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On August 5, 2013, fourteen judges of the 3rd Circuit Court of Appeals weighed in on the issue of whether or not students have a constitutional right to wear bracelets bearing the words: I (heart) BOOBIES: KEEP A BREAST. The bracelets were designed to support a good cause—raising awareness of breast cancer, and encouraging young girls to get over the embarrassment of discussing such things. But any mention of body parts in a junior high school can cause a commotion. And so some teachers expressed concerns about these bracelets, and asked their bosses, the school administrators, what they should do.

The administrators in the Pennsylvania school district huddled up and made a decision. They informed the students that such bracelets would not be permitted. Two students directly disobeyed this directive and were issued minor disciplinary consequences in conformity with the Code of Conduct. And a few years later, after hours of work by numerous lawyers and advocacy groups, generating thousands of dollars of fees, the esteemed judges issued a mammoth ruling, overturning the decision of the local school officials. The First Amendment, according to the nine-person majority, protected this expression of free speech. Five judges dissented (*B.H. v. Easton Area School District*, 2013).

How did we get here? Why were so much time, energy and resources spent on an issue that could have been left to local school officials? To understand, we have to go back to the 1960s

and the upheaval in our country over the War in Vietnam. In December, 1965, Bobby Kennedy called for a truce in Vietnam over the Christmas holidays. Mary Beth Tinker, an eighth grader, along with her older brother and another student, decided to show support for the proposed truce by wearing black armbands to school. The parents of the students were fully supportive, even though they knew that their children would be engaging in a minor league version of civic disobedience. The principal of the school had gotten wind of the plans the day before, and had issued a directive that there were to be no black armbands in the school setting.

The protest armbands caused some talk in the school. While the War in Vietnam eventually became very unpopular, that was hardly the case in December 1965. Moreover, Des Moines, Iowa, was not a hotbed of anti-war activity. Thus, it is not surprising that there were some students, and faculty members, who found these armbands to be offensive. Perhaps even more, there were faculty members disturbed about the student's direct defiance of the principal's orders. If students did not have to obey the principal, they did not have to obey the teacher. Where would this lead?

It led to the U. S. Supreme Court. In February, 1969, the Court issued its decision in *Tinker v. Des Moines Independent Community School District* (1969). Public schools have not been the same since.

By a 7-2 margin, the Court ruled that Mary Beth Tinker had a constitutional right to defy her principal. There had been some talk in the school, but nothing approaching any major disruption. Bells rang. Buses ran. Teachers taught. Students learned. Justice Fortas, writing for the majority, paid lip service to the "special characteristics" of the school. He held that students do not "shed their constitutional rights to freedom of

speech or expression at the schoolhouse gate.” The Tinker Test was established: student free speech was protected unless school officials could reasonably forecast that there would be a “material and substantial” disruption of school (*Tinker v. Des Moines Independent Community School District*, 1969).

Many hailed the decision. Few noted that it marked the beginning of an erosion of respect for authority in the public schools. The next time student free speech came before the High Court the issue was vulgarity. Mary Beth Tinker and her friends used their constitutional rights in support of an important cause – peace in Vietnam. But the next plaintiff – Matt Fraser – used this precious constitutional right to justify his vulgar and offensive speech nominating his friend for an office in the student council. Fraser was clever enough to deliver a speech that contained not a single inappropriate word. But the overall effect, the innuendo and double entendre, combined with the graphic gestures he used, converted his speech into “an elaborate, graphic, and explicit sexual metaphor,” according to the Supreme Court. Fraser lost his case, 7-2. Thus the first exception to the Tinker Test was defined: if speech is vulgar, lewd or indecent in the school setting, it can be prohibited, even when there is no major disruption (*Bethel School District No. 403 v. Fraser*, 1986).

Students also lost the next two cases that came before the Supreme Court. In *Hazelwood School District v. Kuhlmeier* (1988), the Court held (5-3) that schools could censor their own publications, such as student newspapers, based on any “legitimate pedagogical concerns.” Even though students wrote the newspaper, it could be perceived as bearing the school’s approval. So school censorship was permitted.

In *Morse v. Frederick* (2007), the Supreme Court entered the theater of the absurd, trying to decipher the meaning of a 15-foot banner, held by students at a school sponsored event, which

read: BONG HITS 4 JESUS. The banner was held at a parade through Juneau, Alaska as the Olympic torch passed through on its way to the Winter Olympics. The kids holding the banner were not trying to stop the War in Vietnam. They were not nominating their friend for student council. They were not writing for the school newspaper. They just wanted to get on TV! The plaintiff acknowledged this in the subsequent legal proceedings. The principal, viewing the banner as a distraction from the festivities, ripped the banner down and suspended the ringleader of the students. By the slimmest of margins (5-4) and only after pages and pages of angst and effort to decipher what this inscrutable banner meant, the Court upheld the principal's decision.

So students are on a losing streak on free speech issues before the Supreme Court, but as the "boobies case" demonstrates, the damage has already been done. The damage is to the authority and discretion of local school officials. When judges have the right to second-guess decisions of school officials regarding minor disciplinary offenses, we have lost something important.

Of course, this is part of a larger trend – the erosion of respect for authority figures at all levels of our society. But no one has paid a bigger price for this erosion than the assistant principal of a public school. To be sure, over the last several decades we have also learned that too much respect, too much trust for authority figures, is a dangerous thing. Respected and trusted clergy have sexually abused children, and higher ups in the church have covered it up. The same is true with coaches and teachers in both public and private schools. Respected and trusted business leaders have been exposed as greedy robber barons. And let's not get started with the failures of our political leaders.

But consider the context. Mary Beth Tinker was not sexually or physically abused. She was not facing expulsion from school. She was not the victim of discrimination on the basis of race, sex, religion, disability, national origin or sexual orientation. She was only told that she could not wear a particular symbol to school. Joseph Frederick was not faced with any serious consequences arising from his “Bong Hits” prank. The principal ordered short-term disciplinary consequences. This is the type of bump in the road that is discussed with much enthusiasm at the ten-year high school reunion. It’s no big deal.

But the Tinker Test allows lawyers to make it into a very big deal. The Tinker Test allows judges to second guess such minor decisions, all in the very worthy cause of protecting the right of free speech under the First Amendment. Thus all parties can wrap themselves in the cloak of self-righteousness, convinced that they are protecting important freedoms. But perhaps it is time that we recognized the cost of such judicial oversight.

The Tinker Test has eroded the authority of local school officials, even when dealing with inconsequential matters that can and should be left to their discretion. Consider the boobies bracelets. Some school districts have allowed them. Some have prohibited them. Some have required the students to turn them inside out while at school. What’s wrong with a little diversity in how we handle such things? This is not a big deal. What’s wrong with letting each community decide for itself?

But that won’t happen now. With the 3rd Circuit’s decision, the word will go out to school officials all over the country, that this is now a settled matter of free speech. And school officials will then have to deal with the fallout, as kids push boundaries with bracelets and t-shirts expressing their love for all of the other body parts that might be cancerous: prostates and testicles and rectums, oh my!!

I confess I have an attitude. I went to Catholic school. We had no constitutional rights whatsoever. No free speech. No due process. What we had, though, was a right to an education, and a group of teachers and principals who held that as a higher priority than our “right” to express our views at any time on any matter. It was orderly and disciplined and no one would think of openly defying the teacher or principal. I got a good education, and still had plenty of avenues and plenty of time in which to express my opinions under the protective banner of the First Amendment.

What’s wrong with that? The War in Vietnam has left a long trail of consequences in its wake. The Tinker Test is one such consequence. Perhaps it is time that we looked at it with fresh eyes. In this century, ubiquitous technology allows students to express their views on everyone and everything at any time. There will be no lack of free expression in this generation. So what’s wrong with carving out a zone in the public school, during the school day, where we empower our educators to say: not here; not now. What’s wrong with supporting their decisions, even when we disagree with them? What’s wrong with telling our young people: “You are here to learn what we have to teach, and that is important enough that your constitutional rights to freedom of expression can wait.”

What’s wrong with that?

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References

- B.H. v. Easton Area Sch. Dist., No. 11-2067, 2013 WL 3970093 at 5-6 (3rd Cir. Aug. 5, 2013).
Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).
Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).
Morse v. Frederick, 551 U.S. 393 (2007).
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).