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Edward T. Ramey

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STUDENT EXPRESSION: THE LEGACY OF *TINKER* IN THE WAKE OF COLUMBINE

EDWARD T. RAMEY

The proposition that the First Amendment protects expression by students is neither a deeply rooted nor easily applied principle. At best, the proposition finds its tentative roots in Supreme Court opinions back as far as the 1940s,[1] and perhaps earlier, though it was not until 1969 that the principle found its seminal, eloquent expression in *Tinker v. Des Moines Independent Community School District*.[2] In many respects, *Tinker* represents a predictable judicial response to the inevitable excesses of public school administrators accorded too much unquestioned deference in matters touching upon individual liberties. Two high school and one junior high student peaceably wore black armbands to school in December 1965 as a "silent, passive"[3] expression of protest against the growing hostilities—or "conflagration"[4] as Justice Fortas colorfully put it—in Vietnam. In so doing, the students violated a school district regulation adopted and directed pointedly and specifically at them.[5] On the evidence before the Court, the incident "was entirely divorced from actu-

1. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). The Court in *Barnette*, over a vigorous dissent by Justice Frankfurter, struck down a school board mandate compelling students (who were Jehovah's Witnesses) to salute the American flag in contravention of their and their families' religious beliefs. *See Barnette*, 319 U.S. at 642. Lest this admittedly heroic judicial stand at a time of popular patriotic fervor be deemed a far reaching and ringing endorsement of student rights of affirmative expression, the issue in controversy involved compulsion of a pledge of fealty (which the Court found to "invade[ ] the sphere of intellect and spirit"), overtones of encroachment upon the free exercise of religion, and coercion of "both parent and child." *Id.* at 642, 631. Additionally, the Court ruled to the contrary on precisely the same issue, over the single dissent of Justice Stone, a mere three years earlier. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 600 (1940).

2. 393 U.S. 503 (1969). The Court in *Tinker* cites Meyer v. Nebraska, 262 U.S. 390 (1923), and Bartels v. Iowa, 262 U.S. 404 (1923), as authority for the proposition that neither "students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. However, neither case stands for such a proposition. The *Meyer* opinion was grounded in substantive due process considerations—in the soon to be vilified tradition of Lochner v. New York, 198 U.S. 45 (1905). *See Meyer*, 262 U.S. at 399. The *Meyer* Court struck down a law prohibiting the teaching of modern foreign languages as violative of the right of a teacher to engage in his profession of teaching and "of parents to engage him so to instruct their children." *Id.* at 400. The facts and reasoning in *Bartels* are to the same effect. *See Bartels*, 262 U.S. at 409. Similarly, *Pierce v. Society of Sisters* also cited by *Tinker*, striking down a requirement that all children attend public schools, invokes *Meyer* in recognition of a purely substantive due process "liberty of parents and guardians to direct the upbringing and education of children under their control." Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). These opinions have little, if anything, to do with the rights of students themselves to engage in free expression.

3. *Tinker*, 393 U.S. at 508.

4. *Id.* at 510.

5. *See id.* at 504.

ally or potentially disruptive conduct by those participating in it."[6] The Court found there was no indication of "interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone;"[7] there was "no indication that the work of the schools or any class was disrupted;"[8] there were "no threats or acts of violence on school premises."[9] The only "suggestions of fear of disorder" arose from the fact some friends of a former student killed in Vietnam were still in school and that students at another high school threatened to wear armbands of other colors.[10] The district's own official memorandum on the incident indicated that its regulation had been motivated by a belief that schools simply were not appropriate places for "demonstrations."[11] Finally, the evidence showed that the schools were engaging rampantly in viewpoint discrimination—permitting other students to sport political campaign buttons and Iron Crosses ("traditionally a symbol of Nazism"),[12] without objection. On these facts, the three students were summarily suspended and refused readmission until they would return without their armbands.[13]

One does not have to impugn the "good faith"[14] of the Des Moines school administrators to conclude, as did seven of the nine justices, that their actions exceeded the bounds within which deference to their administrative judgment remained appropriate.[15] Even a more conservative

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6. *Id.* at 505.

7. *Id.* at 508. In dissent, Justice Black noted, however, that "the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their class work and diverted them to thoughts about the highly emotional subject of the Vietnam war." *Tinker*, 393 U.S. at 518 (Black, J., dissenting). In support, he noted that John Tinker had felt "self-conscious," that a mathematics teacher "had his lesson period practically 'wrecked' chiefly by disputes with [13 year old] Mary Beth Tinker," and that there were "comments," "warnings," and "poking of fun" by other students. *Id.* at 517-18. Without even attempting to balance a school's interest in avoiding such mild disruptions against whatever rights we may wish to accord students to express themselves upon important issues of public concern, an even more basic inquiry may begin with a recognition that mild diversions of this nature are a natural and common part of everyday life in schools (and virtually anywhere else). It is difficult to imagine how one might eliminate them in a viewpoint neutral and nondiscriminatory manner short of imposing the form of Spartan regimentation rejected out of hand by the Court in *Meyer*. *See Meyer*, 262 U.S. at 401-02.

8. *Tinker*, 393 U.S. at 508.

9. *Id.*

10. *Id.* at 509 n.3.

11. *Id.*

12. *Id.* at 510.

13. *See id.* at 504.

14. *Id.* at 526 (Harlan, J., dissenting). The absence of anything in the record "which impugns the good faith" of the school administrators was the sole determinative point for Justice Harlan, who would accord those administrators "the widest authority in maintaining discipline and good order," and alone joined the more vehement Justice Black in dissent. *Id.*

15. There will always be a call to deference to school administrators in the area of their presumptively superior general expertise, *i.e.*, the administration of the schools under their supervision. This should not prevent the courts from intervening at the margins, however, particularly when basic civil liberties are implicated. As pointedly explained by Justice Jackson for the Court in *Barnette*,

body than the late Warren Court of 1969 would have had difficulty sustaining the actions of the administrators—or even sidestepping the issue[16]—without effectively depriving students of any meaningful expressive rights whatsoever (which of course was an option, though probably not for that Court). Albeit through a rather pathetic veneer of *post-hoc* justifications, the goal of the school authorities had been transparently to keep even non-disruptive discourse on emotionally provocative controversial issues completely off school property. This would have been a difficult state of affairs to sustain as a matter of constitutional principle.

Justice Fortas' opinion for the Court in *Tinker* is a powerful read, more than making up in eloquence whatever it may have missed in terms of consideration of the breadth of its practical implications. Noting the amorphous fears of the school administrators, the Court reasoned:

> [I]n 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.[17]

Noting that "state-operated schools may not be enclaves of totalitarianism,"[18] and that "students may not be regarded as closed-circuit recipients

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> Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. . . . [W]e act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639-40 (1943). Prior to *Tinker*, and in matters principally involving teachers', rather than students', rights, the Warren Court had demonstrated a willingness to go there. *See* Epperson v. Arkansas, 393 U.S. 97 (1968) (opinion for the Court by Justice Fortas striking down a prohibition on the teaching of the Darwinian theory of evolution on free exercise and establishment clause grounds); *see also* Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) (striking down an anti-sedition law applicable to teachers on First Amendment and due process grounds); Shelton v. Tucker, 364 U.S. 479 (1960) (striking down as a violation of associational rights a requirement that teachers disclose all organizations to whom they have contributed within the preceding five years).

16. *Tinker* may be seen as nudging into the zone where even an exercise of Professor Alexander Bickel's celebrated "passive virtues" of avoiding controversial or premature judicial pronouncements—i.e. by denying certiorari—would have had troublesome implications by virtue of the message it would have sent. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111-43 (1962).

17. *Tinker*, 393 U.S. at 508-09.

18. *Id.* at 511.

of only that which the State chooses to communicate,"[19] the Court set the standard that a student may express his or her opinion, even on controversial subjects, essentially anywhere "on the campus during the authorized hours,"[20] "if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others."[21]

Essentially, the rhetoric of *Tinker* was a manifestation of respect for and confidence in our nation's young people. The Supreme Court case was a ringing refusal to demean them as second-class citizens, or worse. Scholars have compared *Tinker*, perhaps not altogether fairly, with the propensity of Justice Scalia to refer interchangeably to "students," "children," "children in school," and "schoolchildren" as explicitly distinguished from "free adults" in *Vernonia School District 47J v. Acton*.[22] The same comparison could as readily be made with Justice White's opinion for the Court in *New Jersey v. T.L.O .*[23] To some degree, the framing of the issue—*i.e.*, are we dealing with "children" or "students"—predetermines the outcome. However, even in the midst of the Court's significant retrenchment from the analytical standard promulgated in *Tinker*, the rhetoric of *Tinker* is still almost uniformly accorded deference.[24]

The Court, however, has indeed retrenched as a matter practical adjudication. *Tinker* was followed by uncertainty on the part of school officials, litigiousness on the part of and on behalf of students, and some measure of fear that Justice Black may have been right in his prognostications of students "running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins."[25] While this fear was hardly realized, the conservatively-shifting Court has taken the opportunity to seize upon factual scenarios less compelling than that of John and Mary Beth Tinker as vehicles for restoring a degree of judicial deference to administrative discretion in the area of First Amendment rights as readily as it has done so in the context

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19. *Id.*

20. *Id.* at 512-13.

21. *Id.* at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

22. 515 U.S. 646, 654-56 (1995) (holding that urinalysis drug testing of school athletes did not violate the Fourth Amendment). *See also* Nadine Strossen, *Essay: Student Rights and How They Are Wronged*, 32 U. RICH L. REV. 457, 472 (1998). Strossen, who is both a law professor and national president of the American Civil Liberties Union, makes the point that "if other people do not respect the rights of young people, then young people are less likely to grow up respecting the rights of other people." *Id.* at 458.

23. 469 U.S. 325, 327-33 (1985) (applying a "reasonableness" rather than "probable cause" standard to on-campus student searches).

24. *See, e.g.*, Justice Scalia in Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655-56 (1995).

25. Tinker, 393 U.S. at 525 (Black, J., dissenting). See also Stanley Ingber, Symposium: Twenty-Five Years After Tinker: Balancing Students' Rights: Liberty and Authority: Two Facets of the Inculcation of Virtue, 69 ST. JOHN'S L. REV. 421, 425-26 (1995).

of the Fourth Amendment.[26] While these shifts have commenced uniformly with homage to *Tinker*, they have nevertheless narrowed the broad sweep of *Tinker's* rhetoric.

Three opinions define the critical stages of the Court's shift. The first, *Board of Education v. Pico*,[27] involved a student challenge to a school board's removal of certain books from high school and junior high school libraries which it characterized as "anti-American, anti-Christian, anti-[Semitic], and just plain filthy."[28] A fractured and uneasy plurality of the Court held that the board's actions had violated the First Amendment rights of the students, and that courts may intervene and override administrative decisions when such basic constitutional values are implicated.[29] Despite Justice Blackmun's lament that the "particularly complex problem" was being taken up by the Court at all,[30] and Justice White's refusal to address the constitutional issue pending a trial on remand,[31] the Court explicitly restricted its holding to the narrow subject of removal of books already on the library shelves,[32] as distinguished from their placement there in the first place. Dissents ranged from pleas for deference on such issues to democratically elected (and parent influenced) school boards and administrators,[33] to dissertations on the varying roles of government as sovereign and as educator,[34] to accusations of "debilitating encroachment upon the institutions of a free people."[35] Justice Powell's dissenting opinion was accompanied by an appendix of colorful—and out of context—quotations from the books in question (presumably to lend credence to the reasonableness of the school board's decisions).[36] The *Pico* opinions, for all their volume and discord, are uniformly unhelpful and for the most part manifestly unprincipled. Disparate positions are taken *vis a vie* deference to school administrators with minimal, and in some cases no, attention to their boundaries. There is no cohesive theme about much of anything. What is evident is a shifting and floundering Court, one less comfortable with *Tinker's* broad license to override the judg-

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26. *See generally, Acton*, 515 U.S. at 654-66 (upholding scheme of suspicionless drug testing of student-athletes under special needs doctrine); *T.L.O.*, 469 U.S. at 337-45 (permitting warrantless search of student's purse grounded in reasonable suspicion of presence of cigarettes).

27. 457 U.S. 853 (1982).

28. *Pico*, 457 U.S. at 857. The books included Slaughter House Five, by Kurt Vonnegut, Jr.; The Naked Ape, by Desmond Morris; Down These Mean Streets, by Piri Thomas; Best Stories of Negro Writers, edited by Langston Hughes . . . ; Soul on Ice, by Eldridge Cleaver, and others. *Id.* at 857 n.3. The removal had been sparked by a demand by a politically conservative parent's organization. *See id.* at 856.

29. *See id.* at 866-67.

30. *Id.* at 876 (Blackmun, J., concurring).

31. *See id.* at 883-84 (White, J., concurring).

32. *See id.* at 871-72.

33. *See id.* at 885-93 (Burger, C.J., dissenting), 921 (O'Connor, J., dissenting).

34. *See id.* at 909 (Rehnquist, J., dissenting).

35. *Id.* at 897 (Powell, J., dissenting).

36. *See id.* at 897-903.

ments of school administrators yet unprepared to address the frontiers of their discretion.

The second case, *Bethel School District No. 403 v. Fraser*[37] indicates a second stage in the Court's shift. In *Fraser*, the Court took the opportunity to review a two-day suspension of a high school student who, over the direct advice of his teachers, had given a sexually suggestive nominating speech at a school assembly (with no apparent repercussions other than some mild embarrassment and bewilderment among the listeners).[38] One may suggest that there was no particular reason to take this case on certiorari at all, except possibly to repair some of the mess left in the wake of *Pico*. What resulted was a lecture on behalf of seven of the justices by Chief Justice Burger on society's "interest in teaching students the boundaries of socially appropriate behavior."[39] Only Justices Marshall and Stevens dissented. Justice Marshall argued the record did not demonstrate that the speech had been disruptive,[40] and Justice Stevens objected on essentially procedural due process grounds.[41] Even Justices Brennan and Blackmun joined the majority.[42] Most tellingly, there was no objection from any quarter to Chief Justice Burger's pronouncement that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings. . . . 'the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket.'"[43]

In *Cohen v. California*,[44] Cohen's jacket bore the epithet "Fuck the Draft" and the Court held in 1971 that he could not be punished for disturbing the peace for wearing it in the corridor of the Los Angeles courthouse.[45] In an opinion by Justice Harlan, the Court had declined to find the expression "obscene" in the context it was used,[46] and had not found it "inherently likely to provoke violent reaction"[47] or directed to a particular person within the parameters of the "fighting words" doctrine of *Chaplinsky v. New Hampshire*.[48] The Court found that Cohen's prosecution reflected at best an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression."[49] The *Cohen* Court noted particularly that communication encom-

37. 478 U.S. 675 (1986).
38. *See Fraser*, 478 U.S. at 677-79.
39. *Fraser*, 478 at 681.
40. *See id.* at 690 (Marshall, J., dissenting).
41. *See id.* at 691-96 (Stevens, J., dissenting).
42. *See id.* at 687-90.
43. *Id.* at 682 (quoting Thomas v. Bd. of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979)).
44. 403 U.S. 15 (1971).
45. *See* Cohen v. California, 403 U.S. 15, 15, 26 (1971).
46. *Cohen*, 403 U.S. at 20.
47. *Id.*
48. 315 U.S. 568, 572 (1942).
49. *Cohen*, 403 U.S. at 23 (citing *Tinker*, 393 U.S. at 508).

passed an "emotive function" as distinct from—and perhaps even more important than—purely "cognitive content," and that the government must not be permitted to "seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."[50]

The distinction between Tinker's armband and Cohen's jacket may not be as readily apparent as Chief Justice Burger would have us believe. It is not at all clear, for example, that the latter would be any more invasive of or susceptible to collision with the rights of other students than the former, or that one would necessarily be more or less disruptive of the school's work. In the context of *Fraser*, the import of the Chief Justice's comment is that school administrators may now be entrusted to determine what is and is not "socially appropriate behavior"[51] on campus (use of the word "fuck" apparently illustrating that which is not acceptable). Viewed solely as a case about "lewd" speech, *Fraser* is not particularly troublesome. Viewed as a broader and unconstrained license to school officials to impose subjective standards of "social appropriateness" upon student speech, *Fraser* becomes extremely troublesome from a civil liberties perspective for precisely the reasons noted by Justice Harlan in *Cohen*—this degree of unchecked regulatory discretion is patently susceptible to use "as a convenient guise for banning the expression of unpopular views."[52] This standard does not fit with the "hazardous freedom"[53] of *Tinker*, if indeed it can be viewed as a standard at all.

The last case in the trilogy of the practical shift away from *Tinker* was *Hazelwood School District v. Kuhlmeier*.[54] In *Kuhlmeier*, three student staff members of a high school newspaper sued over their principal's decision to delete from the final edition of the paper two pages containing, among other items, an article on students' experiences with pregnancy and a separate article on the impact of divorce on students at the school.[55] The evidence indicated that the principal's primary concern with the first article was a realistic prospect that the identities of the pregnant students might be discernable, against their wishes, from the text of the article notwithstanding their use of false names, as well as a belief that the article's references to sexual activity and birth control might be inappropriate for dissemination to some of the younger students at the school.[56] The principal's concern with the second article was that it contained negative references to the divorced parents of an interviewed student who was identified in the article by name, while the parents had been given neither an opportunity to respond nor to object to the article's

50. *Cohen*, 403 U.S. at 26.
51. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).
52. *Cohen*, 403 U.S. at 26.
53. *Tinker*, 393 U.S. at 508.
54. 484 U.S. 260 (1988).
55. *See Kuhlmeier*, 484 U.S. at 263.
56. *See id.*

contents or its publication.[57] The newspaper itself was an "integral part of the school's" second level journalism curriculum.[58]

It is worth noting up front that it is much harder to fault the decisions made by the Hazelwood principal than those of the administrators in Des Moines. In fact, it may be suggested that his decisions appear manifestly reasonable and sensitive to the concerns of students, parents, and the most basic practices of responsible journalism. Yet, he interfered with student expression, and he was sued. Furthermore, the Eighth Circuit Court of Appeals sustained the suit on the grounds that (1) the newspaper was a "public forum" virtually immune from official censorship except (2) when "necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others."[59] As much as we may view the facts of *Tinker* as having cried out for judicial intervention to a receptive Warren Court, it is hardly surprising that the facts of *Kuhlmeier* fell on receptive ears at what had now become the Rehnquist Court.

Even so, the Court did not purport to abandon *Tinker*. Justice White's opinion for the Court commences with a traditional and explicit acknowledgment of *Tinker*.[60] Accompanied by a perfunctory nod to *Fraser's* holding that the First Amendment rights of students "'are not automatically coextensive with the rights of adults,'"[61] the Court proceeds to reject the proposition that curricular school newspapers qualify as a public forum. [62] The Court finally reaches its primary point—a proposition that there is an operative distinction between speech which a school must tolerate and speech which a school must sponsor:

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question of whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public

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57. *See id.*

58. *Id.* at 264. The evidence also suggested that the principle would have taken less drastic action than simply eliminating the articles had there been time to make changes before the scheduled press run.

59. *Id.* at 265 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)).

60. *See Kuhlmeier*, 484 U.S. at 266.

61. *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

62. *See Kuhlmeier*, 484 at 267-70. This holding generated a national backlash from school journalism activists and the adoption in more than a few states of statutes affirmatively declaring school newspapers to be a public forum for students. *See, e.g.*, COLO. REV. STAT. § 22-1-120 (1999).

> might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.[63]

The Court continues:

> Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.[64]

The Court concludes by defining the standard of judicial review to apply to this newly defined "second form" of student expression: "[W]e hold that educators do not offend the First Amendment by exercising editorial control of the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[65] Lest even this appear too inviting to potential student plaintiffs, the Court continues, "[i]t is only when the decision to censor . . . has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d]' . . . as to require judicial intervention to protect students' constitutional rights."[66]

Notwithstanding the Court's facial suggestion to the contrary, it may appear from the discussion above that *Tinker* has been all but lost in the wake of *Fraser* and *Kuhlmeier*, with a broadly applicable "material and substantial interference"[67] standard being replaced by virtually complete deference to school authorities to (1) censor whatever they want in the context of "school-sponsored"[68] activities (*i.e.*, almost anything remotely related to the school) as long as they are able to state some superficial "valid educational purpose"[69] for doing so, and (2) impose open-ended standards of "socially appropriate behavior"[70] on whatever is left. Interestingly, this has not proven to be the case.

The original *Tinker* standard has had a persistent tendency to get its nose above water when "school-sponsored" speech is not clearly implicated, *e.g.*, when a student was penalized by removal from a school football team for telling his parents about a hazing incident to which he had

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63. *Kuhlmeier*, 484 U.S. at 270-71.
64. *Id.* at 271.
65. *Id.* at 273.
66. *Id.* at 273 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).
67. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).
68. *Kulhmeier*, 484 U.S. at 271.
69. *Id.* at 273.
70. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

been subjected;[71] when a dress code prohibited clothing that "harasses, threatens, intimidates, or demeans" others without creating a "substantial risk of a material and substantial disruption";[72] when a school sought to prohibit t-shirts purportedly alluding to an alcoholic beverage.[73] In *McIntire*, the school had asserted, as might have been predicted in the wake of *Kuhlmeier*, that "at least during school hours when classes are in session . . . the district can limit student expression in any reasonable way . . . ."[74] The court did not buy it.[75]

On the other hand, courts have followed *Kuhlmeier* when "school-sponsored" activities have been implicated, such as when a student sought to hand out condoms in the context of a school election,[76] or when students objected to a school's refusal to allow them to play a particular song as part of their marching band's fall program.[77] The author of this essay met with the same result two years running in the context of graduation ceremonies—one year representing African-American students who wished to wear Kente Cloths over their gowns, and the second year representing a student who wished to wear a pin expressing sympathy with the victims of the Columbine High School tragedy.[78] The objections of the school administrators in each of the latter cases focused not on the content of the particular expression at issue, but upon the prospect that if they opened the door to one form of expression, they would fall into the trap of unsupportable viewpoint discrimination unless they opened the door to everything imaginable—even, and perhaps especially, under the highly deferential *Kuhlmeier* standard. In other words, with the unquestioned power to exclude came the practical imperative to exclude everything not manifestly linked to "pedagogical concerns." This was a rather sad and perverse commentary, particularly in the context of the very ceremony which celebrates the students' transition to the purportedly greater freedoms of adulthood.

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71. *See* Seamons v. Snow, 84 F.3d 1226, 1237 (10th Cir. 1996).

72. Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157, 159 (D. Mass. 1994).

73. *See* McIntire v. Bethel Sch., 804 F. Supp. 1415, 1427 (W.D. Okla. 1992). This is notwithstanding the fact that *Tinker* itself expressly disclaimed application to "regulation of the length of skirts or the type of clothing, to hair style or deportment." Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503, 507-08 (1969).

74. *McIntire*, 804 F.Supp. at 1418.

75. *See id.* at 1427.

76. *See* Henerey v. City of St. Charles, 200 F.3d 1128, 1135-36 (8th Cir. 1999) (holding that the School District had the right to disqualify Henerey from the election because his conduct dealt with the controversial topic of teenage sex and because his conduct "carried with it the implied imprimatur of the school").

77. *See* McCann v. Fort Zumwalt Sch. Dist., 50 F.Supp.2d 918 (E.D. Mo. 1999). The song was Grace Slick's "White Rabbit," and the school's objection was that it promoted the illegal use of drugs. *McCann*, 50 F. Supp. 2d. at 920.

78. *See* Ocansey v. Jefferson County Sch. Dist. R-1, No. 98-M-1099 (D. Colo. 1998); Byrd v. Williams, No. 99-WM-972 (D. Colo. 1999). Interestingly, in both cases the school district confined its *Kuhlmeier* argument to the graduation ceremony itself, expressing no objections to the expressive symbols at issue under the *Tinker* standard either before or after the formal ceremony.

In the end, it is *Fraser* that seems to have been at least temporarily—and one may frankly hope permanently—lost in the adjudicatory shuffle. This alone may be quite a positive thing, as *Fraser* certainly embodies the judicial approach potentially most dangerous from a civil liberties perspective and most demeaning to students and contemptuous of young people in general. What is left appears to be an uneasy dichotomy between *Tinker* and *Kuhlmeier*, turning upon whether or not the context within which the speech occurs may be viewed as "school-sponsored." The issue is one of the degree of deference to be accorded presumptively to administrative discretion. It is within this dichotomy that we find ourselves in the wake of the April 20, 1999 shootings at Columbine High School.

The primary legitimate concern raised by Columbine is, of course, the physical safety of both students and teachers. In this regard, we may expect a focused discourse particularly on Fourth Amendment issues in the continued aftermath of the shootings. The justification for constricting First Amendment rights, while much in the news,[79] is far less apparent from a principled perspective. Yet, this is where many of the emotional aftershocks are being felt.

It is essential to recall that the "hazardous freedom"[80] validated in *Tinker* in no way limits the ability of school officials to ensure safety. The standard enunciated by the Court in *Tinker* expressly excludes from its protection "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts class work or involves substantial disorder or invasion of the rights of others . . . ."[81] This exclusion is broad enough to address virtually all realistic and legitimate threats to safety. *Kuhlmeier* adds nothing particular to the mix on this point – it is difficult to imagine a scenario in which speech or conduct which could realistically and legitimately pose a danger to others would be protected under *Tinker* and

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79. By way of illustration: A Virginia high school student was suspended in the immediate wake of Columbine for dyeing his hair blue—a suspension justified by the school board chairman on the grounds that "[t]here are things we have to look at now, with the mood of the whole nation," and supported by the governor's attribution of the Columbine shootings to an "anything goes attitude toward students' appearance[s]." Wes Allison, *ACLU Threatens Surry Law Suit; On Behalf of Blue-Haired Youth; Student Expelled After Columbine Slayings*, RICHMOND TIMES DISPATCH, May 26, 1999, at A-1. A Minnesota high school senior's picture was removed from the school year book because it showed her seated on a flag-draped VFW howitzer as an expression of her patriotism and anticipated career in the United States Army. Doug Grow, *When Zero Tolerance Hits at Common Sense: Even a Patriotic Student's Senior Picture Isn't Exempt from School's Weapons Rule*, MINNEAPOLIS STAR TRIBUNE, Oct. 31, 1999, at B2. All-black clothing, trench coats, oversized baggy pants, camouflaged attire, spiked jewelry, swastikas, bandannas, skull caps, and pentagrams were banned under a revised school dress code in Texas, and a 17-year old student was suspended for wearing a black armband to honor the Columbine victims and as a statement of protest against new school rules restricting student speech. Sandy Louey, *Dress Code Changes in Works; Allen, McKinney React to Incidents*, DALLAS MORNING NEWS, July 24, 1999, at J1.

80. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

81. *Id.* at 513.

could be prevented only due to its nexus with some "school-sponsored" activity.

Tinker requires something more, however. It requires that a restriction upon expression be validated by something beyond an enunciation of "undifferentiated fear or apprehension of disturbance."[82] This is a critical caveat. Absent this caveat, mere invocation of the word "Columbine" would be sufficient to impose "absolute regimentation,"[83] and squelch any vestige of independent expression and, for that matter, thought. Absent this caveat, school officials and administrators would be accorded virtually absolute discretion to impose upon our students their subjective standards of whatever may be viewed as "socially appropriate" by themselves, or their momentarily most vocal constituency—*i.e.*, *Fraser* becoming virulently malignant. This caveat is a last line of defense against both administrative and majoritarian abuses, and against even a good faith loss of perspective (if not common sense) that may accompany times of passion. It is the line upon which our courts—"by force of [their] commissions" to quote Justice Jackson[84]—must stand.

The examples recited in footnote 79, *supra*, are sadly illustrative (though hardly exhaustive) of the levels to which we are all quite unwittingly capable of sinking absent some imperative that we pause for a moment and consider the implications of the power we are abusing. *Tinker's* caveat regarding "undifferentiated fear or apprehension"[85] assists with that pause. This is one of the great benefits of mandating a constant, if not always overriding, level of constitutional discourse in the face of administrative discretion. If nothing else, it keeps us honest. The great threat of convulsions like Columbine is that they make it seductively easy to be innocently dishonest. We become at least temporarily more tolerant of those who, frequently with the best of intentions, would impose (rather than truthfully seek to teach and inculcate) a viewpoint or lifestyle and stifle a competing one. The Columbine tragedy does not call for prohibiting blue hair or gothic dress styles any more than letter jackets or cardigan sweaters. It does not justify depriving students of the opportunity to think for themselves and engage in emotive and intellectual expression merely because it does not resonate with our own sensitivities. It does not justify the exclusion of controversial subjects from the halls of our schools. Columbine is not a license to demean our young people as incapable or unworthy of being respected or trusted.

In the aftermath of Columbine, the legacy of *Tinker* is perhaps more crucial than it has ever been. There is room in that legacy for the operative limitations and inculcative function defined in *Kuhlmeier*. There is

82. *Id.* at 508.
83. *Id.*
84. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943).
85. *Tinker*, 393 U.S. at 508.

more than adequate accommodation for the safety of our students and teachers. There is a strong basis for broad deference to the wisdom and policies of the elective boards and administrative personnel who operate our public school systems. There is also, however, a philosophical and practical commitment to the "hazardous freedom . . . that is the basis of our national strength."[86] If we want that strength to last, this commitment belongs as much in our schools as it does anywhere in our society.

86. *Id.* at 508-09.