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# THE IMPACT OF SYMBOLIC SPEECH IN PUBLIC SCHOOLS: A SELECTIVE CASE ANALYSIS FROM *TINKER* TO *ZAMECNIK*

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*The freedom to express the self and the right to a free public education sets the American public school experience apart from those of many other nations. The combination of the two often creates tensions and confrontations that become contentious leading to litigation. For the past fifty years the courts have attempted to balance the symbolic rights of students with the obligation of the school to protect students from bullying, while maintaining decorum that allows all students to pursue an education free from intimidation. Young people express themselves in many ways, often in a symbolic manner that involves the wearing of a t-shirt or other artifacts conveying their self-expression of ideas and idiosyncrasies. When the learning environment is jeopardized as a result of that speech, the courts have been called upon to determine whether or not the suppression of the speech by school officials is appropriate. Tinker v. Des Moines has served as the bedrock case for symbolic speech, and, since then, there are those who have contended that the courts have chipped away at student rights. The case of Zamecnik v. Indian Prairie School District 204 is illustrative of this contention.*

*Keywords: public schools, student expression, symbolic speech*

**W**earing a New York Yankee jersey and cap to a game at Fenway Park in Boston during a series between the two baseball clubs is viewed as a provocative action by the hometown crowd. While I was not the only Yankee fan in the park, as there is always a smattering, I was definitely in the minority and the subject of many good-natured and some very profane ridiculing comments as the game progressed and more beer was consumed by the Red Sox faithful.

I could have easily avoided any and all jibing by simply wearing neutral clothing or keeping silent when the Yankees were successful, but this would have seemed that I, a die-hard Yankee fan for fifty years, would have been giving away a part of myself and in some way not being true to my baseball faith. I was fully aware of the reception that I would be given for my Yankee paraphernalia. As my son has pointed out, with the player turnover being what it is, we are only rooting for laundry anyway, and should not take it so seriously.

Do not construe my line of demarcation at Fenway with the egregious way some children are bullied and ridiculed at school. Being a white, mid-sixties Yankees fan in a sea of rabid oppositional fanatics is perhaps as close to being bullied for who I am and what I believe in as I am able to humbly extrapolate from this world at this particular juncture. I have not had many Black Like Me epiphanies in my relatively coddled and bully-free life. I can easily wear a different shirt or go to a game in the Bronx, but many students cannot change who they are, and there then lies the rub. Whether one is shamed because they are of a different religion, a different sexual persuasion, a different color, have a different manner of speaking, are physically or mentally challenged, too fat or too thin, wear glasses, are shorter than average, whatever; bullying, hazing and harassment needs to be stopped at all levels of our society, be it in K-12 education or at universities with world-class marching bands. The courts have been relatively consistent in backing schools when it comes to symbolic speech dealing with drugs, vulgar phrases, and the more obvious ridiculing phrases; however, it is becoming more difficult for school districts to figure out what is acceptable symbolic attire and what crosses the line of harassment and bullying.

Students wearing symbolic messages have created dilemmas for school administrators and school boards at least since the early 1960s when the Fifth Circuit ruled on the wearing of political buttons in the *Blackwell v. Issaquena County Board of Education*. This case, which was a precursor of *Tinker* in many ways, found in favor of the school district because the wearing of the buttons deteriorated the learning atmosphere of the school, creating a disruption and fist fights. In the more familiar *Tinker* decision, the Supreme Court of the United States ruled for the students, confirming that students are entitled to all First Amendment guarantees, “symbolic speech being akin to pure speech,” subject only to the provision in which the exercise of these rights creates material and substantial disruption to the educational process. An excerpt from the majority opinion in *Tinker* is illustrative:

School officials do not possess absolute authority over their students. Students in school as well as out of school are “persons” under our Constitution. They possess fundamental rights which the State must respect.... In our system, students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. 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. (*Tinker v. Des Moines*)

Based upon the *Tinker* decision, students are entitled to express their views in a symbolic manner most commonly addressed with messages on t-shirts or buttons, but via other forms of expression as well, including jewelry, hair styles, rubber bracelets, tattoos, body piercings, armbands, and styles of clothing, to name just a few. School districts have found it relatively simple, if they have a clear policy in place, to restrict these messages if there is actual evidence of a material and substantial disruption or a clear indication that there will be material and substantial disruption. Just the anticipation of material and substantial disruption or a gut-feeling is not enough. Rather, the presence of actual evidence of disruption must be apparent. The *Tinker* decision made the policy quite clear, and subsequent courts dealing with these types of issues typically reflect on the material and substantial disruption ruling in *Tinker*. Also, clearly indecent or offensive speech may be prohibited. The principal would not have to wait until an actual fight broke out or the classroom became chaotic because a student was wearing a t-shirt that said “fuck the principal.” School administrators need very thick skin, but not this thick if the message is conveyed on school property. It is likely that if such a t-shirt existed, it could be worn outside of school without incidence in some communities.

Messages that communicate vulgar words or mock others based on race, origin, color, sex, or religion may be restricted, and it would be almost impossible to find a school district without policies restricting this version of symbolic expression. The difficulty for schools is that there must be more than just a desire to avoid the discomfort and unpleasantness associated with a view that may be considered unpopular. A t-shirt stating, “Jesus is Not a Homophobe,” raises an entirely different Constitutional question than does a t-shirt picturing an air conditioner with the phrase “Blow Me.”

The dissent of Justice Black in the Supreme Court’s *Tinker* decision should be read in its entirety for a substantially different take on the majority opinion; however, this summary will suffice to illustrate the Justice Black’s contradicting viewpoint:

The Court’s holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by elected officials of state supported public schools... is in ultimate effect transferred to the Supreme Court.... This particular case here protects the right of school pupils to express their political views all the way “from kindergarten through high school.” One defying pupil was 8 years old.... Only 7 of the 18,000 pupils were in violation of the principal’s edict.... There is evidence that a teacher of mathematics had his lesson period practically “wrecked,” chiefly by disputes with Mary Beth Tinker, who wore her armband for her demonstration.... Nor are public school students sent to the schools at public expense to broadcast political or any other views to educate and inform the public. (*Tinker v. Des Moines*)

A dissent is just that, and Justice Black’s did not carry the day in 1969. Although student speech has been modified by the Supreme Court, particularly in *Bethel School District v. Fraser*, which allows schools to ban pure speech that is lewd or vulgar, and in *Morse v. Frederick*, which amplifies *Tinker* to a degree regarding drug messages as symbolic speech, the “symbolic speech” decision of *Tinker* continues to plague and confuse the public schools over forty years later. Several courts have applied the more deferential standard of *Bethel v. Fraser*. In *Fraser* the case involved actual speech



(pure speech). Some lower courts have used the *Fraser* decision to uphold school restrictions on symbolic speech with messages deemed lewd or indecent (Hayes, Chaltain, Ferguson, Hudson, & Thomas, 2003).

A school district in Ohio had in place a policy banning clothing with offensive illustrations, drug, and alcohol and tobacco slogans. A student wore a Marilyn Manson t-shirt with an illustration of Jesus with three-heads and the statement, "see no truth, hear no truth." As nonsensical as the message may appear, the court agreed that the shirt was offensive because it mocked others' religious beliefs and that the song lyrics of Marilyn Manson were inconsistent and counterproductive to education (*Boroff v. Van Wert City Bd. Of Ed.*). The *Morse v. Frederick* decision had not taken place when *Boroff* was decided, but the reasoning of the court is similar. In *Morse* the school district had a clear policy against the promotion of drugs, and the "bong hits for Jesus" banner, no matter how opaque it may seem, was deemed inappropriate to district policy.

A court in Minnesota reached a different opinion in the case of *Chambers v. Babbitt* when a student wore a t-shirt with the words "Straight Pride" and a symbol of a male and female holding hands. The principal asked the student not to wear the shirt as he was concerned about school safety and the offense that message would bring to other students. A federal district court ruled that the t-shirt was permissible because, in order "to ban the student's expression, the district would have to prove that the message on the t-shirt would have been likely to cause a substantial disruption of or material interference with school activities" (*Chambers v. Babbitt*).

In *C. H. v. Bridgeton Board of Education*, a New Jersey federal district court ruled that the school district could not prohibit students from taking part in a national anti-abortion movement by wearing black and red arm bands with the word "Life" written on the arm band. The district argument was that the message could potentially upset students that had previously had abortions. The court disagreed and, applying the *Tinker* standard, noted no foreseeable risk of substantially disrupting the educational process (*C. H. v. Board of Education*).

In 2004, in response to the "Day of Silence," a student wore a t-shirt to school on the front of which he had written: "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAD CONDEMNED." The back of his t-shirt read: "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27.'" The principal asked the student to remove the shirt over fears that there would be altercations because the message was too inflammatory. The student refused and was suspended. The 9th Circuit of the U.S. Court of Appeals let the suspension of the student stand, stating that "Advising while in a classroom that gays and lesbians are shameful, and that God disapproves of them...strikes at the very core of the young student's dignity and self-worth.... However heartfelt, this type of speech is poisonous stuff and we agree that school administrators must have some latitude to prevent in-school speech intended to vilify minority individuals and groups" (*When Students Speak*, 2006). At the end of the day...the Ninth Circuit decision in *Harper v. Poway Unified School District* armed school officials with a wide-ranging, politically-correct justification to censor any student viewpoints it did not want expressed in the school" (Court Vacates 9th Circuit Ruling against Anti-gay T-shirt, 2012).

Ninth Circuit Judge Stephen Reinhart, writing in *Harper* concerning the "interfering with the rights of others" prong of *Tinker*, concluded that "Harper's wearing of his t-shirt collides with the rights of other students in the most fundamental way" (Biegel, 2012):

Public school students who may be injured by verbal assaults on the basis of core identifying characteristics such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses. As *Tinker* clearly states, students have the right to "be secure and to be let alone." Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and rightful place in society. (*Harper v. Poway Unified Sch. Dist.*)

The case of *Nixon v. Northern Local School District Board of Education*, the District Court for the Southern District of Ohio, offers a stark contrast to *Harper*. In the 2005 case, a student wore a black t-shirt with the word "INTOLERANT" and "Jesus said...I am the way, the truth and the life. John 14:6" written in white on the front and, on the back, "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are black and white!" (*Nixon v. Northern Local School District Board of Education*). Analyzing the case, this court found that the t-shirt "might be potentially offensive from a political viewpoint, but was not vulgar or lewd; therefore, it did not apply under *Fraser*. Only the *Tinker* standard could be applied, and there was no evidence of substantial and material disruption. The "rights of others" standard from *Tinker* did not apply to this silent, passive t-shirt and did not impact other students' rights to be left alone.

The *Harper and Nixon* decision provides an interesting backdrop for a case that had been percolating in the Seventh Circuit since 2008 and likely brought to conclusion on March 1, 2011. T-shirt messages take on unique perspective when the t-shirt may not create harm with the message, but causes the wearer of the message to become the subject of harassment. A case in point is t-shirts with the message "Day of Silence," which are worn on the annual Day of Silence by students and others. This national event, which has been practiced for over fifteen years and was organized by the Gay, Lesbian, and Straight Education Network (GLSEN), is intended to bring attention to anti-LGBT (Lesbian, Gay, Bisexual, Transgendered) bullying, harassment, and name-calling in schools. On this day, students take a vow of silence, which they keep unless called upon in class by a teacher. To counter what some groups consider to be a promotion of a homosexual agenda by the Day of Silence, a "Day of Truth," typically "celebrated" following the "Day of Silence," has been practiced for the past several years. On this day, students and others are encouraged to wear a "Day of Truth" t-shirt message to encourage, according to the sponsors, a dialogue about same-sex attraction and the biblical truth for sexuality (Christian Students Lead 'Day of Truth' to Promote Dialogue on Sexuality, 2012).

Heidi Zamecnik was the original plaintiff in what became known as the *Heidi Zamecnik and Alexander Nuxoll v. Indian Prairie School District #204* case. Zamecnik wore her own t-shirt on the "Day of Truth" in 2006. The front of the shirt read, "My Day of Silence, Straight Alliance." The back of the shirt read, "Be Happy, Not Gay." As so often happens in lawsuits, Zamecnik had graduated by the time the case was adjudicated, and a fellow student, Alexander Nuxoll, carried the case forward.

The dean of the school told Heidi that her shirt was offensive to some students and, with the cooperation of her mother, the words "Not Gay" would be marked out and she would be allowed to continue to wear the shirt. In 2007, on the "Day of Truth," Zamecnik and Nuxoll asked to be allowed to wear the t-shirts again and were denied permission. The school district, in an attempt to reach a compromise, said that they would allow a t-shirt with the message "Be Happy, Be Straight." Also, the mass-produced Day of Truth shirts would be permitted. The students would not compromise and took the issue to federal court. At first blush, the slogan "Be Happy, Not Gay" would appear to fall between the "Straight Pride" t-shirt, which was allowed by the court in *Chambers v. Babbit*, and the derogatory message that was disallowed in the *Harper v. Poway* decision. Justice Posner of the Seventh Circuit opined that, "given gay was once employed as a synonym for happy, many might find the play on words to be...cute (Biegel, 2012 p. 160-161).

Some have wondered if it would be appropriate for a student to wear a t-shirt that would substitute the word "gay" for "Be Happy, Not Mormon," or "Be Happy, Not Muslim." Would the courts approve such messages? A federal court in Florida disallowed students from wearing the t-shirt "Islam is of the Devil." Applying the *Tinker* standard, the court concluded "that the school district was on solid constitutional footing prohibiting the wearing of the t-shirts under their dress code because there were a number of documented incidents where the shirts had caused actual disturbance (*Sapp v. School Bd. of Alachua Cnty.*).

Marcia E. Powers, writing in the fall of 2008, contended that the real impact of *Zamecnik/Nuxoll* is the expansive view of "substantial and material disruption" that the Seventh Circuit took. Using all of the major speech cases of *Tinker*, *Bethel*, and *Morse*, the court inferred that "substantial disruption" was not limited to the fear of violence or actual violence, but included any speech that would lead to "a decline in students' test scores, an upsurge in truancy or other symptoms of a sick school" (*Zamecnik v. Indian Prairie School District 204*). The Seventh Circuit in this case has given *Morse* a much broader range than just curtailing the advocating of drug use. Using this line from *Morse*, the Seventh Circuit asserted, "Imagine the psychological effects if the plaintiff wore a t-shirt on which was written 'blacks have lower IQs than whites' or 'a woman's place is in the home.'" In finding the effects that speech can play psychologically upon a student in the *Tinker* analysis, the Seventh Circuit has given a rationale for school administrators to suppress speech without the fear of or actual substantial and material disruption (Powers, 2012, p. 247).

The previously mentioned case of "Jesus is not a Homophobe" in *Couch v. Wayne Local School District* was filed one year after Zamecnik. The t-shirt in Couch was banned by the school because it was "sexual in nature," and was deemed permissible by an Ohio court to be worn not only on the observance of a "Day of Silence," but "as the student pleases" (Ohio District Offers Settlement to Student in "Jesus Is not A Homophobe" T-shirt Case, 2012). Local churches in the community did protest the school's decision to allow the student to wear the t-shirt (Ohio District Ordered to Pay \$20,000 in "Jesus is not a Homophobe" T-shirt Suit, 2012). The school district determined that it was easier to allow the t-shirt than to challenge the issue in court.



Students with messages on t-shirts, jewelry of all types, piercings, tattoos, hair styles and color, and much else that can adorn a student all fall into the lumped category of symbolic speech. A student coming to school in a turban makes a statement without saying a word. A student with visible tattoos is making a statement about something. A student reading a Bible during free reading time is symbolically expressing at least a reading preference if not a larger message. Symbolic speech is protectable under the First Amendment if the person displaying the symbol intends to convey a particularized message and there is a “great likelihood” that the message will be understood by those observing it (*Spence v. Washington*).

Several law suits have been filed throughout the nation over the wearing of the rubber bracelets promoting breast cancer-awareness. The message contained on the bracelet is “I (heart) boobies,” promoted by the Keep A Breast Foundation, a not-for-profit group that created the wristbands to promote breast health awareness, sell for about \$4 (Schools Banning I Love Boobies Bracelets, 2012). A Pennsylvania court in 2011 ruled that the rubber bracelets were not offensive. That opinion is being appealed by the school district. The court stated in *H., et al. v. Easton Area School District* that

On the school’s designated breast cancer awareness day, two female students defied the school’s bracelet prohibition and both were suspended for a day and a half and prohibited from attending an upcoming school dance.... The court concludes that these bracelets cannot reasonably be considered lewd or vulgar under the standard of *Fraser*. The bracelets are intended to be and they can reasonably be viewed as speech designed to raise awareness of breast cancer and to reduce stigma associated with openly discussing.... nor has the school district presented evidence of a well-founded expectation of material and substantial disruption from wearing these bracelets under *Tinker*. (*H., et al. v. Easton Area School District*).

There was evidence that the bracelets did create a problem, as two female students reported that at lunch they were subjected to a statement from a boy indicating that he “wanted boobies,” while making inappropriate gestures with two pieces of candy. The boy admitted to the incident and was suspended from school for a day. The court did not believe that this rose to the level of material and substantial disruption.

Under *Tinker*, the boobies bracelets would have to create a major disruption to the education process, or the word “boobies” would have to be found inappropriate at some level under *Fraser*. Under the *Fraser* standard, “boobies” would need to be considered a vulgar word. It might be a different question for administrators and the courts if the phrase “I (heart) boobies” were to be worn on a t-shirt. Would this be too sexually provocative, and might this t-shirt worn to school be banned under existing school policy? The rubber bracelets continue to be a legal matter for those who choose to wear them to school and for those who wish to ban them outright or have the students turn the message over so that it cannot be read.

In order to be considered vulgar, lewd or obscene, the material must violate three tests, according to the U.S. Supreme Court’s decision in *Miller v. California*. The three tests established by *Miller* are that “the material must appeal to the prurient or lustful interest; It must describe sexual conduct in a way that is ‘patently offensive’ to community standards; and taken as a whole, it must lack serious literary, artistic, political, or scientific value.” Wearing the “I (heart) boobies” bracelets applied under the wider application of *Fraser*, and using the test set forth in *Miller*, it might seem reasonable that the word “boobie” would perhaps elicit more disruptive snickering from fourth-grade students than it would from more mature high school students.

With proper policies in place, it is somewhat easier to censor vulgar, lewd, drug/alcohol messages, and words that take hateful umbrage with certain classifications of individuals and to get the courts to agree with the school district. The “See Dick Drink – See Dick Drive – Don’t Be a Dick” t-shirt, which is obviously anti-drinking and driving, has been banned in some schools because of the lewd connotation of the word “dick.” A student wearing a t-shirt with the message “Drugs Suck,” was suspended. The suspension was upheld because the court focused on the fact that the word “suck” was vulgar (*Broussard v. Sch. Bd. of the City of Norfolk*).

Some courts will analyze student dress challenges under the legal analysis of the so-called *O’Brien Standard* (*U.S. v. O’Brien*). Under the *O’Brien* test, a school’s dress code or uniform policy will be constitutional if “the policy is authorized under state law; the policy furthers an important governmental interest; the policy is unrelated to the suppression of free expression; and the incidental restriction on First Amendment freedom is no more than necessary to further the

governmental interest" (*U.S. v. O'Brien*).

Policies in place to prevent all types of bullying are found in every responsible public school district and building in the nation. It is in the best interest of all schools to include content regarding the bullying of GLBT students specifically in their policies. Yet, it remains a very real conundrum for schools on how to balance the freedom to participate in and wear a "Day of Silence" t-shirt with the freedom of other students to participate in and wear a "Day of Truth" t-shirt. It is a slippery slope (lawyers like this term) whether or not a t-shirt with the picture of a cartoon farmer with a hoe and the words "I like working with hoes" is acceptable. For illustration purposes only, I once wore a t-shirt to class that pictured a very obviously old and decrepit squirrel standing under the tree with the caption, "I'm so old I can't find my nuts." Principals will not likely confront that particular t-shirt, but sexual innuendos that can and will be developed in the future may be "over the head" of adults until they are pointed out. I remember "Big Johnson" t-shirts being the thing several decades ago, and it took some administrators, me at least, a while to get the joke, and of course, ban the t-shirts. The message on the Co-ed Naked brand was a little less subtle.

In May of 2012, the Illinois Senate rejected an attempt that would have required Illinois schools to adopt a more detailed policy to prevent bullying, with the vote falling several votes short. Since 2007, Illinois has required schools to have bullying prevention policies, but currently law does not provide schools with any guidance about how their bullying prevention policies can most effectively prevent and address bullying (Bully Prevention Policy HB 5290). As is true of every state and community in the nation, bullying and harassment are a problem in Illinois. More than one-third of Illinois students state that they feel unsafe while at school, while a majority of Illinois students say that they were verbally harassed, and one quarter state that they were physically harassed at school this past year (House Bill 5290 – Illinois Schools Anti-Bullying Policy). Illinois currently has a bullying statute, but HB 5290 was to strengthen the act. The statute currently in place in Illinois states that bullying based upon religion, sex, national origin, ancestry, age, marital status, physical or mental disability, military status, sexual orientation, gender-related identify or expression, unfavorable discharge from military service, association with a person or group with one or more of the aforementioned actual or perceived characteristics, or any other distinguishing characteristic is prohibited in all Illinois school districts and non-public, non-sectarian elementary and secondary schools. To this rather detailed list, HB 5290 adds physical appearance, socioeconomic status, academic status, pregnancy, parenting status, and homelessness (HB 5290 – School Bullying Prevention).

In addition, HB 5290 includes some new mandates and procedures for school districts that include adding the new state definition of bullying (if adopted) into district handbooks and websites; developing mechanisms for anonymous reporting of bullying and identifying the person or persons responsible for promptly investigating and addressing all complaints; and including in district policy specific interventions that can be taken to address bullying, which may include, but are not limited to, restorative measures, social-emotional skill building, counseling, school psychological services, school social work interventions, and community-based services. School district policies have to be filed with the State Board of Education and must be updated every two years. The state board of education promises to provide technical support for the implementation of the district policy. The 'technical support' coming from the state is new to HB 5290.

Additions to the Illinois statute do not seem anything but rational to the casual reader, and the act has been widely endorsed, yet HB5290 failed on the third reading in the Illinois Senate. The concern of those voting no or present was that the real purpose of the act was to "lecture students or as a cover to indoctrinate students with a pro-homosexual agenda" (Illinois Senate rejects anti-bullying legislation, 2012). The Illinois Family Institute lobbied for an "opt out" provision that allows students and teachers to skip any lessons to prevent bullying if it violated their religious beliefs. Illinois State Senator Kyle McCarter was quoted as saying, "There are some programs that are not just bullying in general, but some of them tend to have an agenda of being pro-homosexual" (ibid).

Illinois senator Kirk W. Dillard filed an amendment to HB 5290 that states, "No student or school employee shall be required to attend or participate in any bullying program, activity, assembly, or event that may infringe upon her or her free expression or contradict his or her personal, moral, or religious beliefs."

On the surface, it appeared that Illinois HB5290 might have become a lodestar for anti-bullying legislation around the nation. The bill will go through last minute machinations in the Illinois legislature that are common at the end of



sessions in all legislative bodies, and HB5290 may in fact pass in some manifestation. No bill is ever considered “dead” until the legislature actually bangs the adjournment gavel.

As evidenced by the cases ranging from *Blackwell* in 1966 to *Zamecnik*, it might seem obvious that the courts have considered bullying and harassment cases in schools. The cases mentioned are only a tiny fraction of similar cases that have been litigated or settled out of court by summary judgment in the past decades. *Tinker*, *Bethel* and *Morris* certainly helped school boards and educators deal with symbolic speech, and in the case of *Bethel*, pure speech was amplified a notch by the Seventh Circuit to include speech that would lead to students feeling uncomfortable at certain observable levels, such as truancy. The current Illinois statute on bullying and the proposed changes made by HB5290 contain a laundry list of the attributes and conditions for why students should not be bullied or harassed. The list is long, and it should be. Intolerance has been a problem seemingly since the beginning of civilization, and one wonders if any progress has been made on the goal of civility. No matter what one believes in their spiritual, religious, or philosophical nature, it would seem that the words of Jesus (and many others), “Do unto others as you would have them do unto you,” would be appropriate as a t-shirt, if the saying were not attributed to Jesus on the t-shirt.

The Religious Freedom Education Project has produced a pamphlet entitled *Harassment, Bullying and Free Expression: Guidelines for Free and Safe Public Schools*, which has been endorsed by many groups, including the National Association of Evangelicals, Islamic Society of North America, and the National Association of State Boards of Education. The pamphlet concludes with this statement:

Public schools in a democratic society should seek to develop strong civic character by teaching and modeling respect for the rights of others. Students should strive to master the skills of civil engagement both in the classroom and in relationships with their peers. Prevention of harassment and bullying is essential for healthy, effective public schools. But that effort must not lead to excessive limitations on the constitutional right of students to freedom of expression. School officials have an obligation to seek the right balance between upholding free speech and maintaining a safe learning environment for all students.

## CONCLUSION

At the end of the day, the school administrator is left between the proverbial rock and hard place, strategically positioned on the firing line in student speech conflicts. Common sense will take the administrator only so far in dealing with symbolic speech questions. Policies need to be adopted by the Board of Education that are carefully drawn by attorneys who specialize in First Amendment freedoms. These policies must be clearly communicated to all stakeholders in everyday language, not legalese, preferably with clear examples of what is not acceptable.

One class of school law in the education of school administrators is not sufficient. In-service opportunities and workshops are needed periodically, and all staff needs to be informed and involved. Often First Amendment issues will arise in clubs and organizations that are sponsored and directed by the teaching staff. Given the connection between symbolism and bullying, the stakes are too high to leave these issues to happenstance.

## REFERENCES

*Bethel School District No. 403 v. Fraser*, 478 U.S. 503 (1969).

Biegel, S. (2012). *The right to be out: Sexual orientation and gender identity in America's public schools*. University of Minnesota Press, Minneapolis, MN, 92-95, 160-161.

*Blackwell v. Issaquena County Board of Education*, 366 F.2d749 (5th Cir. 1966).

*Boroff v. Van Wert City Board of Education*, 240 F. 3rd 465 (6th Cir. 2000).

*Broussard v. Sch. Bd. of the City of Norfolk*, 801 F. Supp. 1526 (E. D. Va 1992).

Budd, L. (22, May, 2012). Ohio district ordered to pay \$20,000 in “Jesus is not a Homophobe” T-shirt suit. *Dayton Daily News*. Retrieved May 28, 2012, from [http://legalclips.nsba.org/?p=14475&utm\\_source=NSBA+e-Newsletter-](http://legalclips.nsba.org/?p=14475&utm_source=NSBA+e-Newsletter-)



Subscribers&utm.

*C. H. v. Bridgeton Board of Education*, No. 09-5815, 2010 WL 1644612 (D.N.J. Apr. 22, 2010).

*Chambers v. Babbitt*, 145 F. Supp. 2d 1068 (2001).

*Couch v. Wayne Local School District*. Retrieved April 26, 2012, from <http://www.lambdalegal.org/in-court/cases/couch-v-wayne-local-school-district>.

*H., et al. v. Easton Area School District*. Retrieved May 19, 2012, from <http://www.aculpa.org/download/memograntingPlpdf>.

Harassment, bullying, and free expression: guidelines for free and safe public schools. Religious Freedom Education Project/First Amendment Center, 555 Pennsylvania Ave. N. W., Washington, D. C. Retrieved May 10, 2012, from <http://www.20001religioiusfreedomeducation.org>

*Harper v. Poway Unified School District*, 127 S.Ct. 1484 (2007).

Hayes, C., Chaltain, S., Ferguson, Jr., J. E., Hudson, D. L. , & Thomas, O. (2003). The first amendment in schools. ASCD. Nashville, Tennessee, 77-78.

*Heidi Zamecnik and Alexander Nuxoll v. Indian Prairie School District #204*, 636 F. 3d 874 (7th Cir. 2011).

HB5290 (full text). Retrieved May 25, 2012, from <http://ilga.gov/legislation/fulltext.asp?GAID=11&SessionID=84&GA=97&DocType>.

HB5290 Amendment. Retrieved May 30, 2012, from <http://ilga.gov/legislation/fulltext.asp?DocName=09700HB5290sam002&GA=97&Session>.

House Bill 5290—Illinois Schools anti Bullying Policy. Retrieved May 27, 2012, from <http://www.aclu-il.org/hb-5290-illinois-schools-anti-bullying-policy2/>.

Illinois Senate rejects anti-bullying legislation. Retrieved May 27, 2012, from <http://www.news-gazette.com/print/1003196>.

Mauro, T. (2007). Court vacates 9th Circuit ruling against anti-gay T-shirt. Retrieved May 27, 2012, from <http://archive.firstamendmentcenter.org/analysis.aspx?id+18251>.

*Miller v. California*, 413 U. S. 15 (1973).

*Morse v. Frederick*, 551 U. S. 393 (2007).

*Nixon v. Northern Local School District Board of Education*, 383 F. Supp. 2d 965 (S.D. Ohio 2005).

Powers, M. E. (Fall 2008). Unraveling Tinker: the Seventh Circuit leaves student speech hanging by a thread. *Seventh Circuit Review*, 4(1), 215-252. Retrieved at <http://www.kentlaw.edu/7cr/v4-1/powers.pdf>.

Resnick, E. (April 20, 2012). School allows T-shirt, but only on the Day of Silence. Retrieved May 27, 2012, from <http://www.gaypeopleschronicle.com/stories12/april/0420122.htm>.

*Sapp v. School Bd. of Alachua Cnty.*, No. 09-242 (N.D. Fla. Sept. 30, 2011). Retrieved May 28, 2012, from <http://www.ia1700402.us.crchieve.org/61.../gov.uscourts.find.56294.1500.pdf>.

*Spence v. Washington*, 418 U.S. 405 (1974).

*Tinker v. Des Moines*, 393 U. S. 503 (1969).

*U. S. v. O'Brien*, 391 U.S. 367 (1968).

Wernz, J. (May 10, 2010). Day of Silence cases remind that even arguably offensive student speech may be protected speech. Retrieved May 28, 2012, from <http://www.franczek.com/frontcenter-599.html>.

When students speak. Retrieved April 8, 2012, from <http://www.washingtonpost.com/wp-dyn/content/article/2006-08/06/AR2006080600704pf...>



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