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Fighting for Free Speech in Schools

The first morning of the 2005 school year held more than the typical jitters for Toni Kay Scott. One moment, the seventh-grader, known as T.K., was stepping from her mom's Ford pickup to join friends in front of Redwood Middle School in Napa, Calif. Minutes later, the police officer assigned to watch arriving students was steering her toward the principal's office.

Scott, an impish brunet with a tiny nostril stud, had violated Redwood's dress code. The code aimed to squelch gangs by requiring students to wear only certain clothes and solid colors. Scott could change her outfit and stay at school, or she could spend the day at home. "I said, 'There's nothing wrong with what I'm wearing. I'm going home,'" recalls Scott, a near straight-A student. "I thought it was kind of ridiculous."

Her parents thought the dress code more than just ridiculous: they considered it unconstitutional. In March they and a dozen other Redwood parents and students sued the school and the Napa Valley Unified School District in state court. They claim the students have a fundamental right to express themselves through their attire--to speak in effect, through the kind of clothes that Scott insisted on wearing that first day of school: a denim skirt and socks depicting Tigger, a character from Winnie-the-Pooh.

We have come a long way in the four decades since three students in Des Moines, Iowa, wore black armbands to protest the Vietnam War--and won a landmark U.S. Supreme Court decision establishing the right to speak freely in school. Back then lawsuits over school speech were almost unheard of, and they usually involved weighty issues such as racial equality and the right to political protest. But since 1998, students have sued schools in astounding numbers, with as many as 94 disciplinary cases reaching appellate courts in one year. And while lots of these suits claim First Amendment violations, the speech involved can feel trivial: inappropriate clothes, online insults or, as in a current Supreme Court case, BONG HITS 4 JESUS written on a banner.

That the bong-hits case, known officially as *Morse v. Frederick*, has come before the court is a sign of the times. An unprecedented wave of similar suits has clogged the lower courts in recent years, propelled, say legal experts, by several developments: stricter rules in the aftermath of gang violence and school shootings, a crackdown on alarming Internet comments and a perceived hostility toward religion in public schools.

While the lawsuits may strengthen student rights, they come at a high cost for schools--in diminished authority as well as dollars. "We used to defer to the professional discretion of teachers and administrators," says Richard Arum, a professor of sociology and education at New York University and the author of *Judging School Discipline*. "Now our schools are run increasingly by lawyers and judges, and that has profound consequences in undermining the moral authority of school discipline."

The notion that whatever the teacher says goes began to fade in the 1960s. Outrage over racism, poverty and the Vietnam War made questioning authority a righteous cause in schools as well as on the streets. But students also attracted attention from public-interest lawyers who believed that stronger rights of expression would allow children to get a better education. Their first big victory came in 1969 with the black-armband case, called *Tinker v. Des Moines Independent Community School District*. In a 7-to-2 decision, the Supreme Court ruled that students don't "shed their constitutional rights to freedom of speech ... at the schoolhouse gate" as long as they don't cause "substantial disruption" at school. Courts gave students even more rights over the next decade, but the rise of drugs and alcohol on campus made judges increasingly sympathetic to schools. In the '80s, the Supreme Court cut back the rights granted in *Tinker*, telling schools they could limit student speech that was "vulgar and offensive" or "sponsored" by the school in, for example, a student newspaper.

Student lawsuits started to dry up after the backlash. From 1969 to '75, an annual average of 76 school-discipline cases made their way to appeals courts, according to Arum, but from 1976 to '89, the annual average dropped to 29. A few years later, though, the number of student lawsuits began to rise again as schools confronted an alarming new problem: gangs.

The Napa Valley evokes images of wine and elegant living, but during the mid-1990s gangs roamed local high schools and recruited younger members from places like Redwood Middle School. School officials barred suspected troublemakers from wearing certain colors and flashing signs associated with gangs, and violence dropped. Encouraged, the officials got together with parents to create a schoolwide dress code in 1998: no jeans, no pins, no patterns, no reds and no logos of professional sports teams. "Has it worked? Yes," declares Redwood principal Michael Pearson. "Now there is safety on campus. We're on to something here."

But some parents feel Redwood has gone too far. Donnell Scott, T.K.'s mom, sits with three other mothers at the kitchen table of her modest ranch-style house five blocks from the school. Their kids have all been "dress-coded"--punished for wearing an American Cancer Society pin or a T shirt with JESUS FREAK written on it--and, after three years fighting the policy, they're fed up. Free speech is one issue ("What a kid wears says, This is what I'm into," Scott explains), but the dispute also seems to be about control. "My job is to parent my child," says Scott, "and it should be up to me to say what's appropriate for her."

Is that worth fighting about in court? Rebecca Santos, whose son Jacob was dress-coded for wearing jeans, sees no choice: "We've been pushed to this extreme. It's time they heard us." Their lawsuit cites California statutes that give students the right to wear "buttons, badges and other insignia" and parents the choice of "opting out" of school-uniform policies, but it is based largely on constitutional protection for speech. Lots of parents have challenged school dress codes on that ground--and have often lost.

Just as schools were beginning to solve the gang problem, a scarier threat emerged: mass killings like the April 1999 massacre at Columbine High School near Littleton, Colo. Some teachers and principals began to see potential threats behind all kinds of behavior, provoking free-speech disputes that often landed in court. In 2000 a teacher at Northwest School in Leominster, Mass., kicked Michael Demers, 15, out of class for talking. Another

teacher asked Demers how he felt about the ejection, and Demers drew two pictures: one of explosives surrounding the school and another of a gun pointed at the superintendent's head. The principal did nothing until the next day, when Demers wrote on a paper "I want to die" and "I hate life." School officials recommended a visit to a psychiatrist, but Demers refused, so they suspended him for the rest of the school year. He sued, claiming the punishment violated his First Amendment right to express himself through his drawing. In 2003 a federal district court ruled against him, saying Demers should have known his drawing and note were "true threats."

The line between protected speech and disruptive or dangerous comments has gotten even fuzzier since the Internet blossomed. In December 2005 Justin Layshock, a senior at Hickory High School in Hermitage, Pa., used his grandmother's computer after school to create a parody profile of his principal on MySpace.com. When the school found out, it suspended Layshock, citing evidence that Layshock's prank made the school temporarily shut down its website. Although Layshock eventually returned to his school, the lawsuit continues.

The case has outraged civil-liberties advocates, but Francisco Negrón, general counsel of the National School Boards Association, says students and parents should expand their understanding of a school's boundaries. He notes that schools in Prince Georges County, Md., and elsewhere now hold some classes online and that many public schools are as much virtual communities as real ones. "When kids go on MySpace and make threats against teachers or other students," he says, "that becomes a safety issue for schools."

If there is a single organization most responsible for the surge in student-speech cases, it may be the Alliance Defense Fund (ADF), an Arizona-based network of Christian lawyers. Since 1994 the ADF has filed hundreds of cases advocating religious speech in the schools and a spokesman claims that it is "the driving force on this issue in the courts today."

A typical ADF case involves a student prevented from singing a religious song, distributing antiabortion pamphlets or, most recently, wearing an anti-gay T shirt at school. In a case decided last month, the organization's lawyers represented Heidi Zamecnik, 17, a senior at Neuqua Valley High School in Naperville, Ill., a suburb southwest of Chicago. Zamecnik wanted to wear a T shirt that said BE HAPPY, NOT GAY on the day after students observed a Day of Silence in support of gay rights. The school said she could wear a shirt opposing homosexuality, but one with a less derogatory message like be happy, be straight. The ADF lawyers argued that the proposal violated Zamecnik's free-speech rights, but a federal judge disagreed. He ruled that the school's "legitimate pedagogical interest" in "promoting policies of tolerance" allowed it to restrict Zamecnik's speech to a positive message.

Mike Johnson, an attorney for the ADF, criticizes the decision as illogical: "Certainly the First Amendment has got to protect negative statements as well." Johnson views ADF lawsuits as helping public schools, rectifying what he calls the "intimidation and misinformation" that has made schools skittish about religion on campus. But the substantial cost that these and other suits impose on education has others deeply worried.

Sally Jensen Dutcher, general counsel for the Napa Valley schools, says the dress-code case will cost the district at least \$50,000 in expenses if it goes to trial, and perhaps "hundreds of thousands" if it's appealed. That's a small piece of the district's \$118 million budget, but it "bothers me when that money could be better spent educating students," she says.

Money isn't the half of it. Arum's research indicates that cases like Tinker encourage students and teachers to believe that kids have far more legal rights than they actually do. Possibly as a result, 82% of public school teachers and 77% of principals practice "defensive teaching" like ignoring misbehavior so they can avoid lawsuits, according to a 2004 Harris poll. "What these cases do," says Negrón, "is have a chilling effect on [the ability of] administrators and teachers to make the decisions they need to make."

In 2002 the Juneau-Douglas High School in Alaska let students cross the street to watch the Olympic torch pass on its way to Salt Lake City. As TV cameras rolled, senior Joseph Frederick and several friends unfurled a banner that said BONG HITS 4 JESUS. Frederick later testified that the banner was supposed to be "meaningless and funny, in order to get on television." But the school principal was not amused, and she suspended Frederick for 10 days.

Frederick sued the school for violation of his free-speech rights and won in the lower federal courts. But the Supreme Court accepted the school's appeal and is expected to rule on the case before July. It is the most significant high-court case since Tinker to test a school's authority to suppress student dissent, but that may be where the similarities end. "Tinker was all about explicitly political topics, and the courts were sympathetic about protecting students' fundamental political rights," says Arum. "It's quite different when you're talking about bong hits." Or, for that matter, Tigger socks.

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