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BLACK ARMBANDS, “BOOBIES” BRACELETS AND THE NEED TO PROTECT STUDENT SPEECH

David L. Hudson Jr.*

Public school students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹ The U.S. Supreme Court proclaimed this oft-cited phrase in its celebrated decision *Tinker v. Des Moines Independent School District*—a case protecting the right of students to wear black peace armbands to express opposition to the Vietnam War.² Constitutional scholar Erwin Chemerinsky explained the importance of this passage: “This sentence powerfully conveys schools are not institutions immune from constitutional scrutiny: students retain their constitutional freedoms even when they cross the threshold into the school.”³

Tinker remains the “high water mark” of student free-speech rights.⁴ Under *Tinker*, school officials cannot censor student expression unless they can reasonably forecast the speech will cause a substantial disruption of school activities or invade the rights of others.⁵ The Court explained: “In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.”⁶

This decision ushered in a sea change in public schools and awakened a generation of students to the reality of young people asserting their rights to free speech.⁷ One of the *Tinker* litigants, Christopher Eckhardt,⁸ expressed its importance: “What George (Washington) and the boys did for white males in 1776, what Abraham Lincoln did to a certain extent during the time of the Civil War for African-American males, what the women’s suffrage movement in the 1920s did for women, the *Tinker* case did for children in America.”⁹

It created a new era of school litigation over dress codes, hair length, restrictions on newspapers and other forms of student expression.¹⁰ Sometimes

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¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

² *Id.*

³ Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What’s Left of Tinker?*, 48 *DRAKE L. REV.* 527, 527 (2000).

⁴ *Morgan v. Swanson*, 659 F.3d 359, 374 (5th Cir. 2011); *Broussard v. Sch. Bd. of Norfolk*, 801 F. Supp. 1526, 1534 (E.D. Va. 1992).

⁵ *Tinker*, 393 U.S. at 508, 513-14.

⁶ *Id.* at 511.

⁷ DAVID L. HUDSON JR., *LET THE STUDENTS SPEAK!: A HISTORY OF THE FIGHT FOR FREE EXPRESSION IN AMERICAN SCHOOLS* 69 (2011).

⁸ Tragically, Eckhardt died in December 2012. See David L. Hudson Jr., *Christopher Eckhardt Left His Mark as First Amendment Litigant*, *FIRST AMENDMENT CENTER* (Mar. 3, 2013), <http://www.firstamendmentcenter.org/christopher-eckhardt-left-his-mark-as-student-speech-litigant>.

⁹ David L. Hudson Jr., *On 30-Year Anniversary, Tinker Participants Look Back at Landmark Case*, *FIRST AMENDMENT CENTER* (Feb. 24, 1999), <http://www.firstamendmentcenter.org/on-30-year-anniversary-tinker-participants-look-back-at-landmark-case>.

¹⁰ *Id.*

students won, and sometimes they lost. But the decision certainly created an environment conducive to respecting student rights on a much more serious level.

In later years, a more conservative Supreme Court created exceptions to *Tinker* for vulgar and lewd speech,¹¹ school-sponsored expression as opposed to student-initiated expression,¹² and for student speech that promotes illegal drug use.¹³ Despite these “supreme retractions,”¹⁴ *Tinker* remains good law and the seminal First Amendment case for K-12 public school students. Reflecting on the case at the “Gathering at the Schoolhouse Gate” symposium at the University of Missouri-Kansas City, Mary Beth Tinker, John Tinker, Christopher Eckhardt, and their attorney Dan Johnston spoke about the case and its continued impact.¹⁵

Yet the spirit of *Tinker* remains imperiled in an age of censorship, zero tolerance,¹⁶ and conformity.¹⁷ School officials have prohibited students from wearing American flag t-shirts,¹⁸ rosary beads,¹⁹ t-shirts in support of slain classmates,²⁰ and t-shirts of a Presidential candidate.²¹ Students have been punished for pro-gay t-shirts,²² anti-gay t-shirts,²³ and facial jewelry.²⁴ Even more outrageous, a few students have been prohibited from wearing black armbands to protest dress codes or other school policies with which they

¹¹ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

¹² *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

¹³ *Morse v. Frederick*, 551 U.S. 393 (2007).

¹⁴ HUDSON, *supra* note 7, at 85-104.

¹⁵ David L. Hudson Jr., *Student Litigants Reflect on Tinker Case*, FIRST AMENDMENT CENTER (Sept. 21, 2012), <http://www.firstamendmentcenter.org/student-litigants-reflect-on-tinker-case>.

¹⁶ John W. Whitehead, *Arrested Development: The Criminalization of America's Schoolchildren*, THE RUTHERFORD INST. (May 7, 2012), https://www.rutherford.org/publications_resources/john_whiteheads_commentary/arrested_development_the_criminalization_of_americas_schoolchildren.

¹⁷ See Clay Calvert, *Free Speech and Public Schools in a Post-Columbine World: Check Your Speech Rights at the Schoolhouse Metal Detector*, 77 DENV. U. L. REV. 739 (2000); Lynda Hils, “Zero Tolerance” for Free Speech, 30 J.L. & EDUC. 365 (2001).

¹⁸ *Dariano v. Morgan Hill Unified Sch. Dist.*, 822 F. Supp. 2d 1037 (N.D. Cal. 2011); David L. Hudson, Jr., *Students Appeal Ruling in America-Flag T-shirt Case*, FIRST AMENDMENT CENTER (Mar. 2, 2012), <http://www.firstamendmentcenter.org/students-appeal-ruling-in-american-flag-t-shirt-case>.

¹⁹ David L. Hudson Jr., *Students Should be Free to Wear Rosary Beads*, FIRST AMENDMENT CENTER (Mar. 1, 2011), <http://www.firstamendmentcenter.org/students-should-be-free-to-wear-rosary-beads>.

²⁰ Associated Press, *Federal Jury Backs Neb. Schools in Dispute Over Memorial T-shirts*, FIRST AMENDMENT CENTER (Apr. 16, 2012), <http://www.firstamendmentcenter.org/federal-jury-backs-neb-schools-in-dispute-over-memorial-t-shirts>.

²¹ Associated Press, *Pa. Teen Returns to School After Flap Over Romney T-shirt*, FIRST AMENDMENT CENTER (Oct. 9, 2012), <http://www.firstamendmentcenter.org/pa-teen-returns-to-school-after-flap-over-romney-t-shirt>.

²² David L. Hudson Jr., *Student Prevails in T-Shirt Dispute – Too Bad It Took a Lawsuit*, FIRST AMENDMENT CENTER (May 23, 2012), <http://www.firstamendmentcenter.org/student-prevails-in-t-shirt-dispute-%E2%80%93-too-bad-it-took-a-lawsuit>.

²³ *Harper v. Poway Unified Sch. Dist.*, 455 F.3d 1052 (9th Cir. 2006).

²⁴ *Bar-Navon v. Brevard Cnty. Sch. Bd.*, 290 Fed. Appx. 273 (11th Cir. 2008).

disagree.²⁵ High school students in Arkansas faced suspension for wearing black armbands to protest a mandatory school uniform policy.²⁶ A student in Louisiana, who wore a black armband to protest a restrictive dress code, had a principal tell her: “I don’t care about *Tinker*.”²⁷

An example of censorship is how some school officials overreact when students wear “I Love Boobies” bracelets—pure speech designed to bring awareness to the awful reality of breast cancer. A disturbing pattern has emerged in public schools. Students wear the bracelets and face discipline.²⁸ Students in Pennsylvania,²⁹ Indiana,³⁰ South Dakota,³¹ Utah,³² and Kansas³³ have faced the ire of school administrators for wearing the bracelets.

Students who faced suspension filed lawsuits in Pennsylvania and Indiana. A federal district court in Pennsylvania ruled in favor of the students;³⁴ however, there is no judicial opinion to date in the Indiana case. The Pennsylvania case was heard en banc by the Third Circuit in February 2013.³⁵

Recall the *Tinker* case dealt with a most divisive issue in modern times—the Vietnam War. Some students in a school district in Des Moines, Iowa, had lost siblings as casualties of the war. Emotions ran feverishly high in the country. Yet, the U.S. Supreme Court saw fit to protect students’ free-expression rights. Justice Abe Fortas proclaimed in his majority opinion:

²⁵ See David L. Hudson Jr., *Fear of Violence in Our Schools: Is “Undifferentiated Fear” in the Age of Columbine Leading to a Suppression of Speech?*, 42 WASHBURN L.J. 79, 79-80 (2002).

²⁶ *Lowry v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 759 (8th Cir. 2008).

²⁷ DAVID L. HUDSON JR., THE SILENCING OF STUDENT VOICES 7 (2003).

²⁸ Jeff Wiehe, *Teen Sues FWCS to Wear ‘Boobies’ Bracelet*, JOURNAL GAZETTE (May 22, 2012, 2:04 PM), <http://www.journalgazette.net/article/20120522/LOCAL04/305229985/0/SEARCH>; David L. Hudson Jr., *Censorship of ‘Boobies Bracelets’ Continues*, FIRST AMENDMENT CENTER (May 24, 2012), <http://www.firstamendmentcenter.org/censorship-of-boobies-bracelets-continues>.

²⁹ See Associated Press, *ACLU Steps Into Dispute Over ‘Boobies’ Bracelets in Pa. School*, FIRST AMENDMENT CENTER (Nov. 5, 2010), <http://www.firstamendmentcenter.org/aclu-steps-into-dispute-over-boobies-bracelets-in-pa-school>.

³⁰ See Wiehe, *supra* note 28; see also Hudson, *supra* note 28 (discussing the ban on breast-cancer support bracelets in an Indiana school and the lawsuit involved).

³¹ See Associated Press, *Breast-Cancer Bracelets Cause Stir in Schools*, FIRST AMENDMENT CENTER (Sept. 4, 2010), <http://www.firstamendmentcenter.org/breast-cancer-bracelets-cause-stir-in-schools> (discussing the “boobies” bracelet ban in several South Dakota schools because school officials believe the message is “in poor taste”).

³² See Associated Press, *Utah School District Backs Breast-Cancer Bracelets*, FIRST AMENDMENT CENTER (Dec. 26, 2010), <http://www.firstamendmentcenter.org/utah-school-district-backs-breast-cancer-bracelets>.

³³ See Associated Press, *Kan. School Drops ‘Boobies’ Bracelet Ban*, FIRST AMENDMENT CENTER (Dec. 10, 2010), <http://www.firstamendmentcenter.org/kan-school-drops-boobies-bracelet-ban>.

³⁴ *B.H. v. Easton Area Sch. Dist.*, 827 F. Supp. 2d 392, 409 (E.D. Pa. 2011).

³⁵ *B.H. v. Easton Area Sch. Dist.*, No. 11-2067, 2012 U.S. App. LEXIS 17201 (3d Cir. Aug. 16, 2012); Saranac Hale Spencer, *‘I ♥ Boobies’ Case Heard En Banc by Third Circuit*, DAILY REPORT (Feb. 22, 2013), http://www.dailyreportonline.com/PubArticleDRO.jsp?id=1202589098368&I_hearts_Boobies_Case_Heard_En_Banc_by_Third_Circuit&slreturn=20130206085121

But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.³⁶

Today many school officials and judges have forgotten this lofty language. They rely on “undifferentiated fear.” They require “absolute regimentation.” They fear “hazardous freedom” as a dangerous oxymoron. They rage against a “permissive” or “disputatious” society. Writing in 2000, Erwin Chemerinsky issued a dire assessment: “Simply put, in the three decades since *Tinker*, the courts have made it clear that students leave most of their constitutional rights at the schoolhouse gate.”³⁷ The head of the Student Press Law Center warned of the “shrinking of *Tinker*” on its 40th anniversary.³⁸ Another education law scholar assessed that the impact of *Tinker* had been “more symbolic rather than substantial.”³⁹

The “boobies” bracelet controversies epitomize this tragic curtailment of student rights. In the Pennsylvania case, two middle school students wore the bracelets in part to support either family members or close family friends who suffered from breast cancer.⁴⁰ The Keep-A-Breast foundation created the bracelets to raise awareness about breast cancer among young women.⁴¹ The organization hoped to encourage young women to talk openly about breast health and not consider the subject in any way taboo.⁴²

School officials eventually determined the bracelets were inappropriate and banned them.⁴³ In the subsequent litigation, school officials made two basic arguments: (1) the bracelets could be banned under *Tinker* because school officials reasonably believed they were substantially disruptive, and (2) the

³⁶ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-509 (1969).

³⁷ Chemerinsky, *supra* note 3, at 530.

³⁸ Frank D. LoMonte, *Shrinking Tinker: Students Are Persons Under Our Constitution: Except When They Aren't*, 58 AM. U. L. REV. 1323, 1324 (2009).

³⁹ Perry A. Zirkel, *The Rocket's Red Glare: The Largely Errant and Deflected Flight of Tinker*, 38 J.L. & EDUC. 593, 602 (2009).

⁴⁰ *B.H. v. Easton Area Sch. Dist.*, 827 F. Supp. 2d 392, 396-99 (E.D. Pa. 2011).

⁴¹ *I Love Boobies!*, KEEP A BREAST FOUNDATION, <http://www.keep-a-breast.org/programs/i-love-boobies/> (last visited Feb. 15, 2013).

⁴² *B.H.*, 827 F. Supp. 2d at 395-96.

⁴³ *Id.* at 397-99.

bracelets were a form of lewd speech that could be prohibited under the Court's subsequent student-speech decision *Bethel School District v. Fraser*.⁴⁴

In April 2011, federal district court judge Mary McLaughlin granted the students' preliminary injunction and ruled against school officials.⁴⁵ The judge determined the bracelets were not disruptive within the meaning of *Tinker* or lewd within the meaning of *Fraser*,⁴⁶ wisely distinguishing between a "general fear of disruption" and something that is substantially disruptive.⁴⁷ A few isolated incidents simply do not rise to the level of a substantial disruption.⁴⁸ The district court judge explained that at the time of the ban, the principal and assistant principals had not heard any evidence of disruption from the bracelets.⁴⁹ School officials later justified their action by claiming a few boys in area schools made inappropriate comments and some teachers believed the bracelets trivialized breast cancer.⁵⁰

The school district appealed the decision to the Third Circuit. The school officials continue to assert the bracelets were both disruptive and lewd. In their appellate brief, the students emphasize: "Under *Tinker*, the school's responsibility is to discipline misbehavior, not to silence student speech."⁵¹ The students recognize another key parallel between the censorship of black armbands and the censorship of "boobies" bracelets. In each case, school officials engaged in abject viewpoint discrimination. In *Tinker*, school officials prohibited students from wearing black armbands but allowed them to wear Iron Crosses and political campaign buttons.⁵² In the *Easton* case, the school officials prohibited students from wearing the "boobies" bracelets but allowed students to wear the color pink as an acceptable way to speak about breast cancer.⁵³

In each case, school officials violated the most fundamental of all First Amendment free speech principles—the government cannot engage in viewpoint discrimination by favoring certain private messages over others.⁵⁴ *Tinker* also counsels that school officials may not censor student expression simply because they do not like it. One federal judge expressed it well: "Disliking or being upset

⁴⁴ *Id.* at 401; *see also* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

⁴⁵ *B.H.*, 827 F. Supp. 2d at 409.

⁴⁶ *Id.* at 405-09.

⁴⁷ *Id.* at 408.

⁴⁸ *Id.* at 408-09.

⁴⁹ *Id.* at 397, 408.

⁵⁰ *See id.* at 398-99.

⁵¹ Brief for Appellees, at 36, *B.H. v. Easton Area School District*, 2012 U.S. App. LEXIS 17201 (2012) (No. 11-2067).

⁵² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510 (1969).

⁵³ Brief for Appellees, *supra* note 51, at 37-38.

⁵⁴ DAVID L. HUDSON JR., *THE FIRST AMENDMENT: FREEDOM OF SPEECH* 32 (2012) ("The most fundamental free-speech principle in First Amendment law is that the government may not restrict speakers because of their viewpoints.").

by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*.”⁵⁵

Another lesson of *Tinker* is that “school officials can't ban ‘boobie’ bracelets simply because they don't like them or fear that a few people might be made uncomfortable by them.”⁵⁶ It seems that school officials engaged in a kneejerk reaction by assuming that “boobies” bracelets will cause disturbances or problems.

The *Tinker* precedent on black armbands should protect “boobies” bracelets, which have become the latest symbol of student speech.

⁵⁵ *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998).

⁵⁶ David L. Hudson Jr., *Breast-Cancer Bracelets Are Protected Speech*, FIRST AMENDMENT CENTER (Nov. 22, 2010), <http://www.firstamendmentcenter.org/breast-cancer-bracelets-are-protected-speech>.