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## LOSING THE SPIRIT OF *TINKER v. DES MOINES* AND THE URGENT NEED TO PROTECT STUDENT SPEECH

By David L. Hudson, Jr.<sup>1</sup>

Nearly fifty (50) years ago, the U.S. Supreme Court declared in *Tinker v. Des Moines Independent Community School District* that public school students did not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>2</sup> It remains the seminal case on K-12 student speech rights in the United States of America<sup>3</sup> and the “high water mark” of student rights.<sup>4</sup> One of the litigants in the *Tinker* case, the late Christopher Eckhardt<sup>5</sup>, stated: “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.”<sup>6</sup>

The *Tinker* case led to a new era for student speech, increased litigation over school dress codes and hairstyles and created a fundamental appreciation that young persons were truly persons under the Constitution who had constitutional rights that needed to be respected.<sup>7</sup>

Sadly, that day has passed and gone. Today courts increasingly restrict student discourse even under the speech-protective standard that Justice Abe Fortas pronounced for the Supreme Court in *Tinker*. Students live in an environment that does not respect their constitutional rights. Sadly, this is creating a generation of

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<sup>2</sup> *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).

<sup>3</sup> David L. Hudson, Jr. *Black Armbands, Boobie Bracelets, and the Need to Protect Student Speech*, 81 UMKC L. REV. 595, 596 (2013).

<sup>4</sup> *Broussard v. Sch. Bd. of Norfolk*, 801 F.Supp. 1526, 1534 (E.D. Va. 1992).

<sup>5</sup> David L. Hudson, Jr., *Christopher Eckhardt Left His Mark As Student Speech Litigant*, NEWSEUM INST., (Jan. 3, 2013), <http://www.newseuminstitute.org/2013/01/03/christopher-eckhardt-left-his-mark-as-student-speech-litigant/>.

<sup>6</sup> 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/>.

<sup>7</sup> DAVID L. HUDSON, JR., *LET THE STUDENTS SPEAK!: A HISTORY OF THE FIGHT FOR FREEDOM OF EXPRESSION IN AMERICAN SCHOOLS*, 69 – 84 (2011); Stuart L. Leviton, *Is Anyone Listening to Our Students? A Plea for Respect and Inclusion*, 21 FLA. ST. U. L. REV. 35, 41 (1993).

younger persons who don't have the same level of appreciation for the supreme importance of freedom of speech.

This essay first examines the *Tinker* case and reminds readers of the powerful language Justice Fortas used in his majority opinion. It explains that the test from *Tinker* was designed to be a speech-protective standard for student litigants. The second part of the essay evaluates several recent cases, which demonstrate that the once speech-protective standard in *Tinker* has become a test that is often favorable and deferential to school officials embroiled in student, free-speech controversies.

### I. The Glory of *Tinker* and the Protection of Free Speech

The *Tinker* case arose in a time of great social activism. Many people exercised their First Amendment rights to protest both the civil rights movement and the Vietnam War. The *Tinker* family was no different. The patriarch of the family, Leonard *Tinker*, had been removed from his church because of his stance against racial discrimination. He also had worked for the pacifist organization, American Friends Service Committee.<sup>8</sup> Margaret Eckhardt, the mother of litigant Christopher, was the president of the Des Moines chapter of the Women's International League for Peace and Freedom.<sup>9</sup>

The *Tinker* and Eckhardt families' passion for social justice passed down to their kids. Siblings John and Mary Beth *Tinker*, Christopher Eckhardt, and several other students wore black armbands to their public schools to protest U.S. involvement in Vietnam, to support Robert Kennedy's Christmas truce, and to mourn those who had died in the conflict.

School officials learned of the impending armband protest and quickly passed a resolution prohibiting the wearing of such armbands. Interestingly, school officials allowed students to wear other forms of symbolic speech, such as iron crosses or political campaign buttons. Thus, the *Tinker* case was an early pristine example of viewpoint discrimination – the public school targeting a specific symbol associated with a specific political viewpoint.

The students wore their armbands in spite of the school rule and faced suspensions from their principals. Ultimately, they sought vindication in the courts. A federal district court judge ruled against them, ruling that school officials "have an obligation to prevent anything which might be disruptive" of the school atmosphere.<sup>10</sup> He reiterated that "[u]nless the actions of school officials ... are unreasonable, the Courts should not interfere."<sup>11</sup>

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<sup>8</sup> See Hudson, *Let The Students Speak!*, at 58-59.

<sup>9</sup> Hudson, *Let the Students Speak*, at 59.

<sup>10</sup> *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 258 F.Supp. 971, 972 (S.D. Iowa 1966).

<sup>11</sup> *Tinker*, 258 F.Supp. at 972.

The students appealed to the U.S. Court of Appeals for the Eighth Circuit but could do no better than a 4-4 split from the *en banc* court who issued only a one-paragraph opinion indicating the vote.<sup>12</sup> That meant their only avenue of relief could come from the Court of Last Resort – the U.S. Supreme Court. The Court ruled 7-2 in favor of the students, proclaiming that students “do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>13</sup> In his majority opinion, Justice Fortas acknowledged that student speech rights must be interpreted “in light of the special characteristics of the school environment.”<sup>14</sup>

Fortas also noted that the students’ actions of wearing the black armbands was “akin to pure speech”<sup>15</sup> and that “the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it.”<sup>16</sup> Later, they emphasized the lack of disruptions caused by the armband-wearing students, writing: “The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners.”<sup>17</sup> He added that there was “no evidence whatsoever” that the protesting students interfered with the work of the school or intruded on the rights of other students.<sup>18</sup>

Fortas created what later became known as the *Tinker* standard or substantial disruption test. He wrote that there was no “reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.”<sup>19</sup> He later reiterated that student speech should be protected unless the speech “materially and substantially interfer[es] with the requirements of appropriate discipline in the operation of the school” and [does not] collid[e] with the rights of others.”<sup>20</sup>

The test has two parts – the substantial disruption part and the element of the invasion or impingement of the rights of other students. Most of the litigation post-*Tinker* has centered on what constitutes a substantial disruption or reasonable

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<sup>12</sup> *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 383 F.2d 988 (8<sup>th</sup> Cir. 1967).

<sup>13</sup> *Tinker*, 393 U.S. 503, 506 (1969).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 508.

<sup>16</sup> *Id.* at 505.

<sup>17</sup> *Id.* at 508.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 509.

<sup>20</sup> *Id.* at 513, quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5<sup>th</sup> Cir. 1966).

forecast of substantial disruption. However, more and more school districts have expanded their anti-bullying policies to address cyberbullying or online harassment.<sup>21</sup> Given increased attention to cyberbullying, there likely will be increased focus on the invasion of the rights of others part of *Tinker*.<sup>22</sup>

Much of Fortas' opinion reads like an ode to the importance of protecting student speech. Consider the following passages:

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.<sup>23</sup>

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.<sup>24</sup>

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution.<sup>25</sup>

In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.

Fortas reasoned that school officials had no reason to believe that the armbands would cause a significant disruption or invade the rights of other students.<sup>26</sup>

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<sup>21</sup> JAMES C. HANKS, *SCHOOL BULLYING: HOW LONG IS THE ARM OF THE LAW?* 67 – 104 (2<sup>nd</sup> ed. 2015).

<sup>22</sup> David L. Hudson, Jr., *Federal Judge: School Officials Justified in Suspending Student for Cyberbullying*, NEWSEUM INSTL., (Oct. 26, 2016), <http://www.newseuminstitute.org/2016/10/26/federal-judge-school-officials-justified-in-suspending-student-for-cyberbullying/>.

<sup>23</sup> *Tinker*, 393 U.S. at 508.

<sup>24</sup> *Id.* at 508-09.

<sup>25</sup> *Id.* at 511.

<sup>26</sup> *Id.* at 509.

Instead, school officials acted upon “an urgent wish to avoid the controversy which might result from the expression.”<sup>27</sup> He emphasized that school officials suppressed the single symbol, the black armband, but allowed students to wear other symbols, like political campaign buttons and even iron crosses.<sup>28</sup>

Fortas concluded that “the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.”<sup>29</sup>

Several lessons emerge from the *Tinker* case. First, students possess the fundamental right of free speech and that school officials’ power to restrict that speech is limited. Second, school officials must point to specific evidence showing that their fears of disruption are genuine, not based on “undifferentiated fear or apprehension of disturbance” or merely a desire to avoid controversy. Third it is not just any disruption, such a disruption must be material or substantial. Perhaps most importantly, the Court’s entire emphasis was on creating a speech-protective test for students.

The *Tinker* decision generated a flurry of litigation in public secondary schools. The 1970s witnessed students challenging dress codes, hairstyles, censorship of student papers, and a variety of other school regulations and policies. However, the Supreme Court in the 1980s created two exceptions to *Tinker*. The Court ruled in *Bethel School District v. Fraser* (1986) that school officials could prohibit student speech that was vulgar, lewd, or plainly offensive.<sup>30</sup> Two years later, the Court adopted another deferential test for so-called school-sponsored student speech in *Hazelwood School District v. Kuhlmeier* (1988).<sup>31</sup> Nearly two decades later, the Court added a third *Tinker* carve-out for student speech that school officials reasonably believes promotes the illegal use of drugs in *Morse v. Frederick*, colloquially known as the “Bong Hits 4 Jesus” decision.<sup>32</sup>

These exceptions, or “Supreme Retractions, to *Tinker* have reduced significantly the level of free-speech protections for students.<sup>33</sup> Sadly, recent lower court decisions have further eroded and corroded the once speech-protective test of

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<sup>27</sup> *Id.* at 510.

<sup>28</sup> *Id.* at 511.

<sup>29</sup> *Id.* at 513.

<sup>30</sup> *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

<sup>31</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988).

<sup>32</sup> *Morse v. Frederick*, 551 U.S. 393, 394 (2007).

<sup>33</sup> See DAVID L. HUDSON, JR., LET THE STUDENTS SPEAK!: A HISTORY OF THE FIGHT FOR FREEDOM OF EXPRESSION IN AMERICAN SCHOOLS, 85-104 (2011).

*Tinker*. These decisions threaten the spirit of the *Tinker* decision. The substantial disruption test of *Tinker* has turned from a student protective standard to one that is often quite deferential to government officials. Two prominent examples are *Bell v. Itawamba School District*<sup>34</sup> and *Dariano v Morgan Hill Unified School District*.<sup>35</sup>

## II. Punishing the Rapping Whistleblower

John and Mary Beth Tinker are lauded (justifiably) as free-speech icons. Eighteen-year-old, high school senior Taylor Bell was not accorded the same respect. Bell, through his persona T-Bizzle, posted a rap recording on Facebook and then YouTube criticizing two high school football coaches.<sup>36</sup> His song criticized the two Caucasian coaches for allegedly sexually inappropriate comments toward African-American female students. The song featured profanity and language that some considered possibly threatening, such as the line “betta watch your back/I’m a serve this nigga, like I serve the junkies with some crack.”<sup>37</sup>

One of the coach’s wives heard the song and contacted her husband, who reported it to an assistant principal. School officials sent Bell home that day.<sup>38</sup> Later, the school superintendent suspended Bell for “alleged threatening intimidation and/or harassment of one or more school teachers.”<sup>39</sup> After a hearing, a disciplinary committee recommended to the school board that Bell face a seven-day suspension and be placed in an alternative school for the remainder of the grading period.<sup>40</sup> The school board not only determined that Bell intimidated and harassed the coaches but that his vulgar rap recording also threatened them. The board upheld the punishment.<sup>41</sup>

Bell sued in federal court, contending school officials violated his First Amendment free-speech rights. A federal district court ruled in favor of the school defendants, finding that Bell’s rap song constituted “harassment and

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<sup>34</sup> *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5<sup>th</sup> Cir. 2015).

<sup>35</sup> *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764 (9<sup>th</sup> Cir. 2014).

<sup>36</sup> *Bell*, 799 F.3d at 383.

<sup>37</sup> *Id.* at 384.

<sup>38</sup> *Id.* at 385.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 386.

<sup>41</sup> *Id.* at 387.

intimidation of teachers and possible threats against teachers, and threatened, harassed, and intimidated school employees.”<sup>42</sup>

Bell appealed to the U.S. Court of Appeals for the Fifth Circuit. A divided three-judge panel of the Fifth Circuit reversed and ruled in favor of Bell.<sup>43</sup> The panel majority determined that school official’s violated Bell’s First Amendment rights. The majority reasoned that the rap song was not a true threat or substantially disruptive under *Tinker*.<sup>44</sup>

However, the school board successfully sought *en banc* review and prevailed. The *en banc* majority applied the *Tinker* test, determining that school officials “reasonably could find Bell’s rap recording threatened, harassed, and intimidated the teachers; and a substantial disruption reasonably could have been forecast, as a matter of law.”<sup>45</sup>

The *en banc* majority emphasized the “recent rise in incidents of violence against school communities”<sup>46</sup> and “increasing concerns regarding school violence.”<sup>47</sup> The majority noted that some students signal potential violence through expression.<sup>48</sup> The majority reasoned that *Tinker* applied to Bell’s off-campus recording, because Bell intentionally directed his speech toward the school community.<sup>49</sup>

Four justices wrote separate dissenting opinions. Judge James L. Dennis, who had authored the majority opinion at the three-judge panel level, wrote the most comprehensive dissent. He termed Bell a “student whistleblower”<sup>50</sup>, adding that four female students had filed affidavits detailing incidents of sexual harassment against the coaches that Bell mentioned in his song.<sup>51</sup> Dennis emphasized that Bell created the speech off-campus and contrasted that with the on-campus

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<sup>42</sup> *Id.* at 388, quoting *Bell v. Itawamba Sch. Bd.*, 859 F.Supp.2d 834, 840 (N.D. Miss. 2014).

<sup>43</sup> *Id.* at 388-89, citing *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280 (5<sup>th</sup> Cir. 2014).

<sup>44</sup> See David L. Hudson, Jr., *Federal Appeals Court Rules in Favor of Student Rapper*, NEWSEUM INST., (Jan. 27, 2015), <http://www.newseuminstitute.org/2015/01/27/federal-appeals-court-rules-in-favor-of-student-rapper/>.

<sup>45</sup> *Bell*, 799 F.3d at 391, 397.

<sup>46</sup> *Id.* at 393.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 399.

<sup>49</sup> *Id.* at 396.

<sup>50</sup> *Id.* at 403 (J. Dennis, dissenting).

<sup>51</sup> *Id.* at 409, n.3.



expressive activities of the students in *Tinker*. He warned that the majority opinion “allows schools to police their students’ Internet expression anytime and anywhere—an unprecedented and unnecessary intrusion on students’ rights.”<sup>52</sup> He further accused the majority of “creating precedent that contravenes the very values that the First Amendment seeks to protect.”<sup>53</sup> For example, the First Amendment was designed to allow people to criticize school officials, but in this case school officials silenced Bell’s critical speech.<sup>54</sup>

Judge Dennis also noted that the *Tinker* “reasonable forecast” of disruption standard “could be viewed as somewhat vague” and allowed students speech to be silenced based on the reactions of others.<sup>55</sup> He warned that the majority opinion allowed school officials to punish Bell because his song offended and angered them.<sup>56</sup>

Judge Edward Prado’s dissent emphasized the lack of uniformity in student online speech cases. He believed that the majority had stretched precedent to apply it to “purely off-campus speech.”<sup>57</sup> He warned that *Tinker* applied to student speech that takes place on campus and should be not reflexively applied to off-campus speech.<sup>58</sup> He wrote that the “difficult issue of off-campus online speech will need to be addressed by the Supreme Court.”<sup>59</sup>

The *Bell* case shows that many judges fail to appreciate the speech-protective approach that Justice Fortas and the Supreme Court had set forth in *Tinker*. The Vietnam War was one of the most controversial public issues in modern American history. The Supreme Court allowed dissenting speech regarding this most divisive of public issues to receive First Amendment protection. However, the Fifth Circuit in the *Bell* case readily allowed the punishment of a student who blew the whistle on coaches’ alleged sexual harassment.

The *Bell* decision sanctions the ability of school officials to silence those who blow the whistle and make officials look bad.<sup>60</sup> A group of rappers and rap music

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<sup>52</sup> *Id.* at 405 (J. Dennis, dissenting).

<sup>53</sup> *Id.* at 411 (J. Dennis, dissenting).

<sup>54</sup> *Id.* at 412 (J. Dennis, dissenting).

<sup>55</sup> *Id.* at 419 (J. Dennis, dissenting).

<sup>56</sup> *Id.* at 432 (J. Dennis, dissenting).

<sup>57</sup> *Id.* at 433 (J. Prado, dissenting).

<sup>58</sup> *Id.* at 434 (J. Prado, dissenting).

<sup>59</sup> *Id.* at 435 (J. Prado, dissenting).

<sup>60</sup> Motion for Leave to File Brief Amicus Curiae of the Student Press Law Center and the Foundation for Individual Rights in Education, Inc., In Support of Petitioner at 10, *Bell v.*

scholars explained that the 5<sup>th</sup> Circuit majority decision discriminated against rap music, a genre of music with traditions of political and social protest.<sup>61</sup> Furthermore, the 5<sup>th</sup> Circuit allowed school officials to punish a student for expression he created entirely off-campus. The extension of school officials' power in the Taylor Bell case is astonishing.<sup>62</sup>

Bell appealed to the Supreme Court.<sup>63</sup> Many speech advocates hoped that the Court would grant review to clarify the extent of school official's authority over off-campus, online speech, an issue that has been unresolved for many years.<sup>64</sup> Alas, the Court denied review.

### III. You Can't Wear the American Flag

If punishing a student for rapping about school employees' misconduct off-campus was not enough, consider the egregious censorship at Live Oak High School in Northern California. Five Caucasian students wore t-shirts depicting the American flag to their school on Cinco de Mayo, the Mexican holiday. Some students objected to the wearing of American flag t-shirts and questioned the students.<sup>65</sup> Another student told an assistant principal: "There be some – there might be some issues."<sup>66</sup> A group of Mexican students asked the assistant principal why the Caucasian students "get to wear their flag out when we don't get to wear our flag?"<sup>67</sup>

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Itawamba School District (15-666) (Dec. 21, 2015), <http://www.scotusblog.com/wp-content/uploads/2015/12/No.-15-666-OK-TO-PRINT-Student-Press-Law-Center-Copy.pdf>.

<sup>61</sup> Amicus Curiae Brief of Erik Nielson et al. In Support of Petitioner at 12, *Bell v. Itawamba Sch. Dist.* (15-666) (Dec. 17, 2015), <http://www.scotusblog.com/wp-content/uploads/2015/12/Brief-of-Erik-Nielson-et-al-Rap-Scholars-and-Artists.pdf>.

<sup>62</sup> Note, Katherine D. Landfried, *Bell v. Itawamba School District: The Need for a Balance of Freedom and Authority*, 36 ST. LOUIS PUB. L. REV. 193, 218 (2017); David L. Hudson, Jr. *Case of Student Rapper Deserves Close Examination*, NEWSEUM INST., (Sept. 29, 2015), <http://www.newseuminstitute.org/2015/09/29/case-of-student-rapper-deserves-close-examination/>.

<sup>63</sup> David L. Hudson, Jr., *Student-Rapper Appeals to High Court, As a Matter of Last Resort*, NEWSEUM INST., (Dec. 8, 2015), <http://www.newseuminstitute.org/2015/12/08/student-rapper-appeals-to-high-court-as-a-matter-of-last-resort/>.

<sup>64</sup> Aleheah Jones, *Schools, Speech, and Smartphones: Online Speech and the Evolution of the Tinker Standard*, 15 DUKE L. & TECH. REV. 155 (2017); Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 FIRST AMENDMENT L. REV. 210 (2009) David L. Hudson, Jr. *Time for the Supreme Court to Address Off-Campus, Online Speech*, 91 OR. L. REV. 621 (2012)

<sup>65</sup> *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 774 (9<sup>th</sup> Cir. 2014).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 775.

The assistant principal met with the students and told them to remove the American flag t-shirts or turn them inside out. Later, one of the t-shirt wearers received a threatening text and phone call.<sup>68</sup> The assistant principal decided to censor the students' political expression in part because there was some racial tension during the previous year's Cinco de Mayo at the school.

The students later filed a federal lawsuit, contending that their free-speech rights were violated because they were not allowed to wear the t-shirts. A federal district court ruled against them. On appeal, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit affirmed based on its expansive application of the *Tinker* standard. The panel reasoned that "there was evidence of nascent and escalating violence at Live Oak."<sup>69</sup> The panel cited both "ongoing racial tension" and "gang violence within the school."<sup>70</sup>

The panel recognized that it was limiting speech based on the reactions of other students and even referenced that this could "give rise to concerns about a heckler's veto."<sup>71</sup> However, the panel reasoned that in the school environment "the crucial distinction is the nature of the speech, not the source of it."<sup>72</sup> The panel then analogized the wearing of American flag t-shirt cases to Confederate flag t-shirt cases.<sup>73</sup> The panel concluded that the school officials acted constitutionally under the *Tinker* standard by reasonably forecasting substantial disruption or violence.<sup>74</sup>

The students petitioned for en banc review, which was denied. However, Judge Diarmund O'Scannlain dissented from the denial of en banc review with a bristling dissent.<sup>75</sup> He warned that the panel had "condon[ed] the suppression of free speech by some students because other students might have reacted violently."<sup>76</sup> He described the "heckler's veto doctrine" as an important and venerated principle of First Amendment law.<sup>77</sup> He wrote in blunt language: "By

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 776.

<sup>70</sup> *Id.* at 777.

<sup>71</sup> *Id.* at 777-78.

<sup>72</sup> *Id.* at 778.

<sup>73</sup> *Id.* at 778-79.

<sup>74</sup> *Id.* at 779.

<sup>75</sup> *Dariano* 767 F.3d 764 (J. O'Scannlain, dissenting).

<sup>76</sup> *Id.* at 766 (J. O'Scannlain, dissenting).

<sup>77</sup> *Dariano*, 767 F.3d at 770-71 (J. O'Scannlain, dissenting); Katherine M. Portner, *Tinker's Timeless Teaching: Why the Heckler's Veto Should Not Be Allowed in Public Schools*, 86 MISS. L.J. 409, 414 (2017) ("However, it is important to differentiate the 'heckler's veto doctrine' from

interpreting *Tinker* to permit the use of the heckler's veto, the panel opens the door to the suppression of any viewpoint opposed by a vocal and violent band of students."<sup>78</sup>

The *Dariano* case represents a repudiation of the spirit of the *Tinker* ruling. Perhaps this is why Mary Beth Tinker and John Tinker filed an *amicus curiae* brief asking the U.S. Supreme Court to hear the case.<sup>79</sup> As one law student commentator aptly noted, "Peaceful student speech that comments on social or political issues in a manner that does not bully classmates should not be subject to blanket restrictions, even if such speech prompts an angry, disruptive reaction."<sup>80</sup>

Like Taylor Bell, the *Dariano* plaintiffs appealed to the U.S. Supreme Court.<sup>81</sup> They argued in their certiorari petition, that there was "no principled way" to distinguish the wearing of an American flag t-shirt from the wearing of black armbands to protest the Vietnam War in *Tinker*.<sup>82</sup> The U.S. Supreme Court denied review.

### Conclusion

Many years ago, Justice Fortas in *Tinker* proclaimed that "schools are not enclaves of totalitarianism" and school officials needed to respect the rights of students.<sup>83</sup> Nearly fifty years later, many school officials do not respect the rights of students. School officials even punish students for purely off-campus expression that was not truly threatening and for wearing a t-shirt of the American flag.

Students cannot appreciate the importance of individual liberties if they live in an environment that constantly disrespects such liberty and values conformity over

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the "heckler's veto" itself. Diametrically opposing the Supreme Court's "heckler's veto doctrine" is the heckler's veto, which refers to the actual act of listeners censoring speech simply because they disagree.").

<sup>78</sup> *Dariano*, 767 F.3d at 771 (J. O'Scannlain, dissenting).

<sup>79</sup> Frank LoMonte, *Protect Students' right to display the American flag despite 'hecklers,' free-speech icons urge Supreme Court*, STUDENT PRESS LAW CENTER, (Jan, 26, 2015), <http://www.splc.org/blog/splc/2015/01/dariano-tinkers-supreme-court-amicus-brief>.

<sup>80</sup> Note, Julien M. Armstrong, *Discarding Dariano: The Hecker's Veto and a New School Speech Doctrine*, 26 CORNELL J. L. & PUB. POL'Y 389, 416 (2016).

<sup>81</sup> See David L. Hudson, Jr., *American Flag T-Shirt Case Appealed to U.S. Supreme Court*, NEWSEUM INST., (Dec. 26, 2014), <http://www.newseuminstitute.org/2014/12/26/american-flag-t-shirt-case-appealed-to-u-s-supreme-court/>.

<sup>82</sup> Petition for Writ of Certiorari at 7, *Dariano v. Morgan Hill Unified School District* (14-720), <http://www.americanfreedomlawcenter.org/wp-content/uploads/2012/02/Dariano-Petition-for-Cert-Final.pdf>.

<sup>83</sup> *Tinker*, 393 U.S. at 511.

all else.<sup>84</sup> In 1943, Supreme Court Justice Robert Jackson warned that school officials should respect student rights lest they “strangle the free mind at its source and teach youth to discount important principles of government as mere platitudes.”<sup>85</sup> The landmark case of *Tinker v. Des Moines Independent Community School District* displayed an attitude of gratitude for students and their rights.

Today, that appreciation has been lost. We must regain it.

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<sup>84</sup> Hudson, *Let the Students Speak*, at 35.

<sup>85</sup> *Barnette*, 319 U.S. at 637.