# WHAT THE PIGEONS HAVE DONE TO MY STATUE[1]

*Dan L. Johnston, Esq.**

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## I. INTRODUCTION

For one who was drawn to a career in the law mainly because of its utility in protecting human rights, it is especially gratifying to return to the Drake Law School and visit the Center for Constitutional Law. When I was a student here, the single constitutional law course was rather obviously in the curriculum only to meet accreditation standards. It amounted to nothing more than a daily recitation of as many black letter paragraphs from the hornbook as could be read in each class time. No questions were entertained, no discussion allowed.

Entering law school, I hoped to learn more about American constitutional law with its defense of individual human rights against the "tyranny of the majority" which I had discovered as an undergraduate by reading John Stuart Mill, Hugo Black, Robert Maynard Hutchins, and Clarence Darrow. I hoped to find protection in my country's constitutional law—in a world that appeared quite hostile to my homosexual nature. My constitutional law class sorely disappointed and left me feeling cheated by my law school. In fact, Drake Law School left me so unprepared in constitutional law that when, in the first year after my graduation, Drake Law Professor Craig Sawyer asked me to undertake the representation of his clients John,

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* J.D., Drake Law School, 1964; Counsel for petitioners in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), *rev'g* 383 F.2d 988 (8th Cir. 1967), *aff'g* 258 F. Supp. 971 (S.D. Iowa 1966).

1. I should not be held responsible for the conceit that is implied by the title of this Article. Amidst some (now forgotten by me) Iowa-based free speech disputes that arose after *Tinker v. Des Moines Independent Community School District*, a local editorial observed that a statue should be erected to some of us who were involved in the case. When I mentioned this to Professor Tom Baker he rather insisted on the title chosen for my Article.

and Mary Beth Tinker, and Christopher Eckhardt, it was the first I had heard of the Federal Civil Rights Statute[2] which gave us access to the federal courts.

## II. THE THIRTY YEARS SINCE THE *TINKER* DECISION

The purpose of this symposium is to analyze the state of students' rights in public schools, thirty years after the *Tinker v. Des Moines Independent School District*[3] decision. Despite the title of this talk, and despite my obvious personal interest in wishing the impact of the decision to be as significant as possible, and despite the observations of others participating in the symposium, I believe that the rights of students were significantly enhanced by *Tinker* and remain so.

### A. Tinker*'s Impact in the Courts*[4]

To be sure, three decades of federal judges appointed by conservative Presidents have resulted in decisions which are not consistent with the opinions about the role of the First Amendment in public schools expressed so eloquently by Mr. Justice Fortas in *Tinker*.[5] Ironically, conservatives who complained that judges appointed during the Roosevelt-Truman-Eisenhower era were not sufficiently respectful of stare decisis, that pre-New Deal decisions should be followed not necessarily because they were right, but because they were established precedential law, now support decisions of conservative judges who fail to apply *Tinker* to comparable factual claims. Consistency has never been the strong suit of political polemicists of either the right or the left.

Federal courts since *Tinker* have upheld the disciplining of public school students for the content of speeches during an election campaign for student council president,[6] for the content of a student's valedictory speech,[7] for selecting "The Power of God" as a topic for a classroom presentation,[8] for wanting to show a video tape of a religious song in class "show and tell,"[9] for wearing a shirt with an anti-drug message,[10] and for wearing t-shirts protesting school policies.[11] Only the Ninth

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2. *See* 42 U.S.C. § 1983 (1994).
3. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).
4. I am indebted for this Section to Professor Perry A. Zirkel, Ph.D., J.D., LL.M. the Iacocca Professor of Education at Lehigh University.
5. *See id.* at 504-14.
6. Poling v. Murphy, 872 F.2d 757, 764 (6th Cir. 1989).
7. Guidry v. Broussard, 897 F.2d 181, 182-83 (5th Cir. 1990).
8. Duran v. Nitsche, 780 F. Supp. 1048, 1050-51, 1057 (E.D. Pa. 1991).
9. DeNooyer v. Livonia Pub. Sch., 799 F. Supp. 744, 755 (E.D. Mich. 1992), *aff'd sub nom.* DeNooyer v. Merinelli, No. 92-2080, 1993 WL 477030 (6th Cir. Nov. 18, 1993) (unpublished disposition).
10. Broussard v. School Bd., 801 F. Supp. 1526, 1527 (E.D. Va. 1992).

Circuit seems to have solidly embraced *Tinker* in reversing the discipline imposed against students for wearing "scab" buttons during a teacher strike.[12]

But, as a practicing attorney, I am more interested in the facts of a case and the court's holding than in the pronouncements of ruling judges in justification of their decisions. When I analyze *Tinker* from this perspective, it seems to me that *Tinker* remains the law of our land.

The two post *Tinker* United States Supreme Court cases dealing with public school student rights, *Bethel School District No. 403 v. Fraser*[13] and *Hazelwood School District v. Kuhlmeier*[14]—which are often cited as eroding *Tinker*—I believe do not, even though in each of these decisions the Court could have embraced Justice Fortas's eloquent language in *Tinker* to further expand student freedoms. *Tinker* did not mandate that they do so, and was not overruled or even significantly weakened. Despite the language of Justice Fortas's opinion, the actual holding of *Tinker* was rather narrow—reaffirming the application of the Constitution to the public school environment and finding that those principles include the freedom of speech by students.[15]

*Bethel* and *Hazelwood* seem to me to be distinguishable from *Tinker* by their facts, in that they involve speech in school-sponsored forums,[16] while *Tinker* involves private speech by students which occurs on school property. *Hazelwood* involves the censorship of a school newspaper.[17] Someone must decide what goes into a newspaper, and when a public school is the sponsor or publisher, then it is the public school which decides.[18]

The Supreme Court denied certiorari in *DeNooyer v. Livonia Public Schools*,[19] a case in which a second grade public school student was prevented from showing

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11. Baxter v. Vigo County Sch. Corp., 26 F.3d 728, 730 (7th Cir. 1994).

12. Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 530-31 (9th Cir. 1992). *But see also* McIntire v. Bethel Sch. Dist., 804 F. Supp. 1415, 1429 (W.D. Okla. 1992) (granting injunction against school district from prohibiting t-shirts with a slogan).

13. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

14. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

15. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505-06 (1969).

16. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. at 262; Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. at 677-78.

17. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. at 262.

18. The armband prohibition in *Tinker* was preceded by a student's attempt to publish an editorial endorsing the armband protest in the school newspaper. The article was censored, but no complaint of that action was included in the Complaint.

19. DeNooyer v. Livonia Pub. Sch., 511 U.S. 1031 (1994), *denying cert. to* 12 F.3d 211 (6th Cir. 1993) (unpublished disposition). The denial of certiorari cannot be considered either approval or disapproval of the decision below. Edward W. Keane, *Appellate Review*, *in* FEDERAL CIVIL PRACTICE 725, 746 (Georgene M. Vairo ed., 1989).

a videotape recording of herself singing a religious song as part of a show and tell class.[20] The district court found from the evidence that the class assignment required an oral, not recorded, presentation by the students, that the school feared allowing the presentation would be interpreted by some as a school endorsement of the student's religious views, and that it feared students of other religious faiths might be offended.[21] The district court also found in the "closed [school sponsored] forum of the classroom" the school only had to demonstrate its actions were "'reasonably related to pedagogical concerns'" rather than meet the heavier material and substantial disruption standard of *Tinker*'s school-wide speech.[22]

It would be enough to distinguish *DeNooyer* from *Tinker* in that the student's presentation was inconsistent with the class assignment of an oral presentation, but it is my judgment that had the armband prohibition in *Tinker* applied only to the classroom, as in *DeNooyer*, the result in *Tinker* might have been different. To illustrate this observation, during oral argument in *Tinker*, there was this exchange with Mr. Justice White:

> Justice White: "What if the student had gotten up from the class and delivered a message orally what his arm band was intended to convey and insisted on doing it all during the hour?"
>
> Johnston: "In that case we would not be here. Even if he insisted on doing it only for a second, although he would be expressing his views, he would be doing something else."
>
> Justice White: "Why did they wear the arm band in the class, to express the message?"
>
> Johnston: "Yes, Sir."
>
> Justice White: "To everybody in the class?"
>
> Johnston: "Yes, Sir."
>
> Justice White: "Everybody while they were listening to some other subject matter were supposed to also be looking at the arm band and taking in the message."
>
> . . . .

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20. DeNooyer v. Livonia Pub. Sch., 799 F. Supp. 744, 746 (E.D. Mich. 1992).
21. *Id.* at 746-47.
22. *Id.* at 748, 749-50 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. at 273).

> Johnston: "Well, except that, your Honor, I believe that the method that the students chose in this particular instance was specifically designed in such a way that it would not cause that kind of disruption. None of the teachers who have testified at the hearing in the District Court—"
>
> Justice White: "Just wearing a meaningless arm band?"
>
> Johnston: "No."
>
> Justice White: "Carrying an ineffective message?"
>
> Johnston: "No, they intended to be effective." [23]

I was trying to interpose the answer that the record contained no testimony of any teacher that a class was disrupted, but Mr. Justice Thurgood Marshall, who could interrupt Mr. Justice White while I could not, interposed a better answer:

> Justice Marshall: "It prohibited them from wearing the arm band where, in the building?"
>
> Johnston: "That is right. In the cafeteria, halls, anywhere in the school."[24]

Many of the lower federal court decisions which are often cited as eroding *Tinker* fail to reach the threshold, factual prerequisite for *Tinker*—a finding that the students are engaging in constitutionally protected speech.[25] Justice Fortas expressly excluded from his ruling cases in which students do not prove, at the threshold, that their conduct amounts to speech.[26] In my view, then, the two central holdings of *Tinker* remain intact: The reaffirmation of *Meyer v. Nebraska*,[27] and *West Virginia State Board of Education v. Barnette*[28] that the Constitution extends to decisions of public school authorities;[29] and the holding of *Tinker* that students may exercise their

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23. Transcript of Oral Argument at 7-8, Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (No. 21). The transcript and a taped recording of the oral argument, as well as other materials pertaining to the case are available at the offices of the Iowa Civil Liberties Union in Des Moines, Iowa.

24. *Id.* at 10.

25. *See, e.g.*, Heller v. Hodgin, 928 F. Supp. 789 (S.D. Ind. 1996) (suspending students for uttering vulgar, fighting words); Bush v. Dassel-Cokato Bd.of Educ., 745 F. Supp. 562 (D. Minn. 1990) (prohibiting students from attending off-school parties where alcohol was served).

26. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. at 507-08.

27. Meyer v. Nebraska, 262 U.S. 390 (1923).

28. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

29. The suggestion in this symposium by Kay S. Hymowitz of the Manhattan Institute that public school officials need to be allowed to exercise their governmental authority outside the Constitution in order to educate the students in their constitutional role as future adults, strikes me

free speech in school under the facts in *Tinker*, including that the prohibition ran to the entire school and not just classrooms, unless the school authorities wishing to suppress the students' speech can justify suppression by showing a threat of material and substantial disruption to the school.[30]

### B. Tinker's *Impact in the Schools*

The impact of *Tinker* cannot be measured only by the actions of courts and lawyers. Court decisions report only those instances when students and their school authorities disagree. They do not reflect, of course, incidents when students express themselves freely during their school hours without interference. Students and educators have embraced Justice Fortas's ringing principles often out of sight of courts and litigators. I believe it has become education policy and practice in many schools to encourage and nurture free speech among students as advocated in *Tinker*.[31]

At the time of the *Tinker* trial and appeals, I did not share my clients' opposition to the Vietnam War; most Americans did not. However, Sam Brown of Council Bluffs, a national leader of the anti-war movement, who later became the Secretary of State of Colorado, has observed that *Tinker* hastened the end of the war by encouraging school officials to allow anti-war organizers better access to high school and college students, who were, after all, those most interested in the war because they were the ones drafted to fight it. In retrospect it appears that if the views of John Tinker, Mary Beth Tinker, and Christopher Eckhardt had prevailed sooner, the geo-political world would look just as it does now, and hundreds of thousands of young men and women would be alive or living without disabling injuries. If Sam Brown is right, then *Tinker*'s impact on hastening the end of the war is a benefit that cannot be eroded despite decisions of courts or school boards, and reflects a rather wide-spread inclination of school officials, in the wake of the decision, to open their schoolhouses to speech.

In the year after the *Tinker* decision, United States Senator Jack Miller, a Republican from Iowa, was the commencement speaker for a Des Moines high school. A supporter of the Vietnam War, Senator Miller took a hand microphone,

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as decidedly inconsistent with our Constitution and the values of Western liberal democracy. It has been a well-settled American precept since after the Civil War that the Constitution limits the authority of state governments and their subdivisions, and that citizens have a right to sue when those limitations are exceeded. One need only contemplate the situation of minorities in nations without such values to see what an America in the style suggested by Ms. Hymowitz would be like. American parents are free to place their children in private school if they agree with Ms. Hymowitz's view that a totalitarian environment is necessary for adolescent education.

30. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. at 512.

31. *Id.* at 514.

walked among the graduating students, and listened to their views on the war, responding with his. Some students wore black armbands over their robes, and the Superintendent of Education shook the hand of the student who organized the armband demonstration. The Des Moines high schools, at ground zero of *Tinker*, became paradigms of academic freedom and remain so to this date. Justice Fortas's ringing advocacy of students' liberty has become educational policy in Des Moines.

To be sure, there are exceptions. When the *Tinker* decision was handed down on February 24, 1969, many school administrators and teachers were shocked. Not since *Barnette*[32]—twenty-six years earlier—had they been reminded that their authority over students might be limited in some way and that their students might even challenge their authority in court. After *Tinker*, I was asked a few times to talk to school administrators about its meaning. In one rural Iowa meeting, an administrator complained that if he could not make a rule against armbands and enforce it; he could not make and enforce a rule against students fornicating in the halls. In his view, effective power requires absolute power.

A few weeks ago my former companion Dennis Robicheaux, who now lives in Dallas, called to report that a student had gone to school wearing a black armband to express his mourning for students killed at Columbine High School in Colorado. Ordered by a teacher to remove the armband, the student returned the next day with a copy of the *Tinker* decision which the teacher tore up. Fortunately, more responsible officials prevailed and the student was allowed his armband.[33]

I do not mean to underestimate the difficulty in balancing students' rights with the importance of order in the school. It is a task which all American citizens and public officials must undertake. Carl Sandburg wrote:

> For liberty and authority they die
> though one is fire and the other water
> and the balances of freedom and discipline
> are a moving target with changing decoys.
>
> Revolt and terror pay a price.
> Order and law have a cost.
> What is this double use of fire and water?

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32. West Va. State Bd. of Educ. v. Barnette, 319 U.S. at 640-45 (holding the school board's regulation to compel students to salute and pledge allegiance to the American flag or face expulsion transcended constitutional limitations of the school board's power and invaded the students' First Amendment rights).

33. *See* Perry A. Zirkel, *The 30th Anniversary of* Tinker, 81 PHI DELTA KAPPAN 34, *available in* 1999 WL 10971121. This may be the same incident reported by Nadine Strossen in her keynote address to this symposium, but I have added it for the fact that the teacher tore up the student's copy of *Tinker*.

> Where are the rulers who know this riddle?
> On the fingers of one hand you can number them.
> How often has a governor of the people first
> learned to govern himself?
>
> The free man willing to pay and struggle and die
> for the freedom for himself and others
> Knowing how far to subject himself to discipline
> and obedience for the sake of an ordered society free from tyrants, exploiters and
> legalized frauds—
> This man is a rare bird and when you meet
> him take a good look at him and try
> to figure him out because
> Some day when the United States of the Earth
> gets going and runs smooth and pretty there
> will be more of him than we have now.[34]

After these thirty years it seems to me that my clients got it about right, by Carl Sandburg's standards. They expressed their ideas as free citizens, subjected themselves to the demands of order, and prevailed to enhance the freedom for all of us by the decision of the Supreme Court which carries their names.

Winning one case makes one neither a constitutional scholar, litigator, nor an expert on education. But it is my impression that *Tinker* empowers and encourages free women and men among America's students, educators, and in its judiciary, to embrace the noble goal expressed first by the Supreme Court in *Keyishian v. Board of Regents*[35] and re-stated in *Tinker* that:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through the wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.[36]

Many seem to have done so.

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34. CARL SANDBURG, HARVEST POEMS 1910-1960 101 (1960).
35. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).
36. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. at 512 (citations omitted).