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By William A. Kaplin and Edward P. Jesella, Jr.

The public school system is the major American social institution responsible for the transmission of our democratic heritage to present and future generations. In fulfilling this responsibility, the schools often confront problems involving their duty to inculcate students with a sense of patriotism. Probably the most controversial questions have concerned compulsory flag saluting and participation in patriotic exercises. Can a school demand that students salute the flag? Does it matter whether a student's grounds for refusing to participate rest upon a religious or a secular basis? Must students who refrain from participating in flag saluting and patriotic exercises leave the classroom? May they elect to stand silently or remain sitting?

Questions such as these arise under circumstances where students, allegedly exercising First Amendment rights, clash with school authorities engaged in the promulgation and enforcement of school rules. This interplay of educational order and students' rights, and the multi-faceted questions which arise therefrom, have been the subject of several recent court cases which raise once again, usually with significant extension of underlying principles, questions that gained national prominence on the eve of World War II.

The first major United States Supreme Court decision on flag saluting was **Minersville School District v. Gobitis.**[1] Participation in flag salute ceremonies was a condition for attendance at the public schools in Minersville, Pennsylvania. Two children, both Jehovah's Witnesses, believed that such a gesture of respect for the flag was forbidden by command of scripture. The question debated in the lower courts and ultimately presented to the Supreme Court was whether coerced participation in such ceremonies, exacted from a child whose refusal to participate was based upon sincere religious grounds, infringed without due process of law the liberty guaranteed by the Fourteenth Amendment. The Court reasoned (with Chief Justice Stone in strenuous dissent) that attainment of national unity is the basis of national security and that the flag is the symbol of national unity without whose unifying sentiment there could ultimately be no liberties, civil or religious. Since the flag salute was considered necessary to promote national unity, and thus to maintain national security, required participation did not work a denial of Fourteenth Amendment rights.

In the spirit of national unity, then, the state was apparently free to compel flag saluting even though it coerced children into expressing sentiments which they did not entertain and violated their deepest religious convictions. Criticism mounted steadily: "All of the eloquence by which the majority extol the ceremony of flag saluting as a free expression of patriotism turns sour when used to describe the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public."[2] And less than three years after **Gobitis,** the decision's critics were rewarded by the Supreme Court's change of heart in **West Virginia Board of Education v. Barnette.**[3]

Barnette again found Jehovah's Witnesses contesting regulations which compelled participation in the pledge of allegiance and flag salute. Failure to comply meant expulsion from school for the child and possible prosecution of the parents or guardian.

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[1] 310 U.S. 586 (1940).

[2] Robert E. Cushman, "Constitutional Law in 1939-1940," 35 Am. Pol. Sci. Rev. 250, 271 (1941).

[3] 319 U.S. 624 (1943).

The refusal of the plaintiff's children to participate in the flag ceremony did not interfere with the rights of others to do so. Their behavior was peaceable and orderly. The sole conflict was between school authority and the rights of the individual: The State asserted power to condition access to public education on making a prescribed sign and profession, while the children stood on a right of self-determination in matters of individual conscience. The Court resolved the conflict by holding that "the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[4] As Justice Jackson explained for the majority:

> We apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.[5]

The majority opinion expressly disclaimed reliance upon freedom of religion as its constitutional foundation, focusing instead on freedom of speech: "Nor does the issue . . . turn on one's possession of particular religious views or the sincerity with which they are held . . . . Many citizens who do not share . . . [appellee's] religious views hold such a compulsory rite to infringe constitutional liberty of the individual."[6] Although three of the six majority justices discussed the religious issue in separate concurring opinions, the paramounty of free speech in the Court's flag salute jurisprudence had seemingly been established.

Even though compulsory patriotic exercises continued to be practiced in the public schools despite **Barnette's** ringing prohibition,[7] twenty years passed before the next major court decision. In **Sheldon v. Fannin**,[8] the plaintiffs were Jehovah's Witnesses who had refused to stand for the singing of the National Anthem during a general assembly musical program. They were ordered to leave school and were suspended for insubordination. The school authorities contended that toleration of the students' refusal to stand would create a disciplinary problem in the schools. The students argued that their conduct was not disorderly or disruptive of school discipline, and that the suspension therefore violated their First Amendment rights.

The District Court agreed with the students. Since the students had claimed that their refusal to stand was based upon religious belief, the court held the suspension to interfere with their religious freedom in violation of the First Amendment's "free exercise" clause. But the decision does not rest solely on this ground; the court also found that the suspension interfered with the students' rights to refuse to express beliefs which are personally repugnant to them, thus infringing upon First Amendment freedom of speech. For both bases of the decision, the court relied on **Barnette**, which it interpreted as involving not merely the free exercise of religion "but also the principle inherent in the entire First Amendment: that governmental authority may not directly coerce the unwilling expression of any belief, even in the name of 'national unity' in time of war."[9]

Holden v. Board of Education of the City of Elizabeth[10] involved a New Jersey statute which excused students from saying the pledge or saluting the flag if they had "conscientious scruples" against doing so. The plaintiffs were Black Muslims who had been excluded from public school for failure to salute or pledge allegiance, even though they stood at attention as required by the statute. The school board argued that the statute's exemption for "conscientious scruples" was never meant

[4] Id. at 642.

[5] Id. at 641.

[6] Id. at 634.

[7] See Hentoff, Nat, "Why Students Want Their Constitutional Rights," **Saturday Review**, May 22, 1971.

[8] 221 F. Supp. 766 (D. Ariz. 1963).

[9] 221 F. Supp. at 775.

[10] 46 N. J. 281, 216 A. 2d 387 (1966).

to be so broadly construed as to include the students' beliefs, thus challenging the students' accuracy in characterizing their objection to participation in the pledge as "conscientious scruples."

The court held that the students had been improperly excluded from school. The opinion reasoned that the use of the term "conscientious scruples" rather than "religious scruples" brought the statute within the broad range of **Barnette,** thus extending its protection not only to students espousing particular religious beliefs but also to those whose refusals to participate are rooted in the much broader sphere of intellect and spirit.

Up to this point, the cases all concern students who filed suit because they felt their personal or religious beliefs were infringed by school rules compelling participation in patriotic exercises. In contrast, the next case of major importance to the problem under discussion did not involve patriotic exercises, and it concerned an affirmative attempt to express beliefs rather than merely an attempt to guard passively held beliefs from invasion by school authorities. The case is the Supreme Court's landmark decision in **Tinker v. Des Moines Independent Community School District,**[11] brought by three public school students who had worn black armbands to school to protest the Vietnam War. Although they were quiet and neither disrupted class nor impinged upon the rights of others, the students were suspended under a school regulation which banned the wearing of armbands in school.

The Supreme Court, noting that the students had exercised "direct, primary First Amendment rights akin to 'pure speech,' " stated:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. . . . 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 discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that the exercise of the forbidden right would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.[12]

Tinker's greatest significance lies in its evidence of a judicial willingness to scrutinize the constitutionality of public school disciplinary regulations and to measure such regulations in terms which give in-school activities constitutional protection comparable to that given activities conducted off the school grounds. This idea that the constitution goes to school with the student and the state may not interfere with the student's enjoyment of its presence[13] was soon applied specifically to the flag salute problem in the case of **Frain v. Baron.** [14]

The plaintiffs in **Frain** were students who had refused to stand during the daily pledge of allegience because they felt it would constitute participation in a statement in which they did not believe. School officials required the students to leave their schoolrooms during the pledge as a condition for exercising their right not to participate, but the students declined to do so because they considered exclusion from the room to be a punishment for their exercise of constitutional rights.

The court noted that the recent decisions of the Supreme Court and lower federal courts evidenced an increasing judicial concern with the clash between student expression and school rules:

> This increasing concern has been accompanied by a shift in focus, well illustrated by comparing the Supreme Court's decision in **Barnette** . . . with

[10]46 N. J. 281, 216 A. 2d 387 (1966).

[11]393 U.S. 503 (1969).

[12]**Id.** at 506, 509.

[13]**See** Denno, Theodore F., "Mary Beth Tinker Takes the Constitution to School," 38 Fordham L. Rev. 35 (1969).

[14]307 F. Supp. 27 (S.D. N.Y. 1969).

the recent decision in **Tinker.** The original concern with limitation of the state's power to compel a student to act contrary to his beliefs has shifted to a concern for affirmative protection of the student's right to express his beliefs. The present case is novel in that the context, school patriotic exercises, is one in which courts have previously intervened to limit coerced participation, while these plaintiffs are urging not only a right of nonparticipation but a right of silent protest by remaining seated.[15]

The court concluded that the school authorities had the burden of justifying particular restrictions on student expression and that students were free to select their own form of expression so long as it did not materially infringe the rights of other students or cause disruptions. Since the school officials' conclusory assertions that the students' silent protest created a threat to maintenance of discipline did not support a finding of material disruption of school activities, the court enjoined the school authorities from excluding plaintiffs from their classrooms during the pledge or from treating any student who refuses for reason of conscience to participate in the pledge in any way different from those who participate.

In another recent case, **Banks v. Board of Public Instruction of Dade County,**[16] a Florida school board regulation required that students stand quietly if, because of religious or other deep personal convictions, they chose not to participate in the flag salute and pledge of allegiance. The plaintiff was suspended for refusing to obey this regulation, even though his conduct had not been disruptive. In holding that the regulation directly conflicted with the free speech guarantee of the First Amendment, the court stated that:

> the tenor of **Barnette** is negative. It prohibits the state from compelling individuals to act in a certain manner; it is not a recognition of students' rights. On the other hand, the Supreme Court's decision in **Tinker v. Des Moines Independent Community School District** . . . speaks affirmatively . . . . The court recognized that "in the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views" . . . . The conduct of Andrew Banks in refusing to stand during the pledge ceremony constituted an expression of his religious beliefs and political opinions. His refusal to stand was no less a form of expression than the wearing of the black arm-band was to Mary Beth Tinker. He was exercising a right "akin to pure speech."[17]

The last of the major cases to deal specifically with the flag salute issue is **State v. Lundquist,**[18] decided by the highest court of Maryland. Ironically, the opinion was issued on Flag Day — exactly 28 years to the day after the Supreme Court's ruling in **Barnette.** The parallel is fitting, since **Lundquist** raises once again, in pristine form, the issue supposedly disposed of in **Barnette**: whether that case was decided on religious grounds or whether freedom of expression was central to the Court's rationale. The answer made all the difference in the world to the plaintiffs, a student and his public school teacher-father, since they were contesting solely on free speech grounds a 1970 state law requiring all students and teachers who did not object for "religious reasons" to salute the flag.

The court reaffirmed in unqualified terms that **Barnette** was indeed premised upon broad free speech considerations, and on the authority of that case it held the Maryland statute unconstitutional. The court also recognized the importance of **Tinker** to the problem at hand, concluding that that case too was binding precedent:

> The posture in which this case comes before us raises no factual issue of potential or actual disruption. We recognize, as did Justice Frankfurter in the **Gobitis** opinion, that one student's failure to join in this group expression "might introduce elements

[15] **Id.** at 30. This and other reasoning from the **Frain** opinion was subsequently relied upon in a Connecticut federal district court decision upholding a **teacher's** right to refuse to salute the flag; **Hanover v. Northrup,** 325 F. Supp. 179 (D. Conn. 1970).

[16] 314 F. Supp. 285 (S.D. Fla. 1970).

[17] **Id.** at 295.

[18] 278 A. 2d 263 (Md. 1971).

of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise." As if in direct response to this assertion, the Court in **Tinker** has answered: "our Constitution says we must take this risk. . . ."[19]

SUMMARY

The cases discussed above stand for at least the following propositions regarding patriotic exercises in public schools:

1) Students may refrain from saluting the flag, pledging allegiance, or participating in other patriotic exercises.

2) A refusal to participate need not be premised upon religious considerations; students are free to participate or not to participate without giving specific reasons for their decision.

3) Students may elect to sit or stand silently, and may not be ordered to leave the classroom or assembly because of their refusal to participate.

4) School authorities have the burden of justifying particuiar restrictions on ways in which students may express their unwillingness to participate in patriotic exercises, and a student is free to elect his form of expression so long as it does not involve conduct which under **Tinker** would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."

To this list a fifth proposition, not directly articulated in the flag salute cases, should be added:

5) Material and substantial interference with school discipline **which is created by the conduct of studedents who disagree with the views of those who refuse to participate** normally does not justify restrictions upon the rights of the non-participating students. To permit such restrictions in this circumstance would effectively give the distracted or offended majority of students a veto power over the minority's First Amendment rights. Rather than allowing the majority's reaction to subdue peaceful expression, school authorities must use all reasonable means of protecting it.[20]

These propositions are aimed at moderating the interplay between educational order and students' rights in one area of school life. They are part of the broader problem of anchoring public education to our system of constitutional freedoms and thus, ultimately, better understanding the role of public education in American life:

> What was once a virtual automaticity upholding at every level the power of officialdom to have its way in the schools has given ground to the common, widespread social questions of what are our public schools, what do we expect of them, how do they serve the community, what do we expect from the students, what kind of education do we want for them, who is to make the decisions regarding them and, lastly, where do the students themselves stand?[21]

These questions are beginning to be answered, as evidenced by the drastic changes in the law between the 1940 **Gobitis** decision and the **Frain v. Baron** and **Banks** decisions of 1969 and 1970. Perhaps we are approaching closer to the goal prescribed in **Barnette**: "Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction."[22] And perhaps more heed will be paid to the **Barnette** court's warning: "That . . . [boards of education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[23] The Constitution now goes to school with the student; it attends him even during patriotic exercises, and the state may not interfere with the student's enjoyment of its presence.

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[19] **Id.** at 274.

[20] **See Crew v. Clones,** 432 F. 2d 1259, 1265-66 (7th Cir. 1970); Berkman, Richard L., "Students in Court: Free Speech and the Functions of Schooling in America," 40 Harv. Educ. Rev. 567, 591-93 (1970).

[21] Denno, **supra** note 13, at 49.

[22] 319 U.S. 624, 637 (1943)

[23] **Id.**