in order to express his political preferences, his future requests would also be denied.

The school district tried to justify its dress code by applying the precedent of *United States v. O'Brien*.<sup>11</sup> In this 1968 case, the Supreme Court sustained the conviction

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<sup>10</sup> 2008cv00558 (N.D. Tx., filed July 2, 2008).

<sup>11</sup> *United States v. O'Brien*, 391 U.S. 367 (1968).

a man who burned his draft card in protest. Although O'Brien tried to argue for his right to freedom of expression, the court ruled that expressive conduct could be censored if the censorship advances a significant government interest and if it is unrelated to the suppression of freedom of expression. In *O'Brien*, the court decided that the government's interest in conducting a draft outweighed O'Brien's desire to protest by burning his draft card. However, this case had nothing to do with student speech rights, which are governed solely by the aforementioned *Tinker* framework. *O'Brien* has no place in student speech law, and should not be misused, as it was by Waxahachie Independent School district, in an attempt to silence legitimate student speech.

*Palmer v. Waxahachie Independent School District* is an extreme example of the trend of "vanilla schools." In the attempt to create a uniform and productive learning environment, school officials end up banning any form of remotely contentious speech.

But the real world is not so "vanilla." It is understandable to want to protect children from harm, but sheltering them from all controversy is to not prepare them for real life. Schools are a healthy and safe environment in which students should learn about making educated decisions and forming views on the important issues of the day. Brian Eck agrees: "[e]ducating high school students to exercise and endure liberty is more important to a public high school's fundamental mission than ensuring equality or comfort."<sup>12</sup> The high school is a supervised environment in which students can be shaped

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<sup>12</sup> Brian D. Eck, "Rebel Without a Cause: The Right 'Rights of Students' in *Nixon v. Board of Education* and the Shadow of Freedom Under *Harper v. Poway*," *Ave Maria Law Review* 6 (Fall 2007), 199.

into critical and thoughtful citizens. Eck asks, “[w]hat better place is there for young adults to practice the give-and-take necessary to living in a free and disputatious society than high school?”<sup>13</sup> The District Court in *Gillman v. School Board for Holmes County* also dealt with this tendency to eradicate all controversy from the ruling stipulated that while speech about a controversial topic such as homosexuality is likely to incite some debate and conversation, high school students should not be estranged from participation in this national issue. To deprive students of the right of debate is a violation of what Supreme Court Justice and modern thinker Oliver Wendell Holmes referred to as the market place of ideas. He writes:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in 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 wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment.<sup>14</sup>

The value of dialogue in America’s public high schools is too important to be silenced. Clearly the Waxahachie Independent School District desired to create “vanilla” schools void of any controversial clothing or messages. In doing so, they squashed student speech

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<sup>13</sup> Eck, 232.

<sup>14</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919).

rights, and prohibited the very type of core political speech which *Tinker* endeavored to protect.

### **Rights of Others**

The second half of the *Tinker* decision dictates that student speech is permissible until it intrudes on the “rights of other students to be secure and to be let alone.”<sup>15</sup> In student speech cases, the “rights of others” language usually takes a back seat to the disruption test, yet it is worth mentioning, as some courts have ruled according to it. Although the Supreme Court justices in the *Tinker* majority intended to protect students from only “battery, defamation, and such individualized intrusions to a general right to be free from offensive messages,” the “rights of others” test, like the disruption test, has sometimes been misapplied.<sup>16</sup>

*Tinker* itself is vague as to the meaning of “rights of others.” Nowhere in the decision does the court clarify when and how the infringement on these rights should be determined. The fact that the “rights of others” is not expounded on in *Tinker* has lead many courts to discount its significance. Abby Marie Mollen of Northwestern University

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<sup>15</sup> 393 U.S. 503, 508 (1969).

<sup>16</sup> Peter J. Jenkins “Morality and Public School Speech: Balancing the Rights of Students, Parents and Communities,” *Brigham Young University Law Review* 2008 (2008), 606.

asserts: “[a]s a result of *Tinker*’s casual treatment of the students’ rights language, some have gone so far as to conclude that it its mere dicta.”<sup>17</sup> The result of the lack of explanation of the “rights of others” is that courts seldom give credence to it.

However, some courts do chose to rule under the “rights of others” language, including several circuit courts. For example, in *Saxe v. State College Area School District*, the Third Circuit declared the unconstitutionality of a policy a high school speech policy which prohibited negative, demeaning, and derogatory speech, stating “[t]he precise scope of *Tinker*’s “interference with the rights of others” language is unclear; at least one court has opined that it covers only independently tortious speech like libel, slander or intentional infliction of emotional distress.”<sup>18</sup> When examining what speech may infringe upon the rights of others, the court held that mere offensiveness if not enough to merit suppression of student speech.

The Sixth Circuit has also ruled on the application of the “rights of others” test. In *Castorina v. Madison County School Board* the court ruled that confederate flag t-shirts, although highly offensive, were permissible unless actual or imminent violence occurred as a direct result of the shirt.<sup>19</sup> The *Castorina* decision addressed the important distinction between positive and negative speech. Namely, if the school allowed students to wear Malcolm X t-shirts, they also had to allow students to wear confederate flag tee shirts.

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<sup>17</sup> Abby Marie Mollen, “In Defense of the ‘Hazardous Freedom’ of Controversial Student Speech,” *Northwestern University Law Review* 102 (2008), 1518.

<sup>18</sup> *Saxe v. State College Area School District*, 240 F.3d 200, 217 (2001).

<sup>19</sup> *Castorina v. Madison County School Board*, 246 F.3d 536 (6th Cir. 2001).

In conclusion, the “rights of others” prong was not intended to mean anything more than traditional protection from battery, and defamation. Most courts have correctly interpreted the Supreme Court’s intention when it protected the “rights of others.” However, much like the disruption test, the “rights of others” has in some cases been used to silence legitimate student speech.

### **Example of *Tinker* Incorrectly Applied**

In *Harper v. Poway*, the Ninth Circuit Court of Appeals applied *Tinker* “rights of others” test. Harper’s t-shirt read, I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED” on the front and, “HOMOSEXUALITY IS SHAMEFUL. ROMANS 1:27” on the back.<sup>20</sup> Clearly, the speech was personal expression, not school-sponsored speech, so it falls under the *Tinker* umbrella of pure student speech. His speech was neither sexually explicit, nor pro-drug, so it could not be ruled an exception to *Tinker* under either *Bethel* or *Morse*. Accordingly, the courts should have assessed Harper’s speech according to the *Tinker* material and substantial disruption standard. Nonetheless, courts did not adhere to the traditional application of *Tinker* when evaluating Harper’s speech.

The district court denied Harper’s request for an injunction preventing school officials from suppressing his t-shirt, on the basis that he failed to demonstrate a likelihood of success based on the evidence presented.<sup>21</sup> Harper appealed, and the Ninth

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<sup>20</sup> *Harper v. Poway Unified School District*, 445 F. 3d 1166, 1171 (9th Cir. 2006).

<sup>21</sup> *Harper v. Poway Unified School District*, 345 F. Supp. 2d 1096 (S.D. Cal., 2004).

Circuit Federal Court of Appeals affirmed the district court's decision in a 2-1 decision. Judges Reinhardt and Thomas wrote the majority opinion, while Judge Kozinski dissented.

What is peculiar about the manner in which the Ninth Circuit majority wrote its opinion is that flies in the face of all previous applications of *Tinker*. Rather than rule under the material and substantial disruption test, the court chose instead to focus on the “invades the rights of others” language of *Tinker*. The Ninth Circuit court stated that Harper could not wear his t-shirt because of the potential for the shirt to offend or cause psychological harm to homosexual students:

We conclude that Harper's wearing of his T-shirt “collides with the rights of other students” in the most fundamental way. Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses. As *Tinker* clearly states, students have the right to “be secure and to be let alone.” Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.<sup>22</sup>

The court did not judge the worthiness of Harper's speech according to whether it caused material and substantial disruption. Rather, it chose to ban the speech because of the potential that it could have offended certain students.

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<sup>22</sup> 445 F. 3d 1166, 1191-1192 (9<sup>th</sup> Cir 2006).

The *Harper* ruling breaks with the traditional application of *Tinker*'s "rights of others" test. According to a 2007 *Harvard Law Review* article, "[n]o court has interpreted *Tinker*'s reference to the "rights of other students" as broadly as did the *Harper* panel."<sup>23</sup> In *Harper v. Poway*, the Ninth Circuit ruled in a manner that was completely at odds with the way other circuits have interpreted the "rights of others" language in *Tinker*. Both the Third and Sixth Circuits in *Saxe v. State College Area School District* and *Castorina v. Madison County School Board*, respectively, noted that offensiveness is not enough to warrant silencing speech as an infringement on the rights of others.

The Ninth Circuit engaged in viewpoint discrimination, and the decision also draws an unsettling distinction between positive and negative speech. Jerico Lavarias describes, how in *Harper*, "the Ninth Circuit incorrectly applied a viewpoint-specific ban on religious opinions or symbolic speech that would be insensitive to homosexuals."<sup>24</sup> While *Harper*'s high school designated an entire day to speech which is tolerant of homosexuality, it suppressed the opposing view on the issue.

Judge Kozinski, in his dissenting opinion to *Harper v. Poway*, criticized the majority's decision as without legal precedent: "The fundamental problem with the majority's approach is that it has no anchor anywhere in the record or in the law. It is entirely a judicial creation, hatched to deal with the situation before us, but likely to cause

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<sup>23</sup> "Ninth Circuit Upholds Public School's Prohibition of Anti-Gay T-Shirts," *Harvard Law Review* (April 2007), 1694.

<sup>24</sup> Jerico Lavarias, "A Reexamination of the *Tinker* Standard: Freedom of Speech in Public Schools." *Hastings Constitutional Law Quarterly* 35 (Spring 2008), 584.

innumerable problems in the future.”<sup>25</sup> Judge Kozinski’s prediction was right, as the *Harper* decision added fuel to the fire of the *Tinker* standard debate.

Harper did appeal the Ninth Circuit’s decision to the Supreme Court, who granted certiorari. However, rather than rule on this important case for student speech, the court merely vacated the Ninth Circuit’s decision. Their rationale was that because Harper had already graduated from Poway High School, the case was moot. Perhaps if the Supreme Court had in fact issued a judgment in *Harper*, the proper application of the rights of others language would be more apparent. Since they did not weigh in on the rights of others, school officials are left struggling with how to translate the standard into a real-world classroom setting. Just as courts have struggled to fairly apply *Tinker*’s disruption test, they have also struggled with the true meaning of the “rights of others.”

### ***Tinker* Needs a Modern Interpretation**

Although in *Harper v. Poway* the Ninth Circuit ruled under the “rights of others” language, even if the court had applied the disruption test, the result might have been the same for Harper. The Ninth Circuit may have cited some other reason for Harper’s shirt to be labeled disruptive and therefore silenced. Chapter Two has illustrated the problems with both the disruption and rights of others prongs of the *Tinker* standard. First, that the subjectivity of the *Tinker* standard leaves school officials with too much say as to what speech is and isn’t allowed. The danger of such subjectivity is that it opens the door to

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<sup>25</sup> 445 F. 3d 1166, 1260 (9th Cir. 2006).

viewpoint discrimination. The *Tinker* test needs a modern interpretation with a more objective way for school officials to evaluate student speech. The second problem with the *Tinker* test is that it is unclear as to what constitutes “material and substantial disruption.” Without a concrete way to judge disruption, school administrators have sometimes violated the *Tinker* test by suppressing speech without the occurrence of disruption. The disruption standard must be clarified as to what constitutes disruption, and when. Third, the tendency to completely eradicate all controversy from schools is perhaps the most threatening affront to *Tinker*, and to student speech rights in general. In order to reverse the trend toward “vanilla” schools, the mindset of school officials must be changed. They must realize that debate and conversation in America’s public schools is essential to raising mature and thoughtful citizens. Aside from problems with the disruption test, the “rights of others” language of *Tinker* must also be clarified. Chapter Three will elaborate on more detailed solutions to each of the problems with the *Tinker* standard as it exists in America today.

## CHAPTER THREE

### RETHINKING *TINKER*: THE SOLUTION TO STUDENT SPEECH RIGHTS

Although the Supreme Court intended for *Tinker v. Des Moines Independent School District* to be the governing standard for student speech rights, some problems have emerged with the practical application of *Tinker*. The disruption test has proven to be innately subjective, granting school officials too much power. Another major dilemma is *Tinker*'s lack of explanation as to whether school officials can censor speech that they anticipate will cause disruption, or whether they must wait until actual disruption occurs. Also, in the forty years since the *Tinker* ruling, its original intentions have been undermined by the desire to ensure that schools are completely free of all potentially damaging or controversial speech. Finally, the "rights of others" prong of the *Tinker* test has often been neglected due to its indistinct meaning. In the few instances when the "rights of others" language has been addressed, courts have misused it in order to shelter students from any speech with which someone could take offense.

Besides the problems inherent in *Tinker*, technology has raised issues for student speech that the authors of *Tinker* could have never imagined. For instance, the Internet has blurred the boundaries between on and off-campus speech. As a result, students have invented new means of expressing their views on controversial issues. Clearly, the *Tinker* standard needs both an explanation of its original language and a modern clarification in order to persevere in the twenty-first century as the seminal ruling in student speech.

## **First Amendment Worthiness**

Before assessing how and when student speech may be suppressed, it is important to examine student speech worthiness within the broader context of the First Amendment. Although the First Amendment guarantees all Americans certain rights of expression, it also has limiting principles. These principles apply in schools, as in all other public places in the United States. Consequently, the first step in evaluating student speech worthiness is asking whether the speech is appropriate for First Amendment protection at all.

### *Malicious Speech*

Three types of speech are not afforded First Amendment protection. Therefore, these types of speech are also unprotected in America's schools. The first of these is speech which maliciously threatens or identifies a specific individual. The Supreme Court has issued two major decisions in regard to this type of speech. In *Chaplinsky v. New Hampshire*, the court ruled that so-called "fighting words" are not protected under the First Amendment. The case resulted arose in 1942 when Walter Chaplinsky, a Jehovah's Witness, attracted a large crowd while distributing religious materials in Rochester, New Hampshire. When a city police officer warned him that the crowd was becoming riotous, Chaplinsky verbally assaulted the officer, calling him a "racketeer" and a "fascist". The Supreme Court found Chaplinsky's speech to be outside the realm of First Amendment protection, and termed the speech "fighting words". The court defined this type of

unprotected speech as, “those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>1</sup> Such speech is generally considered to be without any social merit, since its sole purpose is to invoke an immediate violent reaction. Therefore, fighting words are unprotected by the First Amendment.

The other major decision about malicious speech was issued in a 1969 decision, *Watts v. United States*. In this case, the court stipulated that only “true threats” are unworthy of First Amendment protection. Robert Watts, a young African-American man, allegedly stated during a draft protest in Washington D.C.: “I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers.”<sup>2</sup> The court reasoned that Watts’ speech was mere “political hyperbole”<sup>3</sup> and therefore could not be reasonably perceived as a legitimate threat. He truly did not intend to shoot the president. Obviously fighting words and true threats are not afforded First Amendment protection and are therefore inappropriate for the school environment. To ensure the safety of every student, physical threats and fighting words should absolutely not be tolerated.

The aforementioned impermissibility of speech which maliciously threatens an individual is the true meaning of the “rights of others” language of *Tinker*. When evaluating student speech, school administrators should adhere to the narrowest possible definition of the “rights of others”: battery, defamation, and such individualized

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<sup>1</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>2</sup> *Watts v. United States*, 394 U.S. 705, 708 (1969).

<sup>3</sup> 394 U.S. 705, 708 (1969).

impositions. The purpose of this definition is to protect students while simultaneously allowing the widest possible freedom of speech in schools.

Nowhere in the definition of the first type of prohibited expression is speech which is offensive or generates discomfort. The Supreme Court touched on this very issue in *Tinker*. The majority opinion states that a school “must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>4</sup> The reason that offensiveness cannot be the bar by which speech is judged is that censoring speech merely because it is offensive to some individual effectively issues a heckler’s veto to every student. Namely, any student who disagrees with the speech of another student could call for censorship based on their own discomfort.

Preserving free student speech in public schools outweighs the importance of preventing offense and discomfort for all students. Overextending the definition of “rights of others” beyond traditional protection from battery and defamation would effectively cripple student speech rights. That being said, fighting words and true threats are not appropriate speech under the First Amendment, and therefore this type of speech is also not permissible in public schools.

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<sup>4</sup> 393 U.S. 503, 509 (1969).

### *Speech Advocating Criminal Activity*

The second type of speech not protected by the First Amendment is speech which explicitly advocates criminal activity. Speech advocating criminal activity can be considered criminal if it is found to aid and abet a crime. The case which established this type of speech as outside the realm of First Amendment protection was *Central Bank v. First Interstate Bank*. The court stated: “an actor is liable for harm resulting to a third person from the tortious conduct of another ‘if he . . . knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other . . .’”<sup>5</sup> If the speech can be described as inciting others to criminal activity, then it is unprotected by the First Amendment.

Examples of speech which advocates criminal activity are blatant statements such as “smoke weed everyday” or “steal cars.” These are imperative statements which recommend, even urge other to engage in such illegal activity. Speech which advocates illegal activity is especially dangerous for the public school environment. Illegal activity represented as cool or positive is dangerous in schools, and should be punished.

However, like the malicious individual threats of the first category of inappropriate speech, speech advocating criminal activity must also be interpreted in the narrowest manner possible. For instance, a hat with a marijuana leaf or a t-shirt with the slogan of the video game Grand Theft Auto do not explicitly advocate criminal activity. While they may contain symbols or messages associated with criminal activity, they do

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<sup>5</sup> *Central Bank v. First Interstate Bank*, 511 U.S. 164, 181 (1994).

not encourage criminal activity. Therefore, to ensure the widest possible latitude to free speech, they must be allowed. Although advocacy or incitement to criminal activity is inappropriate, to censor all slight references and allusions to criminal activity is an invasion of students' First Amendment rights to free speech.

### *Obscenity and Indecency*

The third and final category of speech which is not protected by the First Amendment is speech which is obscene or indecent. Obscene speech is sexual in nature, specifically patently offensive sexual and excretory language. The test for obscenity was proscribed in *Miller v. California* and reads as follows:

- (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>6</sup>

The Supreme Court has sanctioned censorship of obscene speech because it is seen to have no redeeming social value other than pure sexual titillation. However, given the extreme vulgarity necessary to constitute obscene speech, it is very unlikely that student speech would meet the threshold of obscenity.

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<sup>6</sup> *Miller v. California*, 413 U.S. 15, 24-25 (1973).

A much more common problem which might arise in schools is indecency. Indecent speech includes curse words and vulgarities. While indecent speech is protected by the First Amendment in most contexts, the Supreme Court has mandated two areas where indecent speech is not acceptable: the public airwaves and schools. In *FCC v. Pacifica Foundation*, the court ruled that indecent speech may not be broadcast over the public airwaves since broadcasting is uniquely pervasive and accessible to children.<sup>7</sup> In *Bethel v. Fraser*, the court identified indecent speech as inappropriate for schools.<sup>8</sup> However, both of these holding should be read in the narrowest manner possible. The court took pains to explain that neither of these rulings may be used to silence indecency in contexts other than public broadcasting and public schools.

Both instances in which indecency is unprotected stem an effort to shield children from profane speech. In middle schools, indecent speech is not appropriate. Although in *Bethel v. Fraser* the court also stipulated that indecent speech is also unallowable in high schools, some critics of the decision beg to differ. Fraser's speech straddled the line of indecency, but because he had a captive audience of teenagers as young as fourteen, the court declared his speech indecent.

In summary, there are three categories of speech, and by extension speech in public schools, which are unworthy of First Amendment protection. These include: malicious personal threats, speech which advocates criminal activity, and obscene and indecent speech. All of these types of speech contribute nothing to the educational

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<sup>7</sup> *FCC v. Pacifica Foundation*, 438 U.S. 726, 746-750 (1978).

<sup>8</sup> *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1968).

environment and therefore should not be permitted in schools. However, it is crucial that the definitions of such categories are applied in the narrowest manner possible. To stretch the limits of these inappropriate kinds of speech is to suppress valid student speech. Therefore, school officials and courts must be diligent about strict application of the definitions of speech which is unworthy of First Amendment protection.

### **Special Conditions of the School Environment**

Certain types of speech are unworthy of First Amendment protection, namely, malicious individualized threats, speech advocating criminal activity, and obscene and indecent speech. All other speech is protected by the First Amendment. However, the special characteristics of the school environment allow for suppression of student speech in some instances. In order to allow the maximum freedom of expression for students however, the circumstances which warrant suppression must be specific and clear. The reasons for censorship of student speech include: if the speech is school-sponsored, if the speech is not age-appropriate, if the speech actually impedes learning, and if suppression of the speech is the last resort for teachers. Each of these reasons for suppression will be thoroughly explained as to how they together form a new, modernized interpretation of the *Tinker* framework.

### *School Sponsored Speech*

The first of the special circumstances when student speech may be suppressed is if the speech is school sponsored. If the thoughts and opinions expressed in the speech may be reasonably believed to represent those of the school, then student speech may be censored. A school has the right to approve the views purported in events and publications which it lends its name to. School-sponsored speech is different from the pure personal speech governed by *Tinker*, which is assumed to reflect only the opinions of that individual, and not the school they attend. The standard to judge whether an event is school-sponsored is if members of the local community believe the views espoused by the speech to be in line with the views of the school as an institution. This exception to student free speech was made precedential in the 1988 decision *Hazelwood School District v. Kuhlmeier*.

In *Hazelwood v. Kuhlmeier*, the speech in question was printed in a newspaper, *Spectrum*, as part of the journalism curriculum. It was not an independently-run student publication; rather it was merely a tool in which journalism classes could practice their skills. Since the paper was published as part of the educational process, it is feasible for the community to assume that the views expressed in the paper are in line with those of the school. Other school-sponsored forums might include a yearbook, a football game, or a television program produced as part of a broadcasting course. Since these forums are directly funded and associated with the school as an institution, the school has a right to approve the messages expressed in them.

On the other hand, many events and groups in which students take part may not be school sanctioned. If students of a school issue an independently student-run newspaper, then it is clear that the opinions written in the paper do not reflect those of the school. Similarly, if students in a poetry club organize an after-school reading of their poems, it is obvious that the personal views of the students are separate from the school which they attend. Despite the fact that students may attend a certain school, if the school doesn't lend its funds, organization and name to a certain forum of expression, then that forum cannot be deemed school-sponsored.

A controversy about what constitutes school-sponsored speech was raised in *Morse v. Frederick*. Principal Morse argued that the viewing of the passing of the Olympic torch through Juneau, Alaska was a school-sponsored event. The students watched the torch pass from off-campus property across the street from the school. Although Principal Morse likened the passing of the torch to a field trip, the students were actually released from school and unsupervised by school officials while the torch passed. The reasonable member of the community would not ascribe the views of Frederick's banner, which read "BONG HiTS 4 JESUS," to those of the school. There is no reference to Juneau-Douglas High School in the speech which would lead the community to believe the speech was anything more than the personal opinion of Frederick as an individual citizen who happened to attend the school.

In conclusion of school-sponsored speech as a category of student speech which can be censored, it is extremely important that schools have the right to approve the messages espoused in events and forums which they sponsor. However, schools should

not be allowed to abuse this privilege by censoring student speech which is the personal view of a student or group of students.

### *Age Appropriateness*

The second factor in whether speech worthy of First Amendment protection may be suppressed in a school environment is whether the speech is age appropriate. Certain speech which older children may be mature enough to understand may be inappropriate for younger children. Age is an extremely important factor in evaluating the worth of speech, as maturity and comprehension levels can vary greatly with age. Specific standards should be established regarding the age-appropriateness of student speech.

A 2008 case which illustrates the need for a standard of age-appropriateness is *K.B. v. Independent School District #423*. The mother of twelve-year-old Minnesota middle school student K.B. filed a lawsuit after the administration told him not to wear t-shirts with anti-abortion messages. K.B. wore the shirts for the whole month of April, leading up to National Pro-Life Day (April 29). The three variations of the shirts contained messages including, the words “NEVER KNOWN, NOT FORGOTTEN” surrounding an ultrasound picture of a fetus, and “47,000,000 BABIES ABORTED 1973-2008.”<sup>9</sup> The dress code of Hutchinson Middle School, which K.B. attended, allowed

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<sup>9</sup> *K.B. v. Independent School District #423*, 2008cv01464 (D. Minn., filed May 28, 2008).

students to “express political, religious, philosophical or similar opinions by wearing apparel on which such messages are stated.”<sup>10</sup>

Although the dress code allows for expression of religious beliefs on apparel, K.B. was repeatedly reprimanded for the shirt throughout the month of April. He was singled out in his classes and sent to the principle’s office by teachers who deemed his shirt “inappropriate.” School Principal Todd Grina told K.B. not to wear the shirts anymore, except on National Pro-Life Day, April 29. When K.B.’s mother inquired why he was not allowed to wear the shirts, Principal Grina responded that the shirts were inappropriate, and “some of the kids are starting to ask questions.” Grina informed K.B.’s mother that he would ask K.B. to turn the shirts inside out in the future. Throughout the rest of the month, K.B. wore the shirts and was instructed by various teacher and administrators to cover them up or turn them inside out. Grina also threatened him with in-school suspension.

On April 29, 2008, National Pro-Life Day, K.B. again wore his pro-life shirt. Principal Grina requested K.B. report to his office and asked K.B., “why do you keep wearing these shirts when you know that they *annoy* me?”<sup>11</sup> When K.B. reminded Grina that he had personally given K.B. permission to wear the shirt that day, Grina responded that he could wear the shirt that day, but was not to wear the shirt again. For the rest of the day, K.B. was publically singled out by teachers who expressed the displeasure with the message of his shirt.

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<sup>10</sup> 2008cv01464 (D. Minn., filed May 28, 2008).

<sup>11</sup> 2008cv01464 (D. Minn., filed May 28, 2008).

K.B. sued on grounds that the dress policy was unconstitutionally vague. The superintendent of the school district stated that a message's offensiveness is generally left up to the discretion of school official. This policy is a violation of *Tinker* because it allowed for suppression of student speech based on the subjective judgment of the administration. Principal Grina acted in a biased manner when he let his personal opinions dictate whether K.B. could wear his shirt.

Although the principal clearly let his personal views influence his attitude toward K.B.'s speech, it is understandable why Grina and other teachers might think the issue of abortion could be inappropriate for a middle school context. Abortion is an extremely controversial issue about which many Americans hold deeply ingrained religious and moral beliefs. Such a contentious issue must be addressed delicately in the context of a middle school where students may not fully understand the implications. Also, parents may have strong opinions as whether abortion should be addressed at all in schools, and how. All of these factors are magnified in a middle school, where children are younger and more innocent than high school students.

The problem of how to deal with student speech in middle and elementary schools is difficult. While it is important not to completely shelter students from all controversy, many of the issues which generate debates about student free speech need to be dealt with carefully. Student speech rights in middle schools should be more limited than those afforded high school students. Parents must be included in the decision as to how wide or narrow their student's speech rights are. If parents want to be involved in the process, they should attend Parent Teacher Association hearings about student speech rights. The

maturity level and issues of particular interest to the students of each school should be examined separately. Hopefully, through meetings specifically dedicated to the issue of student speech rights, parents, teachers and administrators will come to a general consensus about how student speech rights should be handled in that specific district.

The case of *K.B. v Independent School District No. 423* is an example of the importance of an age-appropriate standard for student speech rights. This case should be handled differently than if the speech had occurred in a high school setting. Middle school students may fully comprehend the issue of abortion and all its implications. Also, their views on this issue may not necessarily be well-informed, as younger children are more impressionable to persuasive rhetoric. However, the fact that one student at Hutchinson Middle School expressed views about abortion means that other students most likely have their own opinions on the issue. Therefore, the issue deserves to be addressed by school officials.

Given the fact that Pro-Life day was approaching, school administrators should have reached out to parents to gauge where they stood on the issue of abortion being discussed in their children's school. K.B. wore his shirt for the entire month of April leading up to Pro-Life day on April 29, so the school had ample time to contact parents about their opinions on the issue and its repercussions for student speech rights. If a majority of parents approved of their children participating in educated discussion about the issue, the school could have used Pro-Life day as a forum to debate both sides of the issue. K.B. would have been allowed to wear his shirts and the school could have taught students what a hotly-contested issue abortion is and why. If the majority of parents did

not approve of abortion being discussed, the issue should have been dropped. K.B. would not have been permitted to wear the shirts because the parents of his middle school peers did not want their children learning about this particular issue.

When it comes to the age-appropriateness of student speech, foremost in the minds of school officials should be the idea that if students are expressing views on a certain issue, then they should be mature enough to discuss that issue. School is a safe context for students to be informed and debate about controversial issues. In a middle school context, parents should be involved in the process of regulating student speech.

### *Actually Impedes Learning*

The problem of actual vs. theoretical disruption and the lack of explanation of “material and substantial” disruption in *Tinker* must be addressed. As the wording of *Tinker* exists, it leads to confusion for teachers and courts to apply. In a new clarification of the original phrasing of *Tinker*, only speech which pollutes the classroom by preventing learning should be suppressed. Disruptive speech must be so intrusive that it can only be called toxic to the environment of learning. The difference between this new standard and the original *Tinker* standard lies in the increased emphasis on the poisonous nature of the speech. ‘Disruptive’ is too mild a word to describe the type of student speech which really merits suppression. Instead, only speech which is truly harmful to the learning environment may be censored.

Additionally, only speech which occurs in an actual classroom may potentially be suppressed. The hallways, cafeteria, gymnasium and school grounds do not constitute a classroom. Rather, they are social environments in which students may choose to discuss whatever topics they wish. In areas outside of the actual classroom, as long as malicious personal attacks, obscenity and indecency are not part of the speech, students may speak about anything they choose without penalty.

Also, consideration for “anticipation” must be excluded from the standard. Too many schools have used the threat of anticipated disruption to engage in viewpoint discrimination. The subjective view by one teacher or school official that a particular message may eventually cause disruption is not enough to silence valid student speech. Schools are boisterous environments in which disruptive actions occur daily. To allow for the suppression of student expression based on anticipated disruption is like handing administrators a free pass to silence any speech they don’t like.

Applying this new and improved standard to the case of *Miller v. Penn Manor School District*, Miller’s t-shirt which said “Terrorist Hunting Permit” should not have been censored. First, the shirt must be assessed according to whether it was worthy of First Amendment protection at all. While the shirt did reference a particular group (terrorists), it was not an individualized threat. Therefore, it cannot be censored based on the “rights of others.” Next, does the shirt advocate criminal activity? This was the reason the district court ruled against Miller’s shirt. Although the shirt does reference illegal activity, namely the murder and “hunting” of humans, it does not directly advocate for others to engage in the criminal activity. Miller’s shirt does not say “Go out and kill you a

terrorist!” Even though the shirt alludes to criminal activity, under the strictest application of the new standard, it does not *advocate* such criminal activity. So far, Miller’s shirt has not violated two of the three categories of student speech inappropriate for public schools. The last category is speech which is obscene or indecent. Miller’s t-shirt cannot plausibly be described as either obscene or indecent.

Since Miller’s shirt has been proven worthy of First Amendment protection, the clarified *Tinker* standard can be applied to his speech. Was the shirt age appropriate? Although in a middle school context, parents and teachers might deem his shirt inappropriate, there exist no age restrictions on speech in high schools. Secondly, did the speech actually poison the classroom by preventing learning? Miller’s teacher was alerted to his shirt by a female student passing him a note. Miller’s shirt and his classmates’ reactions to it can hardly be seen as a toxic invasion of the classroom. His teacher didn’t even stop class to address the shirt. Therefore, the speech on Miller’s shirt did not actually impede learning. While the old standard may have allowed for censorship of the shirt based on a claim of anticipated disruption, the new standard allows for no exceptions based on predicted disruption. Consequently, Miller’s shirt passes the test and therefore should not be suppressed according to the adjusted *Tinker* standard.

A more narrow and refined adjustment to the “disruption” language of the *Tinker* standard would solve the problems with how the standard is currently applied. Administrators would have a more objective means of evaluating student speech to ensure they would not engage in viewpoint discrimination, consciously or unconsciously. Furthermore, the problem of actual vs. theoretical disruption would be solved by the

elimination of any standard which suppresses student speech for anticipated disruption. Under this newly proposed standard, only student speech which is so intrusive that it poisons the actual classroom may be silenced.

### *Last Resort*

While two of the three main problems with the recent application of the *Tinker* standard have been dealt with, one major flaw still remains. The tendency to expunge all controversy from America's schools is in complete opposition to the original intention of the Supreme Court in *Tinker*. While the *Tinker* decision was liberating for student speech rights, recently it has been used to silence core political speech. To combat this trend, teachers and administrators need to change the way they think about *Tinker*. Rather than using the standard as an opportunity or tool by which to censor students, teachers must think of suppressing student expression as an absolute last resort. A myriad of alternatives can and should be attempted before student speech is silenced.

To begin, controversial speech should be used as an opportunity to facilitate discussion on issues which students are concerned about. If students are mature enough to form a view on a certain issue, then they should be mature enough to debate that issue in the healthy environment of school. Justices Alito and Kennedy's concurring opinion in *Morse v. Frederick* stresses the importance of dialogue in America's public schools:

Even in high school, a rule that permits only one point of view to be expressed is less likely to produce correct answers than the open discussion of countervailing

views... In the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment.

Whatever the better policy may be, a full and frank discussion of the costs and the benefits of the attempt to prohibit the use of marijuana is far wiser than the suppression of speech because it is unpopular.<sup>12</sup>

The responsibility of public schools is to shape students into responsible, thoughtful students. Informed discussion of all sides of an issue is one of the best ways to accomplish this mission. Instead of striving to suppress speech, school officials and teachers should set an example of tolerance toward all viewpoints.

The case of *Harper v. Poway* is an example of a missed opportunity to encourage tolerance toward both sides of an issue. Given that Harper's speech was made in response to the Day of Silence, a specific event devoted to the topic of homosexuality, the school invited discussion on the issue. However, when Harper expressed a view about homosexuality with which the school didn't agree, they censored his speech. Since the day was already devoted to the discussion of homosexuality, the school should have taken the opportunity to hold a panel in which students could express their own views on the issue. Additionally, students could have received information about homosexuality as it is recognized by both the United States government, and other governments around the world. A non-biased conversation about the issue lead by teachers and school officials would have allowed students to gain more information about a controversial topic in American society, and to form their own opinions on the matter.

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<sup>12</sup> *Morse v. Frederick*, 551 U.S. \_\_\_\_ (2007).

Apart from using controversial speech as an opportunity for informed discussion, schools must implement internal checks and balances to ensure personal agendas are not creeping into the enforcement of the precedents which govern student speech. Teachers should observe each other to ensure that speech is not being censored.

Also, it would be beneficial for all teachers to attend seminars on student speech and the First Amendment. For instance, in the case of *Gillman v. School Board for Holmes County*, after Gillman sued for the right to wear pro-choice clothing, the teachers at Ponce de Leon High School were ordered to undergo sensitivity training. Teachers and officials should be reminded of Oliver Wendell Holmes' marketplace of ideas:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in 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 wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment.<sup>13</sup>

If teachers were required on a national level to attend this preemptive seminar, less students and schools would become embroiled in messy litigation. Internal checks and balances and mandatory Free Speech seminars would help to level the playing field of students' speech rights across America.

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<sup>13</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919).

Finally, schools must never lose sight of the original intentions of *Tinker*-protecting core political speech. For instance, *Palmer v. Waxahachie Independent School District* is a prime example of how the original intentions of *Tinker* were subverted. Palmer's "John Edwards 2008" t-shirt is a clear example of political speech which should have been protected under *Tinker*. He wore the shirt in support of a political candidate's campaign for presidency. The school's policy of banning any political messages is in complete opposition to *Tinker*, which protected black armbands as a symbol of peaceful protest against the Vietnam War.

Again, a national event as significant as a presidential election is the type of contemporary history which should be addressed in America's public schools. The school should have informed students on the various candidates and their platforms. Although most high school students are too young to vote, training students to be discriminating voters is part of sculpting them into responsible citizens. America's public schools should make it part of their mission to ensure that all students have a firm grasp on American politics.

School administrators should remember that they do not have the final say over what student speech is allowed. Instead, they should defer to the courts when assessing the worth of student speech. One of the problems in recent years with the application of *Tinker* is that school officials have forgotten this judicial deference and instead wield a wand of absolute power over students.

While the *Tinker* standard can be tweaked and exceptions can be carved out, threats to student speech rights will still arise unless teachers and administrators radically

alter the way they think about student speech. Rather than using *Tinker* and its exceptions as reasons to justify censorship of student expression, school officials should regard suppression of student speech as their last possible resort. To ensure that administrators are not too quick to silence student speech in the name of *Tinker*, a number of strategies have been proposed. First, controversial speech should be used as a springboard for informed debates and panels on national issues which matter to students. Secondly, schools should implement internal checks and balances to ward against premature stifling of student speech. A Committee on Free Speech should be established in every school district to monitor policies and handle disputes over student speech. Finally, every employee of America's public schools should remember what *Tinker* was really about—protecting core political speech.

### **Conclusion**

*Tinker v. Des Moines Independent Community School District* and its exceptions are the framework which has governed student speech rights for forty years in America. However, recent cases have presented a few problems with the application of the *Tinker* standard. The standard is inherently subjective, giving teachers and school officials too much discretion as to which student speech should be allowed and which should not. Also, the language of *Tinker* is hazy as to what constitutes disruption, and whether anticipated disruption is enough to warrant censorship of speech. Lastly, and most problematic, is the trend to expunge from schools all controversy. These three factors

have contributed to an inordinate number of students suing their schools to protect their freedom of expression.

Chapter Three proposed a new means by which to evaluate student speech. First, the speech must be judged according to whether it is worthy of First Amendment protection. Speech which is threatening to an individual, advocates criminal activity, is obscene or indecent, is never afforded protection under the First Amendment. If the student speech is worthy of First Amendment protection, it must then be examined according to the special conditions of the school environment. The age-appropriateness of the speech is a factor which may allow for its suppression. Next, student speech should only be silenced if it poisons the classroom and prevents learning. Mere discomfort or offense taken by other students is not enough to warrant censorship of student speech. Finally, and most importantly, suppression of student speech must be regarded as the absolute last resort for school officials. Rather than impose a culture of judgment in America's schools, teachers and administrators should strive to set an example of toleration toward all opinions and beliefs.

Although this thesis primarily relied on cases of expressive t-shirts to illustrate the problems with the application of *Tinker*, the new standard proposed in Chapter Three can certainly be extended beyond just t-shirts to the larger realm of student speech. Times have changed since 1969 when *Tinker* was issued. New technology and innovative student speech have increased the demand for a clarified standard to govern student speech. Facebook and other websites have raised new issues about speech which occurs completely off campus, but which may have ramifications in school. While in the past the

act of gossip occurred from person-to-person contact, now online gossip can reach a great number of individuals with the mere click of a mouse.

The pervasive nature of our culture means children may be more aware of controversial issues than ever before. Hot topics such as homosexuality and abortion have sparked debate not only in national politics, but also in America's schools. Also, children are maturing more quickly and may be grappling with important issues and younger and younger ages. Schools are the premiere environment for students to engage in guided and informed discussions, with the goal of shaping them into responsible and thoughtful citizens.