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Butchered at Birth

As I walk through the halls of the high school where I work as Dean of Students, I keep an eye out for anything out of the ordinary. Student standing on the window sill (not allowed), student texting between classes (not allowed), student using profanity loudly (not allowed), and so on... These are cut-and-dried violations that students can't really argue. Then I see a student, Brett, walking down the hall with a black tee-shirt with skeletons on it. Same as always. But I look closer, and these skeletons are bloodied from a woman they're cutting up with a knife, whose head is all that remains, other than her bloody skeleton. And behind these skeletons are the hanging corpses and skeletons of what appear to be babies. "Cannibal Corpse," the gruesome tee-shirt says. Brett turns around, and one final skeleton is revealed: that of a fetus, still in the fetal position, captioned "Butchered at Birth."

Now, while I am repulsed by this shocking tee-shirt, I have an obligation as a state agent to act with fairness with regard to the Constitution. I must ensure that all students' fundamental rights, including the right to free speech, are protected. However, I must also ensure a proper academic atmosphere. Students must act in a manner that is consistent with our community's standard of decency and that does not cause disruption to the educational atmosphere. I must decide how to act. The question presented here is: would a school's interest in maintaining community standards of decency with regard to its dress code violate a student's right to free

speech under the First Amendment? I hold that a school's interest in doing so does not violate a student's free speech rights, and a school administrator is able to bar students from wearing a tee-shirt similar to the one described above, based on several court cases.

In any dress code scenario, the discussion must begin with *Tinker v. Des Moines Independent Community School District*. This case established the fact that schools may not simply outlaw any manner of dress they want; clearly, as it has been stated many times before, students do not leave their Constitutional rights at the schoolhouse door. Tinker was allowed to wear his armband because he was peaceably expressing a political view, and people who saw the armbands clearly understood their significance (contrasted with the student in *Bivens v. Albuquerque Public Schools*, who tried unsuccessfully to claim that his wearing of baggy jeans was an expression of his hip-hop culture). No evidence of an educational disruption was found in the *Tinker* record, and in fact, other similar political expressions had gone un-disciplined without incident. The school was found to have acted with indiscretion, as it seemed to be more concerned with the message of the protest than with an educational disturbance. A similar case in Michigan confirmed this recently, as a student from Dearborn was disciplined for wearing a shirt with a controversial political message. In the Michigan case, the student was allowed to wear his "Bush is an International Terrorist" tee-shirt because, like *Tinker*, the judge determined that the school's barring of it was more an indictment on the message rather than a means to prevent school disruption. *Tinker v. Des Moines* Judge Patrick J. Duggan stated in his decision that students actually "benefit when school officials provide an environment where they can openly express their diverging viewpoints and when they learn to tolerate the opinions of others."¹

¹ ACLU.ORG. <http://www.aclu.org/freespeech/youth/11405prs20031001.html>. retrieved 6/19/09.

Does this then mean that the student in the above scenario may wear his “Butchered at Birth” shirt to school? Well, clearly a balance must be struck between protecting students’ First Amendment rights as well as providing for an adequate educational environment so as to provide for students’ property rights, as per the Fourteenth Amendment. It must be shown that this case is substantially different from *Tinker*, which I propose it is. The wearers of the “Butchered at Birth” shirt are not trying to express their political viewpoint. In fact, when asked directly what their shirt means, or why they’re wearing them, they say things like “I don’t know, it’s just a shirt,” or “I like the band,” or “I just like seeing people’s reactions.”

So if students are not trying to send a political message, but their wearing of this shirt is not disrupting school (at least not in any tangible observable measure), does a school have a substantial justification to prohibit it? Legal precedence suggests so. A middle school’s dress code that outlawed several types of clothing with very strict guidelines was upheld in *Blau v. Fort Thomas Public School District* because the purpose of the code was not to suppress expression but rather to foster a substantial interest regarding an optimal educational environment. In another case, *Harper v. Edgewood Board of Education*, a school’s dress code not allowing prom attendees to wear the clothing of the opposite sex was upheld because it “reasonably related to the valid educational purposes of teaching community values and maintaining school discipline”.² This standard applies during the school day as well, as shown in *Broussard v. School Board of the City of Norfolk*, a case in which upheld a school’s directive, not allowing a student to wear a shirt that said “drugs suck.” Clearly, the school would have agreed with the message, so the *Tinker* Doctrine did not apply; the vulgar nature and sexual connotation of the word “sucks” gave the school ample justification to disallow it in school. This is further

² LaMorte, Michael W. (2008) *School Law: Cases and Concepts*. Pearson Ed., Boston. p. 178.

supported by *Bethel School District No. 403 v. Fraser*, which confirms that schools can limit expression if it is deemed too vulgar for school.

Brett's "Butchered at Birth" shirt is clearly too vulgar for school. His wearing of the shirt lessens the academic atmosphere of the school, which is a stated purpose of the dress code in the student handbook. This would pass the strict scrutiny of the courts, as the "viewpoint" of the shirt (if there even is one) is not being targeted but rather the shirt's effect on the school environment. I can ask Brett to remove the shirt and be relieved that anyone who is sensitive to the issues of abortion, infanticide, or death in general will not have to let their emotional well-being or academic focus be in question while in school. So I ask Brett to change his shirt. His response? "Okay, sorry." (Did I mention Brett and I have a good relationship?) Now if I could only get that kid to get off the window sill...

Cases Cited

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)

Bivens v. Albuquerque Public Schools, 899 F.Supp. 556 (D. N.M. 1995)

Blau v. Fort Thomas Public School District, 401 F.3d 381 (6th Cir. 2005)

Barber v. Dearborn Public Schools, 286 F.Supp. 2d 847 (E.D. Mich. 2003)

Broussard v. School Board of the City of Norfolk, 801 F. Supp. 1526 (E.D. Virginia 1992)

Harper v. Edgewood Board of. Education, 655 F. Supp. 1353 (S.D. Ohio 1987)

Tinker v. Des Moines Independent Community School District (No. 21) 383 F.2d 988