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THE FIRST AMENDMENT AND EDUCATION —
A PLEA FOR PEACEFUL COEXISTENCE

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SINCE *Tinker v. School District*¹ was decided in 1969, I have been reluctant to participate in symposia such as this because of my belief that handling one piece of litigation really does not make a lawyer an expert on education.

Also, I cannot, of course, speak for the United States Supreme Court. Justice Fortas ably did that in his opinion in *Tinker*. I can no longer speak for my clients — the students, John and Mary Beth Tinker and Chris Eckhart. Nor can I speak for the students' parents, at least some of whom believe that both the protests that they were engaged in during the Christmas season in 1965 and the decision of the Supreme Court in 1969 are now irrelevant to the changes this society needs to become democratic and to serve the interests of the people they think have to be served. Therefore, I can only express my personal opinion.

For anyone who perhaps does not know the circumstances of *Tinker*, let me briefly restate the facts. During the Christmas season in 1965, the Students for a Democratic Society (SDS) advocated a nationwide protest against the war in Vietnam. The form of the protest, to wear small pieces of cloth in the nature of black arm bands on one's arm, seems mild, uncontroversial, and mainstream in 1972. The specific purpose of the protest, as stated by my clients, who were Quakers and Unitarians, was to express their feeling of mourning for the dead on both sides in the Vietnam war and to express their support for the proposition espoused at that time by Senator Robert Kennedy — namely, that the 1965 Christmas truce be made open-ended. The school authorities in Des Moines first learned of the coming protest through an attempt to publish an editorial in the school newspaper at one of the high schools. The editorial was denied or censored by the advisor to the school newspaper. The principals of the senior and junior high schools then adopted a special regulation against the wearing of these armbands, stating that students who wore armbands to school would be asked to take them off and that, if they did not comply, they would be suspended from school.

Appeals were made to the school board to reverse that decision and, by a split vote, the school board, without discussing the merits,

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1. *Tinker v. School Dist.*, 393 U.S. 503 (1969).

said simply: "our administrators have made a decision and we have to support their decision." A suit was then filed in the United States District Court for the Southern District of Iowa, alleging a violation of the Civil Rights Act of 1871.² The judge ruled for the school and essentially held that, although the young people were engaged in conduct that was privileged as free speech, it was not sufficiently privileged. The authority of the school to control activities within the school building outweighed, in this particular situation, the interest of the students in their right to express their beliefs.³ An appeal was taken to the United States Court of Appeals for the Eighth Circuit. The case was then heard by a three-judge panel which was unable to reach a decision. We were then asked to return to St. Louis to re-argue before the court of appeals en banc. Then the court, evenly divided, affirmed.⁴

There were two earlier cases from the Fifth Circuit that involved the wearing of "Freedom Buttons" by black students in high schools. In one case, even though the freedom buttons caused no disruption in the school, the students were suspended. The court ruled that these suspensions were illegal and the students had to be readmitted.⁵ In a companion case there was evidence that the wearing of buttons had disrupted the schools and the Fifth Circuit supported the school and ordered that the students not be reinstated.⁶ It was in that context, then, that the United States Supreme Court agreed to review the decision of the Court of Appeals in the *Tinker* case in which the record showed no evidence of disruption. By a 7-2 vote, the Supreme Court ruled that, absent some showing by the school that there would be a material and substantial disruption of the school caused by wearing armbands, the suspension of students for wearing such armbands was in violation of their right of freedom of speech under the first amendment of the United States Constitution.

There were basically three legal problems in *Tinker*, two which I will discuss very briefly and one which I will treat in more detail because I think it has more relevance for non-lawyers. Firstly, we were concerned with *Adderley v. Florida*⁷ which involved young people who had taken a demonstration onto the grounds of a Florida jail to protest the arrest and imprisonment of a fellow civil rights demonstrator. The *Adderley* Court held that jailyards were not tra-

2. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, *codified in* 42 U.S.C. § 1983 (1970).

3. *Tinker v. School Dist.*, 258 F. Supp. 971 (S.D. Iowa 1966), *aff'd*, 383 F.2d 988 (8th Cir. 1967), *rev'd*, 393 U.S. 503 (1969).

4. 383 F.2d at 988.

5. *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966).

6. *Blackwell v. Board of Educ.*, 363 F.2d 749 (5th Cir. 1966).

7. 385 U.S. 39 (1966).

ditional places where American citizens exercise freedom of speech by demonstration and seemed to say that the first amendment did not extend that far. Therefore, the trespass convictions of those demonstrators were upheld.

Secondly, at the trial level in *Tinker*, we were confronted with a problem concerning the burden of proof. The United States Supreme Court and other federal courts had said much about freedom of speech, primarily in the area of substantive law. Thus, we felt that, if we proved the students had engaged in their conduct for the purpose of expressing a point of view on a political issue, and proved they had been suspended from school for engaging in that activity, then the burden would shift to the school. The school would be required to come forward to show that there was some purpose in its action that overrode the students' right of free speech. Since that was the way we tried the case, it almost seemed as if the issues were never joined. Although arguably there were some incidents which had resulted from the wearing of arm bands and which could have been considered disruptive, the school did not bring forth any evidence on this issue. The school essentially took the position that it, for the most part, had absolute authority to decide what would or would not go on within the school system during school hours, and that the Bill of Rights and the first amendment did not apply to the school situation. Basically, that position is an application, in the purest form, of the doctrine of *in loco parentis*, referred to by Dr. Shedd a few minutes ago — whereby schools have the same authority over their students that a parent has over his child. Justice Black, in the minority in *Tinker*, dissented even more strongly in oral argument than he did in his written opinion. He noted that not only had the petitioners worn arm bands, but that Paul Tinker, who was 8 years old, and Hope Tinker, who was 13, had also worn arm bands. In the oral argument Justice Black wondered when this right of free speech began — did it begin with 5 year olds? in kindergarten? how broad a spectrum did it encompass? He clearly believed these questions involved a misapplication of the first amendment and constituted a serious, irresponsible invasion of the authority of public school officials. He believed the crucial question was whether students and teachers may use the school as a platform for the exercise of free speech — a question quite similar to the *Adderley* question, which focused upon the “proper” application of the first amendment and the Bill of Rights.

It is interesting, I think, in viewing the *in loco parentis* doctrine in the context of the *Tinker* case, to note that the Tinker children and

Christopher Eckhart were acting *with* their parents in what they and their parents felt to be the legitimate exercise of the religious principles of the churches they were attending. Therefore, if the school, in fact, was attempting to act as the parents of the Tinker and Eckhart children while they were at school, it was countermanding the strong religious and political views of the actual parents of these three children. The parents, too, had worn arm bands, and the meeting at which the decision was made to wear arm bands was a church meeting attended by both parents and children.

So there comes a time, you see, when the *in loco parentis* doctrine goes much further than it was intended. It may actually come to the point of countermanding the exercise of parental responsibility over children. I believe the critical question involved in the doctrine and the critical question in Justice Black's dissent in *Tinker* — and also in the opinions of some federal courts in upholding the rights of schools to suspend students for the clothes they wear, or do not wear, or for the length of their hair — is the concept of limited government. It is not so much the one about which Dr. Shedd was talking — what rights do the students have? — but rather the question of what power does the government have over its citizens? That is the critical question, and it seems to me that every time it has been reviewed by courts, in decisions which we view as almost venerable, the answer has been that government has very limited power over the lives of its citizens and can interfere only after a showing that the interference is, in the expression of *Tinker*, “materially and substantially”⁸ necessary for some legitimate government purpose.

So really what school authorities have to learn, I think, is to see themselves in the same context as policemen have had to learn to see themselves, only in a different factual situation. Policemen have had to learn that their power is not absolute, although that has been a hard lesson for them to learn in some instances. School authorities have had an even more difficult task in learning that their power is no longer absolute and is not nearly as broad as that which parents may exercise over their children, because public officials are creatures of a Constitution that creates a limited government. Before they make a decision that interferes or invades or alters the decisions of a citizen, no matter how young that citizen is, they must be able to justify it. They cannot simply say, as they did in *Tinker*, that a decision has been made and that the suspension was not for wearing arm bands, but for disregarding that decision.

8. 393 U.S. at 509.

The trial judge in *Tinker* is now on the Court of Appeals for the Eighth Circuit. In a recent long-hair case, he wrote a dissent which essentially amounts to this: in our society it is a necessary lesson in education for students to learn blind obedience to absolute authority, and school authorities may establish regulations without any basis and suspend and punish students for violating those regulations.⁹ I hope that is *not* a necessary lesson in our society. I do not believe that you can educate young people for the kind of participation which we need from citizens in a free society by having them spend their first twelve or so years in a totalitarian society. My conclusion seems to parallel what Justice Fortas was saying for the Court in the *Tinker* case.

I am not so naïve to think that the decision in *Tinker* has revolutionized the educational system and made it what I would like it to be. However, I do think it has given encouragement to some students who have things to say and would like to say them to their fellow students in a manner that is not disruptive of the school. I do not believe it has accomplished what one school official in Des Moines told me he thought it had done: "You know, if I cannot make a regulation limiting the length of my students' hair, I don't believe I have the authority and the power to prevent fornication in the hallways of my school." I think this statement points up dramatically the problem of taking an entire class of people — in this case, public school administrators — and of forcing them to recognize that their authority is limited. If a public official believes he has to have *absolute* power in order to exercise *necessary* power, then there is something seriously lacking in *his* educational background.

9. *Torvik v. Decorah Community Schools*, 453 F.2d 779 (8th Cir. 1972).