

Tinker v. Des Moines / Gangs, Tattoos, and Symbolic Speech

Directions:

1. Read the **Background** section below.
 2. Read the case brief on *Stephenson v. Davenport Community School District* (page 2).
 3. Complete the **Revise School Policy** activity (page 3).
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Background

The rise of gangs has been a major problem. In 2012, there were an estimated 30,700 gangs across the United States and 850,000 gang members. Gangs wreak havoc in homes, communities, and schools. According to a study from the National Center for Education Statistics, “Between 2001 and 2017, the percentage of students ages 12—18 who reported that gangs were present at their school during the school year decreased overall (from 20 to 9 percent), as well as for students from urban areas (from 29 to 11 percent), suburban areas (from 18 to 8 percent), and rural areas (from 13 to 7 percent).” These decreases might possibly be the result of school districts around the United States attempting to reduce gang violence by regulating which types of symbols students could display during school. Specifically, school officials banned gang symbols.

If you were a school official, how easy or difficult would it be to enforce this ban? Look at the tattoo to the right. Would you be able to say whether this was a gang symbol?

In 1969, the Supreme Court of the United States ruled on the case of *Tinker v. Des Moines*. The Court decided that a student’s constitutional right to freedom of expression existed in schools as long as the expression did not cause—or could not reasonably be predicted to cause—a substantial disruption to the work of the school. At the time, the expression being considered was the right to symbolic speech through the wearing of black armbands to protest United States’ involvement in the Vietnam War.



Now, over 50 years later, tattoo art has become an accepted form of symbolic speech. In October 2000, Massachusetts Judge Barbara Rouse recognized the First Amendment implications of tattooing. In a case that struck down a 38-year-old ban on tattooing, she noted, “persons obtain tattoos to demonstrate commitment to other persons, to institutions, to religious beliefs, and to political and personal beliefs. The medium on which the drawn image appears should not be relevant when determining whether something is ‘speech’; the tattoo itself is symbolic speech deserving of First Amendment protection.”

If Judge Rouse is correct, it would seem that the right of students to display tattoos would be governed by the standard applied to armbands in *Tinker*.

Stephenson v. Davenport Community School District

Read the case brief below and determine whether the U.S. Court of Appeals for the Eighth Circuit applied the *Tinker* standard toward students’ tattoos.

Facts

In 1992, Brianna Stephenson was an honor roll student at West High School. Teachers described her as “conscientious and diligent.” During this time, gang activity at West had become a significant problem, with gang members using school grounds to intimidate and recruit other students. In an attempt to combat the escalating gang activity, the school district created a new rule that said “gang-related activities such as display of colors, symbols, signs, etc., will not be tolerated on school grounds. Students in violation will be suspended from school and/or recommended to the Board for expulsion.”

Brianna went to visit her counselor in August of that year to discuss routine schedule matters. During the meeting, the counselor noticed a small cross tattoo on her hand. After the counselor, the assistant principal, the school’s police liaison officer, and another officer ruled that the tattoo was a gang symbol, Brianna was told that she would be suspended with a recommendation for expulsion if she did not remove or change the tattoo.

Although Brianna maintained that her cross tattoo was more than two years old and she had no gang affiliation, the school district stood by both its policy and disciplinary decision. After undergoing painful and expensive laser surgery to remove the tattoo, Brianna was allowed to return to school. Upon her return, she filed a lawsuit against the school district, claiming that her First Amendment right to free speech was violated. The U.S. District Court dismissed her case, but the U.S. Court of Appeals for the Eighth Circuit heard her appeal.

Issue

Did the school district’s policy barring the display of gang symbols violate Brianna’s First Amendment rights?

Ruling

The Eighth Circuit Court of Appeals ruled that the school district's policy was unconstitutional. Specifically, the Court found fault with two characteristics of the policy.

1. According to the Court, the school's policy was too vague because it did not give students enough information about exactly what conduct/expression was prohibited.
 2. Furthermore, the Court held that such a vague policy invited unconstitutional, arbitrary, and discriminatory enforcement because it allowed school administrators, police officers, judges, and juries to determine on a case-by-case basis exactly which colors, symbols, signs, etc., violated the policy.
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Revise School Policy

You are a member of the Davenport Community School District's School Board. As a board member, it is your job to create and approve specific school policies. With your fellow board members, revise the school's policy prohibiting the display of gang symbols so that it is constitutional.

Current policy language: "Gang-related activities such as display of colors, symbols, signs, etc., will not be tolerated on school grounds. Students in violation will be suspended from school and/or recommended to the Board for expulsion."

Answer these questions to help improve the policy:

- What specific conduct and symbols would you prohibit?
- What guidelines would you provide school officials with to ensure that only those students who were truly advertising gangs would be punished?
- Specifically, how would you define "gang"?
- What exact symbols would be prohibited?
- Which colors/color combinations are gang-related?

Write your amended district policy below: