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Mathew Fraser Sheds His Consititutional Rights To Freedom of Speech at the Schoolhouse Gates

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MATHEW FRASER SHEDS HIS CONSTITUTIONAL RIGHTS TO FREEDOM OF SPEECH AT THE SCHOOLHOUSE GATES

Freedom of speech has been recognized as one of the preeminent rights of individual liberty.[1] Justice Cardozo characterized it as "the matrix, the indispensable condition of nearly every other form of freedom."[2] However, the constitutional guarantee of freedom of speech does not confer an absolute right to speak and the law has long recognized the possibility to abuse such freedom.[3]

Professor Thomas Emerson's emphasis on the importance as well as the perplexity of arriving at an understanding of the definition of freedom of speech is readily appreciated when attempting to gain an understanding of such a complex area.[4] "The theory of freedom of expression is a sophisticated and even complex one. It does not come naturally to the ordinary citizen but needs to be learned. It must be restated and reiterated not only for each generation but for each new situation."[5] The Constitution does not bestow an "unbridled license giving immunity for every possible use of language."[6] The first amendment is not the guardian of unregulated talkativeness.[7] Accordingly, the state's power to control the conduct of children reaches beyond the scope of its authority over adults, and the well-being of children is one subject entirely within the state's constitutional power to regulate.[8] While children clearly have some first amendment rights, these rights differ in important respects from the rights enjoyed by adults.[9] As the Supreme Court noted, "the world of children

[1]Dunagin v. City of Oxford, 489 F.Supp. 763, 769 (N.D. Miss. 1980), *rev'd,* 701 F.2d 335 (5th Cir. 1983), *reh'g granted,* 701 F.2d 336 (5th Cir. 1983), *aff'd,* 718 F.2d 738 (5th Cir. 1983).

[2]Palko v. Connecticut, 302 U.S. 319, 327 (1937), *overruled on other grounds,* Benton v. Maryland, 395 U.S. 784 (1969).

[3]*See* O'NEIL, FREE SPEECH RESPONSIBLE COMMUNICATION UNDER LAW (1972). For a good discussion on the historical background of free speech, see generally NOWAK & ROTUNDA, HANDBOOK ON CONSTITUTIONAL LAW 830-35 (3rd ed. 1986); Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941).

[4]Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877 (1963).

[5]*Id.* at 894.

[6]Whitney v. California, 274 U.S. 357, 371 (1927), *overruled,* Brandenburg v. Ohio, 395 U.S. 444 (1969). Little can be gathered from the actual debates within the House concerning the meaning of the first amendment. The Framers felt no need at the time to explain a provision expressly upholding a general theory of freedom of speech. NOWAK, *supra* note 3, at 833.

[7]A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

[8]Ginsberg v. New York, 390 U.S. 629 (1968) (Douglas, J. dissenting), *reh'g denied,* 391 U.S. 971 (1968).

[9]*Id.* at 638. Although a great difference exists as to the court's treatment of adults and its treatment of children, the authority the court possesses over adults can be better understood from Justice Harlan's majority opinion in Konigsberg v. State Bar of California, 366 U.S. 36, 49 (1961), *reh'g denied,* 368 U.S. 869 (1961):

> Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection . . . . On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interests involved . . .

is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules."[10] At school, the authorities stand in loco parentis to enforce minimum standards of expression.[11]

Despite the power of the state to regulate students' conduct, these types of cases become particularly difficult to resolve inside the courtroom because they usually involve two competing principles of constitutional structure. On the one hand, the court has recognized the importance of the public schools in the preparation of students as citizens, and in the preservation of the values on which our society rests.[12] Yet, on the other hand, it is beyond dispute that school authorities must also act within the confines of the first amendment.[13] Despite the ongoing contradiction, courts can easily reconcile that first amendment jurisprudence recognizes an avid interest in protecting minors from exposure to vulgar and offensive language. Such protection has become a highly appropriate function of public school education.[14] While there is a certain aura of sacredness attached to the first amendment, constitutional rights must be balanced against the state's obligation to educate students in an ordinary and decent manner.[15]

It comes as no surprise that today's high school students are not insulated from the "shocking demonstrators and protestors in streets and on campuses and by authors of best-selling modern literature."[16] Yet, it is still considered quite a different matter when students take on the same language within the schoolhouse doors.[17] Justice Black once stated:

. . . if the time has come when pupils of state-supported schools,

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[10] *Ginsberg*, 390 U.S. at 638.

[11] New Jersey v. TLO, 469 U.S. 325 (1985).

[12] Ambach v. Norwick, 441 U.S. 68 (1979).

[13] Board of Educ. v. Pico, 457 U.S. 853, 865 (1982). The school board was forbidden to rid the library of books they considered vulgar and obscene. The court held that while students' first amendment rights must be construed in light of the needs of the School Board, the special characteristics of the library make the library especially appropriate for recognition of such rights. *Id.* at 871. The books ordered removed from the library included: SLAUGHTER HOUSE FIVE by KURT VONNEGUT JR.; THE NAKED APE by DESMOND MORRIS: DOWN THESE MEAN STREETS by PERI THOMAS; BEST SHORT STORIES BY NEGRO WRITERS, edited by LANGSTON HUGHES; GO ASK ALICE, of anonymous authorship; A HERO AIN'T NOTHIN' BUT A SANDWICH by ALICE CHILDRESS; and SOUL ON ICE by ELDRIDGE CLEAVER. *Id.* at 856 n.3.

[14] It is much more difficult to regulate an adult's exposure to vulgar and offensive language. However, the majority in Roth v. United States, 354 U.S. 476 (1957), decided that obscenity is not an utterance within the area of protected speech and press. *See generally* JUSTICE DOUGLAS AND FREEDOM OF SPEECH (H. Bosmajian ed. 1980).

[15] Schwartz v. Schuker, 298 F.Supp. 238 (E.D.N.Y. 1969).

[16] Scoville v. Board of Educ., 425 F.2d 10 (7th Cir. 1970), *cert. denied*, Board of Educ. v. Scoville, 400 U.S. 826 (1970); *See generally* Garvey, *Children and The First Amendment*, 57 TEX. L. REV. 321 (1979).

[17] It is important at this time to note that this article concentrates on free speech of high school students. Younger students as well as college students have considerably different standards to follow. For an excellent study on college students' rights see RATLIFF, CONSTITUTIONAL RIGHTS OF COLLEGE STUDENTS (1972); *see generally* Berham, *Student in Court: Free Speech and the Functions of Schooling in America*, 40 HARV. EDUC. REV. 567-595 (1970).

> kindergartens, grammar schools, or high schools can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary.[18]

With respect to Justice Black's statement, the courts have continuously held that school officials may curtail first amendment rights by reasonable regulations necessary to maintain orderly conduct during school hours.[19] Furthermore, school officials have the inherent authority to maintain order; thus they have latitude and discretion to formulate rules, regulations and general standards of conduct.[20]

In *Bethel School District No. 403 v. Fraser,*[21] the idea that the school has a right to regulate students' speech continues.[22]

FACTS OF *BETHEL*

On April 26, 1983, Mathew Fraser, a student at Bethel High School in Bethel, Washington, delivered a speech nominating a fellow student for a student government position.[23] The following statements were included in his speech:

> I know a man who is firm — he's firm in his pants, he's firm in his shirt, his character is firm . . . Jeff Kulhman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts — he drives hard, pushing and pushing until finally — he succeeds . . . Jeff is a man who will go to the very end — even the climax for each and every one of you.[24]

Approximately 600 high school students, many of whom were fourteen year-olds, attended the assembly.[25]

Two of Fraser's teachers, with whom he had discussed the contents of the speech, advised him not to deliver it because of its inappropriateness, and suggested that his delivery might generate severe consequences.[26]

A school counselor who had observed the student reaction to the speech,

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[18]Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 518 (1969) (Black, J., dissenting).

[19]Tate v. Board of Educ., 453 F.2d 975 (8th Cir. 1972). A reasonable regulation has been defined as one which is "essential in maintaining order and discipline on school property" and "which measurably contributes to the maintenance of order and decorum within the educational system." *Id.* at 978. The *Tate* court held that the suspension of high school students under regulation, which in effect prohibited the creation of disturbance in an assembly, did not violate students' first amendment free speech rights. *Id.* at 979.

[20]*Tate,* 453 F.2d at 978.

[21]106 S. Ct. 3159 (1986).

[22]*Id.*

[23]*Id.* at 3162.

[24]*Id.* at 3167.

[25]*Id.* at 3162.

[26]*Id.*

noted that some students, "hooted" and "yelled," and some, with gestures, graphically imitated the sexual activities alluded to in Fraser's speech.[27] Other students appeared bewildered and embarrassed by the speech.[28] One teacher reported that on the day after the speech it was necessary to forgo a portion of the scheduled class to discuss the speech.[29]

On the morning after his speech Fraser was informed that the school considered the speech to have violated a Bethel High School Disciplinary rule.[30] Fraser also received copies of five letters by teachers describing his conduct at the assembly.[31] Fraser admitted he had given the described speech and that he had deliberately used the sexual innuendoes contained in the speech.[32] Fraser received a three-day suspension and was permanently removed from the list of candidates for graduation speaker.[33]

Through the school grievance procedures, Fraser sought review of the disciplinary sanction.[34] The hearing officer determined that because of the sexual references the speech was "indecent, lewd, and offensive to the modesty of many of the students and faculty in attendance."[35] Thus, the officer upheld the discipline.[36] After serving two days of his suspension, Fraser was permitted to return to school.[37] Fraser, under the guardianship of his father, decided to bring a lawsuit against the school.[38]

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[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* The rule provides: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of profane language or of gestures." *Id.* at 3162. The rule is modeled after the test set out in *Tinker,* 393 U.S. at 509, which regulates the school's power to control students' actions.

[31] *Fraser,* 106 S. Ct. at 3162.

[32] *Id.*

[33] *Id.* at 3162-63.

[34] *Id.* at 3163.

[35] *Id.* The usual test for determining whether language is "obscene" is found in Miller v. California, 413 U.S. 15 (1973), *reh'g denied,* 414 U.S. 881 (1973). The Court in *Miller* defined "obscene" as:

> [to] the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

Id. at 17. The court further set out basic guidelines for the trier of fact to follow. They were:

a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24. The Court in *Bethel* never had to determine the issue of whether or not Fraser's speech was obscene. Whether this was because the obscenity of the speech was never doubted or whether the *Miller* test is confined strictly to adults cannot be determined. However, it does seem that the process for determining whether a student's speech is obscene is more a matter of school board discretion.

[36] *Fraser,* 106 S. Ct. at 3163.

[37] *Id.* at 3163.

[38] *Id.*

Fraser commenced an action in the United States District Court for the Western District of Washington.[39] He alleged a violation of his first amendment right to freedom of speech and sought both injunctive relief and monetary damages.[40] The district court found in favor of Fraser for several reasons.[41] The court found that the school's sanctions violated Fraser's right to free speech and that the school's rules were unconstitutionally vague and overbroad.[42] Furthermore, the removal of Fraser's name from the graduation speakers' list violated the Due Process Clause since the disciplinary rules did not specifically mention such removal as a possible sanction.[43] The Court of Appeals for the Ninth Circuit affirmed the judgment of the district court, following basically the same rationale.[44] The case was granted certiorari and the Supreme Court reversed, and held in favor of the school.[45]

SUPREME COURT'S REASONING

In its decision, the Court acknowledged the rooted concept that, "students do not shed their constitutional rights to freedom of speech of expression at the schoolhouse gate," but at the same time distinguished the concept.[46] *Tinker v. Des Moines Independent Community School District*[47] did not involve speech or action that intruded upon the rights of other students. In *Tinker,* a number of high school and junior high students were sent home from school for refusing to remove armbands they wore to show objection to the Vietnam war.[48] Initially, the students were denied injunctive relief on the grounds that school authorities acted reasonably in order to prevent disturbance.[49] The Supreme Court, however, upheld the students' right to wear the armbands.[50] The Court adopted the material disruption standard and resolved the case in favor of the students since there was no material and substantial disruption.[51]

On the contrary, Fraser's speech was the cause of much disruption.[52] The Court found that it was both lawful and desirable for school authorities to

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[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Tinker,* 393 U.S. at 503. *See* Denno, *Mary Beth Tinker Takes the Constitution to School,* 38 FORDHAM L. REV. 35-62 (1969). *See also* Note, *Constitutional Law: The Black Armbands Case — Freedom of Speech in Public Schools,* 52 MARQ. L. REV. 608 (1969).

[47] 393 U.S. 503 (1969).

[48] *Id.* at 503.

[49] *Id.*

[50] *Id.*

[51] *Id.* (The material disruption standard mentioned will be addressed at length at a further point in this note.)

[52] *Fraser,* 106 S.Ct. at 3159.

regulate the student's speech; such regulation was consistent with the fundamental values necessary to maintain a democratic political system, as well as the principles underlying the role of the public educator.[53] The Court balanced the freedom to advocate unpopular and controversial views within the school against the public educator's countervailing interest in teaching students the boundaries of socially appropriate behavior.[54]

The Court looked at the most vigorous political debates of history, especially the rules prohibiting the use of offensive expressions, and compared them to Fraser's situation.[55] The Court was quick to distinguish the level of scrutiny applicable to students in a public high school.[56] Nevertheless, the Court found it a highly appropriate function of public education to prohibit the use of vulgar and offensive terms in public discourse.[57] To back this point, the Court relied heavily on the idea that nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions.[58]

The Court also stressed that the process of educating youth goes beyond the books, the curriculum, and the classroom.[59] Teachers as well as older students play an important role in demonstrating the appropriate form of civil discourse. "They become, like parents, role models and their conduct and deportment is studied in and out of class."[60] Furthermore, the Court concluded that civil, mature conduct cannot be conveyed in a school that tolerates lewd,

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[53] *Id.*

[54] For a general discussion of regulated speech and the value of free speech see generally M. REDISH, FREEDOM OF EXPRESSION A CRITICAL ANALYSIS (1984).

[55] *The Manual of Parliamentary Procedure,* drafted by Thomas Jefferson and adopted by the House of Representatives, governs the proceedings in that body and prohibits the use of expressions offensive to other participants in a debate. Jefferson's manual is reprinted in MANUAL RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. No. 97-271.

[56] *Fraser,* 106 S. Ct. at 3164.

[57] *Id.* There is a great difference between the state's power to regulate an adult's speech in a public forum and that of a student on school grounds. Accordingly, a different level of scrutiny is applied to each case.

In general, it may be said that the state may place reasonable time, place or manner restrictions on an adult's speech that takes place in a public forum. City of Madison v. Wisconsin Employment Relations Comm'n., 429 U.S. 167 (1976). To prevent the abuse of such power and to help assure that the regulations are reasonable, the Court will determine if the regulation is a means of protecting important interests and whether it is the proper means of protecting these interests. *Id.* at 167.

The court determines the validity of time, place, or manner restrictions in two slightly different ways. First, the court will determine if the state is sufficiently justified within the Constitution to regulate the speech. United States v. O'Brien, 391 U.S. 367 (1968), *reh'g denied,* 393 U.S. 900 (1968). Second, the court uses a three-part test to determine the validity of the regulation. United States v. Grace, 461 U.S. 171 (1983).

Regardless of which method the court chooses, it must be constitutionally justified in its actions.

Public schools must also be justified in limiting students' speech, but they are less restricted in their means of imposing regulations. For the most part, the school only needs to prove that the student's speech had a materially disruptive effect on the student body. (The "material disruptive" test will be discussed in detail later on in this paper).

[58] *Fraser,* 106 S. Ct. at 3164.

[59] *Id.* at 3165.

[60] *Id.*

indecent, or offensive speech.[61]

EFFECT OF *BETHEL*

The *Bethel* decision is consistent with its precedents and faithfully continues to preserve the right of public school authorities to regulate students' speech and expression.

In a similar case, *Baker v. Downey City Board of Education,*[62] two students were suspended from high school for the use of profanity and vulgarity in a newspaper they published and distributed to other students.[63] The district court distinguished the *Tinker* case on the basis that profanity and vulgarity were not involved.[64] In *Baker,* the boys were disciplined for the profane and vulgar manner in which they expressed their views.[65] The court ruled that: "the right to criticize and to dissent is protected to high school students but they may be more strictly curtailed in the mode of their expression and in other manners of conduct than college students or adults. The education process must be protected and education programs properly administered."[66]

The Material and Substantial Disruption Requirement

To determine whether the student's conduct warrants punishment, courts look to the standard in *Burnside v. Byars.*[67] In that case, a regulation that prohibited students from wearing "freedom buttons" was challenged.[68] The students purportedly wore the buttons to encourage members of the community to exercise their civil rights.[69] School officials saw no relation between the wearing of buttons and the process of education, and further felt that such an activity disrupted the school.[70]

When asked to remove the buttons, the students refused and as a result were suspended.[71] The lower court refused to enjoin the enforcement of the regulation and the case came before the Fifth Circuit Court of Appeals.[72] The

[61]The issue concerning the removal of Fraser's name from the ballot for graduation speaker became moot since Fraser had been permitted to speak in accordance with the District Court's injunction. *Fraser,* 106 S.Ct. at 3161.

[62]307 F. Supp. 517 (C.D. Calif. 1969).

[63]*Id.* at 517.

[64]*Id.*

[65]*Id.* at 527.

[66]*Id.*

[67]363 F.2d 744 (5th Cir 1966). For a similar case decided the same day see also Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966).

[68]*Burnside,* 363 F.2d at 744.

[69]*Id.* at 746.

[70]*Id.*

[71]*Id.* at 747.

[72]*Id.* at 746.

appellate court reversed the lower court's decision and held that the regulation was "arbitrary and unreasonable, and an unnecessary infringement on the students' protected right of free expression."[73]

The court emphasized the importance of free speech, holding that persons have the right to communicate concerns which they feel are vital to public interest.[74] That right is clearly protected against infringement by state officials.[75] The court held that "school officials cannot infringe on their students' right to free and unrestricted expression . . . where the exercise of such rights do not materially and substantially interfere with the requirement of appropriate discipline in the operation of the school."[76] The court further noted that it did not desire to undermine the authority of the school, as it recognized the value of authority in operating an educational institution.[77] This standard has been consistently followed since *Burnside,* and only in recent years have some courts disregarded the standard.[78]

Nevertheless, the material disruption standard has been the subject of much debate among school officials and the courts. Questions arise as to what constitutes a substantial disruption and what role the schools as well as the courts play in the decision process. Generally, the standard remains flexible and should be viewed in light of the delicate environment necessary to sustain learning.

Although the courts have given schools enough discretion to insure that students will be protected from indecent language and other student misconduct, the material disruption standard remains inside the school house gates.

Indecent Language Outside the Classroom

Several decisions have addressed themselves to issues concerning indecent language in situations involving children outside the classroom. In *FCC v. Pacifica Foundation,*[79] a radio station made an afternoon broadcast of comedian, George Carlin's, satiric monologue, "Filthy Words," which listed and repeated words forbidden from public airwaves.[80] A father who heard the broadcast while driving with his young son complained to the FCC.[81] The court found that certain words in the monologue depicted sexual and excretory activities in a particularly offensive manner, and since the show was broadcast

[73] *Id.* at 748.
[74] *Id.* at 747.
[75] *Id.*
[76] *Id.* at 749.
[77] *Id.*
[78] Schwartz v. Schuker, 298 F. Supp. 238 (E.D.N.Y. 1969).
[79] 438 U.S. 72 (1978), *reh'g denied,* 439 U.S. 883 (1978).
[80] *Id.* at 726.
[81] *Id.* at 730.

in the early afternoon when children could easily be in the audience, the court concluded the show was indecent and therefore prohibited.[82]

Similarly, books, magazines and television shows are all forbidden from making indecent material available to children.[83] Several decisions have addressed issues concerning other forms of freedom of expression. These cases range from a school's successful attempt at suppressing the distribution of written materials critical of the school,[84] to students' refusal to engage in patriotic exercise,[85] to the most recent battle of students' rights to engage in school prayer.[86]

The Court continues to abide by the long-standing holding that obscenity is not within the area of protected speech and that the scope of constitutional freedom of expression secured to a citizen to read or see material concerned with sex depends on whether that citizen is an adult or minor.

A Move Away from the Traditional Standard

In a recent case, *Williams v. Spencer,*[87] involving the ban of an unofficial student newspaper, the court did not attempt to reconcile the *Tinker* standard.[88] Instead, the *Williams* court held that the Supreme Court did not intend the substantial disruption requirement to be the only permissible justification for curtailment of student speech.[89] The court held that another permissible justification was avoiding the encouragment of actions endangering the health and safety of students.[90] In the same context, school authorities may, by appropriate regulation, exercise restraint where they can reasonably forecast substantial disruption of, or material interference with, school activities.[91] If a

[82] *Id.* at 726. The Court in this case upheld the power to regulate "adult speech" over radio air waves as well. The Court held that the FCC does have the power to regulate a radio broadcast that is "indecent" but not "obscene" in the constitutional sense. *Id.* at 731. The Court held that the FCC was warranted in concluding that the words "obscene," "indecent," or "profane" are in the disjunctive, implying that each has a separate meaning. *Id.* at 733. Prurient appeal is an element of "indecent," which merely refers to nonconformance with accepted standards of morality. *Id.* at 739.

Protection of children is not the only reason why such regulations are placed on broadcasting. Such regulations exist because adult viewers and listeners have the right to hear and view what they choose. For a general overview of broadcasting rights see generally, J. BARRON, FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA (1973); Barron, *Access to the Press — A New First Amendment Right,* 80 HARV. L. REV. 1641 (1967); Barron, *An Emerging First Amendment Right of Access to the Media?,* 37 G.W.L. REV. 487 (1969).

[83] *See Ginsberg,* 390 U.S. at 629, and *Roth,* 354 U.S. at 476, for a more in-depth discussion of prohibited reading materials.

[84] *Scoville,* 425 F.2d at 10.

[85] Frain v. Baron, 307 F.Supp. 27 (E.D.N.Y. 1969).

[86] Widmar v. Vincent, 454 U.S. 263 (1981). (These current topics have been researched extensively. However, in order to limit the discussion to freedom of speech, references to these areas has been limited.)

[87] 622 F.2d 1200 (4th Cir. 1980).

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] Butts v. Dallas Indep. School Dist., 436 F.2d 728, 731 (5th Cir. 1971).

reasonable basis for such a forecast exists, it is not necessary that the school stay its hand in exercising a power of prior restraint until disruption actually occurs.[92]

A number of schools concerned with the alarming rise in school discipline problems have gone even further. In these instances, high school students may be punished for gross disobedience of school rules and gross disrespect of school authorities, without a determination of the constitutionality of the rule or the action of the school official.[93] In other words, these schools need demonstrate only gross disrespect in order to punish students. To some extent the *Bethel* decision disregarded the due process argument and held that maintaining security and order in school requires a certain degree of flexibility in school disciplinary procedures.[94]

It is highly unlikely that the traditional standard of a material and substantial disruption will be totally abandoned in the near future. The Supreme Court has continued to require a material and substantial disruption before allowing a school to restrict a student's freedom of speech. To allow the schools to control student speech for any reason could easily facilitate the schools gaining too much power and discretion to regulate student speech.

CONCLUSION

Courts have come a long way since the pre-*Tinker* days.[95] Absent any proof of substantial disruption, the courts remain only mildly opposed to allowing school officials to set their own rules and regulations. The balance between the public schools preparing students to be law-abiding citizens and the preservation of our societal values continues to remain stable and the courts' concern for the future of this country's children remains indomitable.

The *Bethel* decision remains generally conservative, however, it is expansive in the power it grants to regulate student speech. The school had little difficulty in establishing a "material" disruption. In other words, the materiality requirement was easily met. In *Tinker,* the wearing of armbands did not satisfy the material element.[96] From these examples, it is reasonable to conclude that present courts are more willing than earlier courts to grant schools more discre-

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[92] *Id.* at 730.

[93] *Schwartz,* 298 F.Supp. at 240 (student suspended for distributing high school newspapers referring to principal as "King Louis," a "big liar," and "a person having racist views and attitudes."); Hatter v. Los Angeles City High School Dist., 310 F.Supp. 1309 (D.C. Cal. 1970), rev'd 452 F.2d 673 (1971) (students suspended for passing out leaflets opposed to a fund raising event without the school's permission and continuing to wear tags bearing slogans that opposed fund raiser); Graham v. Houston Indep. School Dist., 335 F.Supp. 1164 (S.D. Texas 1970) (students suspended for distributing unauthorized newspapers at school.)

[94] *Fraser,* 106 S.Ct. at 3159.

[95] For an in-depth discussion of *Tinker* see Porto, *The Tinker Decision and Native Americans: The Case For Expanding A Precedent,* 11 J.L. & EDUC. 65 (1982). For a related view, compare Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention,* 59 TEX. L. REV. 477 (1981).

[96] *Tinker,* 393 U.S. at 503.

tion to determine what constitutes a material disruption.

Without leeway provided by the courts, the authority of school officials to maintain and enforce standards of discipline would be undermined by students claiming first amendment rights. School officials would be limited in their power to discipline a student, like Fraser, who makes a crude and sexually suggestive speech. First amendment freedoms would no longer coexist harmoniously with institutional needs.

> Schools perform a special function in our society. They are entrusted with the difficult task of educating children and preparing them for full participation in adult society. In addition to transmitting necessary information and techniques of learning to the students, we expect schools to instill citizenship, discipline, and acceptable morals. In short, we expect schools to inculcate society's values and help children become fully adjusted adults.[97]

A move away from the material disruption standard would create too much tension between the courts and our schools. Presently, courts give great deference to the judgment of teachers and administrators. If schools begin to control student speech impulsively, disregarding the material disruption standard, it will force the courts to take a more active role to institute guidelines. The deference given to school officials would disintegrate due to the need for such guidelines.

It does not seem necessary at this time to change something that has worked well for the past twenty years. The courts and the schools have worked closely together to preserve order and a proper educational environment.

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[97] *Fraser*, 106 S.Ct. at 3159.