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Student Discipline in Texas Schools

MARK G. YUDOF*

Introduction

There are many controversies which surround the public schools, but none have been more fiercely debated in recent years than the question of the extent to which students should be afforded constitutional guarantees. Many parents lament the breakdown of discipline in the schools, the decline of adult authority. They attack what they perceive as a rampant permissiveness which is gradually eroding the structure and values of American society. These parents, joined by some educators and courts, emphasize the immaturity of school children, the need for restrictions in the special environment of the school, and the need to preserve a large degree of order if the educational goals of compulsory schooling are to be achieved. Others perceive the schools as authoritarian institutions which promote order for its own sake, which stifle the free development of children, which crush spontaneity and creativity. They fear that the impartation of skills has been submerged by the emphasis on institutional values such as silence and docility. They look to the courts to redress both the inhumanity and educational futility of conditions in the modern public schools. These parents too have found their allies in the community of educators, judges, and lawyers.

In many ways, the debate boils down to what is the most appropriate model for governing the public schools—a Puritan model or a legal model.

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3 See, e.g., Ferrell v. Dallas Ind. Sch. Dist., 392 F.2d 697 (5th Cir. 1968).
4 See generally SILBERMAN, CRISIS IN THE CLASSROOM (1970).
6 Much of the discussion of governance models is taken from Legal Problems Arising from the Regulation of Student Behavior in Classroom and School, delivered by Edward T. Ladd, Division of Educational Studies, Emory University, at the University of Texas School Law Conference, San Antonio, Texas, November 16, 1971.
The Puritan model is the most traditional and traces its name and history back to the Massachusetts Bay Colony. That model is premised on the view that authority in the schools should reside in an administrative structure, that children in the light of their immaturity, should be afforded privileges but not rights, and that coercion is an acceptable way of compelling students to conform to the role that adults have carved out for them. The state knows what is best both for the survival of society and for the individual child, and thus it may justifiably reduce the scope of students rights and comforts which are later afforded to mature adults. The alternative model for governing schools, a model which in theory prevails in the society at large, finds its genesis in traditional democratic philosophy. It views students as having particular rights and responsibilities, and holds that authority imposed from above be limited to the minimum necessary to make possible the achievement of educational goals. Proponents of this model urge that true learning can take place only in an atmosphere of equality, and that coercion is inconsistent with American democratic ideals.

This is not the place to resolve—if it is resolvable at all—the conflict between these two approaches to public education. What is important, however, is a recognition that the tide is running against the older Puritan model and in favor of the legal model. Over the last decade the courts, for better or worse, have become increasingly sensitive to the denial of civil liberties to school children. Litigation has become more common where the perceived rights of students and educators have come into conflict. In a survey of Texas school districts conducted by law students at the University of Texas, 80 per cent of the school superintendents responding claimed to be familiar with court decisions on student discipline. Seventeen per cent expressed dissatisfaction with the intrusions of courts and lawyers in school affairs. Court decisions, dealing with such disparate subjects as the orga-

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8 R. COHAN, B. SIMPSON, L. SIMPSON, TEXAS SCHOOL DISCIPLINE STUDY (1972) (unpublished manuscript) (hereinafter DISCIPLINE STUDY). The authors surveyed 432 of the 1149 school districts in Texas. This represented a significant proportion of districts in each student population category:

<table>
<thead>
<tr>
<th>No. of Students in District</th>
<th>No. of Districts Surveyed</th>
<th>% of all Districts in Texas in this Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 100</td>
<td>30</td>
<td>23%</td>
</tr>
<tr>
<td>100-499</td>
<td>161</td>
<td>38%</td>
</tr>
<tr>
<td>500-999</td>
<td>77</td>
<td>36%</td>
</tr>
<tr>
<td>1000-1499</td>
<td>39</td>
<td>41%</td>
</tr>
<tr>
<td>1500-1999</td>
<td>24</td>
<td>36%</td>
</tr>
<tr>
<td>2000-2999</td>
<td>39</td>
<td>47%</td>
</tr>
<tr>
<td>3000-4999</td>
<td>27</td>
<td>46%</td>
</tr>
<tr>
<td>5000-9999</td>
<td>20</td>
<td>55%</td>
</tr>
<tr>
<td>10,000-19,999</td>
<td>12</td>
<td>46%</td>
</tr>
<tr>
<td>20,000 and over</td>
<td>12</td>
<td>60%</td>
</tr>
</tbody>
</table>
nization of fraternities, the wearing of armbands, and the distribution of underground newspapers are often inconsistent. Administrators prevail as often as they find themselves on the losing end of a judicial decision. Securing compliance with court orders, as in so many aspects of school law, is an arduous and, at times, hazardous process. But the real importance of these cases is that the schools and school officials are no longer insulated from legal challenge, and litigation has become a legitimate and acceptable way of resolving disputes which arise in the public schools.

**Early Student Rights Decisions**

Until the 1960's the Puritan model of school governance dominated legal thinking in the students rights area and students were successful in challenging school regulations of their conduct in very few cases. Suspensions of students for smoking, and riding in a car with a young man, wearing cosmetics, or refusing to remove metal cleats from shoes were upheld by state courts. These holdings were reached on one or more of the following grounds. First, local school boards generally operated under very broad statutory provisions which allowed them wide discretion in determining the rules and regulations governing pupil conduct. So long as this discretion was not exercised in bad faith—meaning that the objective of a regulation was a legitimate educational goal—the courts should not attempt to supersede the judgment of elected authorities. Second, in the absence of clear legislative pronouncements, any reasonable, non-arbitrary exercise of power by a school board or school administrator usually was affirmed by the courts. In this regard, the burden of proof clearly rested on the student who alleged that a particular regulation was capricious. Third, school children have no right to attend a public school. School attendance is a privilege bestowed by the state, and as such, it can attach whatever conditions it pleases to its largesse—even if attendance is required by state compulsory education laws. Fourth, particularly where a private school or college is involved, the relationship between the student and the educational institution which he attends is governed by the law of contracts. If the particular rule or penalty in question has been provided for under the contract between the student and his parents and the school, the courts are obliged to uphold the action of the authorities. Finally, school authorities, as the agents of the parents, have the same rights as parents to prescribe rules for children during the portion of the day that the children are in their charge.

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12 Stromberg v. French, 60 N.D. 750, 236 N.W. 477 (1931).
Thus courts may interfere with their treatment of students only if they have exceeded the bounds of parental discretion. Given the scope of parental authority at common law, rarely could such overstepping of authority be demonstrated. This rule was called the in loco parentis doctrine, and strangely enough, it often operated under circumstances where the parents expressly denied that they had authorized school officials to act.\textsuperscript{14}

\textit{Anthony v. Syracuse University}\textsuperscript{15} is an interesting example of the traditional attitude of the courts toward student rights. Beatrice Anthony, a Home Economics student at Syracuse University, was dismissed from the University without any assignment of reasons or a hearing of any type. She was advised that school authorities had heard rumors about her: "she had caused a lot of trouble," and she was not "'a typical Syracuse girl.'" University regulations provided that attendance was a privilege and not a right. The University had "the right to request the withdrawal of any student whose presence is deemed detrimental." The New York court held that the regulation was within the discretion of the University and that the dismissal was within the terms of the contract. Further, it placed the burden of proof on the plaintiff and concluded that she had failed to prove—even in the absence of stated reasons—that she was dismissed on legally inadequate grounds. While the context is distinguishable from most cases in that a private school was involved, the attitude toward student rights evidenced by the court is typical for this period.

**State Court Decisions in Texas**

The Texas statutes, as in so many states,\textsuperscript{16} vest exclusive responsibility for student discipline in the public schools in the hands of local school boards (Trustees). Trustees have the "exclusive power to manage and govern public free schools of the district," and they "may adopt such rules and by-laws as they deem proper."\textsuperscript{17} More specifically, they are empowered to "suspend from the privileges of the school any pupil found guilty of incorrigible conduct, but such suspensions shall not extend past the current term of the school."\textsuperscript{18} The Attorney General of Texas has interpreted the latter provision as referring to students "incapable of being corrected, amended, or improved," and stated that there must be a prior-school rule pertaining to the conduct at issue before a suspension is lawful.\textsuperscript{19}

\textsuperscript{15} \textit{Anthony v. Syracuse Univ.}, 224 App. Div. 487, 231 N.Y.S. 435 (1928).
\textsuperscript{17} \textit{TEX. EDUC. CODE} §§ 23.26(b), (d) (1969).
\textsuperscript{18} \textit{Id.}, § 21.301.
\textsuperscript{19} \textit{TEX. ATT’Y GEN. OP. NO. M-332} (1969).
Texas courts have scrupulously respected the broad discretionary power given local boards of education. Absent unreasonableness, bad faith, or capriciousness, they have steadfastly refused to intervene in student rights problems. In addition while many of the doctrines which insulated school authorities from judicial review of their actions in disciplining students—the right-privilege distinction and the in loco parentis doctrine—have been repudiated by most federal and state courts, in many instances Texas state courts have continued to assert their validity. Reference is often made to the language employed by a federal district court in Georgia: “By accepting an education at public expense pupils at the elementary or high school level subject themselves to considerable discretion as to the manner in which they deport themselves.” So too, the in loco parentis doctrine finds ample support in the Texas case law. For example, the Austin Court of Civil Appeals recently upheld an otherwise illegal search of a student on the theory that the principal of a public school conducted the search in loco parentis rather than as an official of the State.

Student Rights in Federal Court: The Constitutional Issues

While the Texas state courts have, by and large, not been caught up in the judicial trend toward enlarging the scope of student rights, the federal courts have taken the lead in this regard. The landmark decision, following in the steps of two cases decided by the Fifth Circuit, is Tinker v. Des Moines Independent Community School District. In that case, three school children, ages 13, 15, and 16, wore black armbands to public school in order to protest the war in Vietnam. They were suspended under a school regulation that provided “that any student wearing an armband to school would be asked to remove it, and if he refused he would be sus-

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24 Blackwell v. Issaquena Cty Bd. of Educ., 363 F.2d 749 (5th Cir. 1966); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

pended until he returned without the armband.” Plaintiffs filed a complaint under 42 United States Code § 1983 seeking an injunction to restrain the school officials from disciplining them. The district court upheld the constitutionality of the suspensions, and the Court of Appeals for the Eighth Circuit, sitting en banc, affirmed the district court by an equally divided vote.

The Supreme Court of the United States reversed the lower courts. The Court reasoned that the wearing of armbands is a symbolic act, “closely akin to ‘pure speech,’” which is protected by the free speech clause of the first amendment, and that students, as citizens, were entitled to the same constitutional rights as adults. The Court rejected the argument that constitutional rights must be shed at the “schoolhouse gate,” and characterized the issue for decision as the appropriate application of the first amendment “in light of the special characteristics of the school environment.”

The Court ultimately adopted the following test:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,” the prohibition cannot be sustained.

[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. . . . But our Constitution says we must take this risk, Terminiello v. Chicago, 337 U.S. 1 . . . and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength. . . .

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students.

In applying this test to the facts of the case, the Supreme Court held that there were no facts in the record to indicate that school officials might reasonably forecast a substantial disruption of school activities and that, in fact, no such disruption had occurred:

Their [Plaintiffs'] deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce,

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27 383 F.2d 988 (8th Cir. 1967).
29 Id. at 509.
30 Id. at 508–509.
31 Id. at 511.
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to make their views known, and, by example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.32

The test for approving or disapproving of the exercise of student rights which was announced in Tinker is deficient or ambiguous in a number of ways. This has made application of this doctrine in the lower courts difficult and unpredictable. The Tinker test fails to delineate with any precision the scope of the state’s interest in education. Is its interest primarily in orderliness or does it lie more within the instructional realm? Can the two be separated? To what extent is the state’s interest in aculturating children—that is teaching them certain social values—a legitimate interest which must be balanced against the individual’s interest?33 Another question which derives from the lack of definition of interests is what is a disruption? Is noise a disruption? Inattentiveness? Where do we draw the line between intellectual commotion and riot?34 Often a judge’s determination as to the existence or likelihood of disruption seems more an indication of his personal educational philosophy than a dispassionate evaluation of the facts.35

Does not the nature of the interests and the definition of disruption depend to a large extent on the specific context? For example, vociferous discussion of the Vietnam War may be unobjectionable in the hallway when classes are changing and yet it may be entirely objectionable in the midst of a geometry class. It may be more appropriate in a history class than a biology class. Are there not differences between conduct which impedes the flow of traffic through a school and conduct which prevents classroom discussion and instruction? Between before-school and during-school activities? Tinker then fails to set forth the time and place distinctions which are necessary to achieve an intelligent application of its standard.

It is not clear whether the forecast of a disruption or an actual disruption is necessary before speech in the schools can be limited. The Tinker opinion is inconsistent on this point, although lower courts have consistently held that a forecast is sufficient.36 If this is so, prior censorship of speech is permissible if the state can meet its burden of proving that there

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32 Id. at 514.
34 See Eisner v. Stamford Bd. of Educ., 460 F.2d 1355 (2nd Cir. 1971).
35 Cf. Landsdale v. Tyler Junior College, 470 F.2d 659, 661 (5th Cir. 1972) (Opinion of Clark, J.).
36 See e.g., Norton v. East Tennessee State Univ., 419 F.2d 195 (6th Cir. 1969).
is a substantial probability of material disruption of the school. But this forecast problem leads to the most fundamental unanswered question concerning *Tinker*: When has the state satisfied its burden of showing that a material disruption is likely to occur. Apart from considerations of how great the probability must be, what type of evidence will suffice? If the uncorroborated testimony of school officials is accepted, *Tinker* will have little substantive impact; for it will simply compel administrators to articulate their decisions with reference to the magical phrases employed in *Tinker*. Whether consciously or otherwise, political and ideological motivations will be subsumed and rationalized in disruption terms. On the other hand, it is the height of folly to hold that a prohibition on student expression is permissible only after some calamity has befallen the school. What is needed is some reference to the prior experiences of the specific school involved and of other schools that have confronted similar circumstances. In this fashion, the courts may intelligently approach the problem of ascertaining the nexus between the forbidden behavior and the breakdown of the minimum degree of order necessary to sustain an educational environment.

The *Tinker* Court also evidenced little awareness of the distinction between expressive behavior which is itself disruptive and expressive behavior which causes others to disrupt. This is the problem of the so-called "hecklers' veto." If the speakers are not guilty of any misconduct but simply express themselves peacefully, then why should they be punished for the violent and disruptive reactions of others who object to the message which is being conveyed? For example, if some students distribute handbills favoring one political party and other students favoring another political party attack them, should not the attackers be punished instead of the handbill distributors? Obviously, at some point it is more efficient and less risky to punish the speakers, but in many instances this may not be the case. This brings me to the final difficulty with the *Tinker* test: there is insufficient emphasis on the availability of alternative means to prevent disturbances, means which are less detrimental to the students' right of free expression. If newspapers are noisily distributed by students or if littering is a problem, the school should promulgate anti-noise and anti-littering regulations and not ban all distributions of newspapers. If armbands or political buttons are disquieting to a segment of the school population, administrative efforts to quiet fears and avoid conflict should precede bans on such expressive activity. In other words, where it is reasonable to do so—

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87 Compare Scoville v. Board of Educ., 425 F.2d 10 (7th Cir. 1970), with Griffin v. Tatum, 425 F.2d 201 (5th Cir. 1970).

particularly where time permits—alternative approaches should be explored before students are prevented from speaking.39

*Tinker* has been applied by the lower federal courts—in Texas and elsewhere—in a variety of factual contexts,40 and the results, emanating from the spacious declarations of *Tinker*, are often puzzling and unpredictable. The following represents a rough summary of the law and practice in Texas with respect to student rights:

1. There has been tremendous controversy surrounding long hair and dress regulations, and a number of courts of appeal have held such regulations to be violative of the fourteenth amendment.41 The Court of Appeals for the Fifth Circuit (which includes Texas) has generally upheld hair and dress codes,42 and it recently held in *Karr v. Schmidt*43 that district courts must dismiss complaints alleging violations of rights in this area. The court, sitting *en banc*, reasoned that there was no constitutional right for students to dress and wear their hair as they pleased, and thus, distinguishing *Tinker*, schools might constitutionally regulate such conduct without reference to any disruption standard. In a subsequent case, the Fifth Circuit refused to extend *Karr* to junior colleges, and expressly held that hair and dress codes were unconstitutional as applied to junior college students.44 In practice, 70 per cent of Texas school districts regulate the hair length and dress of their students.45

2. As a general rule, the federal courts, including those in Texas, have upheld the right of students to distribute underground newspapers so long as they are not disruptive.46 Libelous or obscene written material is not protected, and the school may reasonably regulate the time and place of distribution. This right applies to distributions occurring both on and off of school grounds. One important caveat, however, is in order. School officials may constitutionally review, and ultimately censor, such newspapers prior to their distribution in order to determine if there is a sub-

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39 Ferrell v. Dallas Ind. Sch. Dist., 392 F.2d 697, 705 (Tuttle, J., dissenting).
40 See Berkman, *supra* note 33.
41 Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970); Breen v. Kahl, 419 F.2d 1084 (7th Cir. 1969), *cert. denied*, 398 U.S. 877 (1970); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971). *But see* Gfell v. Rickelman, 441 F.2d 444 (6th Cir. 1971); King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971).
43 Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972).
44 Landsdale v. Tyler Junior College, 470 F.2d 659 (5th Cir. 1972) (*en banc*).
45 *DISCIPLINE STUDY*.
stantial probability of disruption. This review, however, must be expeditious and sufficiently objective and fair to satisfy the requirements of procedural due process. In practice, most Texas school districts allow the distribution of underground newspapers on school grounds, but 26 per cent of the districts, in clear violation of the law, refuse to allow such distribution under any circumstances.

3. Solicitations for money on school premises are so inherently disruptive that public school officials may ban them completely. In Texas, only 22 per cent of school districts exercise this power.

4. Strikes and boycotts similarly are not protected under Tinker.

5. Corporal punishment has been upheld by federal courts in Texas, Vermont and New Mexico, and 99 per cent of Texas school districts employ it. The vast majority of these districts do not require parental consent.

6. Bans on fraternal organizations in public schools have been sanctioned by Texas law and by Texas state courts. The federal courts in Texas have not passed on the issue. Courts outside of Texas are divided. Only 24 per cent of Texas school districts appear to ban particular school organizations and clubs.

7. The wearing of buttons and armbands is protected if the requirements of

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48 DISCIPLINE STUDY.

49 See Katz v. McAulay, 438 F.2d 1058 (2nd Cir. 1971).


52 DISCIPLINE STUDY.


55 Compare Wright v. Board of Educ. of St. Louis, 246 S.W. 43 (Mo. 1922) with Coggins v. Board of Educ. of Durham, 223 N.C. 768, 23 S.E.2d 527 (1943). See also, Waugh v. Board of Trustees, 237 U.S. 589 (1915). The Supreme Court's recent decision in Healy v. James, 92 S.Ct. 2383 (1972) casts considerable doubt on the continuing constitutional vitality of these earlier cases. In that decision, the Court expressly held that state college and university students were protected by "the First Amendment . . . right of individuals to associate to further their personal beliefs. Id. at 2346. Healy involved the denial of recognition and the use of facilities to a political organization, and thus fraternity bans, with an impact beyond the campus, would seem to be prohibited even more clearly. The obvious caveat, however, is that the Court in future associational cases may wish to draw a distinction between elementary and secondary students and more mature college students.

56 DISCIPLINE STUDY.
Tinker are met.\textsuperscript{57} It is shocking to note that nearly one-fourth of Texas school districts completely ban buttons and armbands notwithstanding the Tinker decision.\textsuperscript{58}

Conclusion

While the arguments surrounding student rights issues tend to be made in purely legal terms, obviously there are important concerns relating to the type of public schools which we wish to have which transcend these legal considerations. How much freedom do we wish to give our young people? When should they be afforded the same rights as adults? How should a well-working educational institution operate? What degree of order is desirable or necessary? In short, we must determine what is wise and not only what is legal—although certainly our determination as to the former will effect the latter. Discipline in the public schools is a matter of public concern, and the public and its elected representatives ultimately must shoulder the responsibility for evaluating the efficacy of particular rules and punishments. These are hardly matters which fall within the exclusive province of the courts; for they have no monopoly or special claim to educational expertise. Moreover, it is unrealistic to urge the courts to reshape public educational institutions in a fashion which is unacceptable to the larger community. This is evidenced by the relative lack of correlation between many school practices and the law with respect to student discipline—school authorities are as likely to ban underground newspapers and armbands as they are solicitation on school premises or fraternal organizations, notwithstanding the constitutional protection afforded to the former. Courts may influence attitudes and uphold the rights of individuals in particular cases, but their decisions are no substitute for informed community direction and supervision.


\textsuperscript{58} DISCIPLINE STUDY.