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CULTURE WARS IN THE PUBLIC SCHOOLS: WHAT HAVE THE COURTS SAID?

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On August 5, 2013, fourteen judges of the 3rd Circuit Court of Appeals weighed in on the issue of whether or not students have a constitutional right to wear bracelets bearing the words: I (heart) BOOBIES: KEEP A BREAST. The bracelets were designed to support a good cause—raising awareness of breast cancer, and encouraging young girls to get over the embarrassment of discussing such things. But any mention of body parts in a junior high school can cause a commotion. And so some teachers expressed concerns about these bracelets, and asked their bosses, the school administrators, what they should do.

The administrators in the Pennsylvania school district huddled up and made a decision. They informed the students that such bracelets would not be permitted. Two students directly disobeyed this directive and were issued minor disciplinary consequences in conformity with the Code of Conduct. A few years later, after hours of work by numerous lawyers and advocacy groups, generating thousands of dollars of fees, the esteemed judges issued a mammoth ruling, overturning the decision of the local school officials. The First Amendment, according to the nine-person majority, protected this expression of free speech. Five judges dissented**.** *B.H. v. Easton Area School District,* 725 F.3d 293 (3rd Cir. 2013).

How did we get here? Why so much time, energy and resources spent on an issue that could have been left to local school officials?

The "boobies" case is a colorful and excellent example of the reality that we sort out our values in this country through litigation. The fact that much of that litigation focuses on the public school is hardly surprising. After all, we all want the public school to reflect our values. The problem is….we don't agree on our values. If there is a "culture war" issue going on in the country, it's going to find its way into the public school.

To understand, we have to go back to the 1960s and the upheaval in the country over the War in Vietnam. In December, 1965, Bobby Kennedy called for a truce in Vietnam over the Christmas holidays. Mary Beth Tinker, an 8th grader, along with her older brother and another student, decided to show support for the proposed truce by wearing black armbands to school. The parents of the students were fully supportive, even though they knew that their children would be engaging in a minor league version of civic disobedience. The principal of the school had gotten wind of the plans the day before, and had issued a directive that there were to be no black armbands in the school setting.

The protest armbands caused some talk in the school. While the War in Vietnam eventually became very unpopular, that was hardly the case in December, 1965. Moreover, Des Moines, Iowa, was not a hotbed of anti-war activity. Thus it is not surprising that there were some students, and faculty members, who found these armbands to be offensive. Perhaps even more, there were faculty members disturbed about the student's direct defiance of the principal's orders. If students did not have to obey the principal, why should they obey the teacher? Where would this lead?

It led to the U. S. Supreme Court. In February, 1969, the Court issued its decision in *Tinker v. Des Moines Independent Community School District.* Public schools have not been the same since.

By a 7-2 margin, the Court ruled that Mary Beth Tinker had a constitutional right to defy her principal. There had been some talk in the school, but nothing approaching any major disruption. Bells rang. Buses ran. Teachers taught. Students learned. Justice Fortas, writing for the majority, paid lip service to the "special characteristics" of the school, but that's all it was. He held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The "Tinker Test" was established: student free speech was protected unless school officials could reasonably forecast that there would be a "material and substantial" disruption of school, or there was an infringement on the rights of others. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Many hailed the decision. Few noted that it marked the beginning of an erosion of respect for authority in the public schools. It also highlighted the irrefutable fact that our public schools are a major focus of our society's ongoing "culture wars." Everyone wants the public schools to reflect our values. But we don't agree on our values. So….we litigate everything from America's involvement in wars to students wearing sexually suggestive jewelry.

In this paper, we will review some of the major areas in which the so called "culture wars" affect our public schools, and then offer some suggestions for the attorneys who guide their school district clients through these troubled waters.

RELIGION

With regard to religion, the problem is not just one of clashing values—the tension is built into the fabric of the Constitution. The First Amendment protects the free exercise of religion, and at the same time requires governmental entities not to endorse religion. It is understandable that many educators, as well as lawyers and judges, find it hard to "draw the line" consistently. The 5th Circuit recognized this reality in *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011). This was a long running piece of litigation arising out of the efforts of some elementary school students to distribute gifts that included a religious message at a classroom holiday party. After a decade of litigation, the *en banc* Circuit Court held that two principals had engaged in unconstitutional viewpoint discrimination in violation of the First Amendment. The principals allowed the children to distribute all manner of gifts and messages, but not a religious one. However, the principals were not held personally liable for this. Due to the murkiness of the law, the court granted the principals qualified immunity:

> When educators encounter student religious speech in schools, they must balance broad constitutional imperatives from three areas of First Amendment jurisprudence: the Supreme Court's school-speech precedents, the general prohibition on viewpoint discrimination, and the murky waters of the Establishment Clause….The many cases and

> the large body of literature on this set of issues demonstrate a "lack of adequate guidance," which is why no federal court of appeals has ever denied qualified immunity to an educator in this area. We decline the plaintiffs' request to become the first.

Over the past fifty years there has been a notable shift in the type of challenge schools face with regard to religion. In the early days, the challenges usually came from an individual or group outside of the religious mainstream, objecting to practices in the school that they viewed as promoting religious belief. Schools continue to face challenges like these, frequently brought by The Freedom From Religion Foundation, The American Humanist Association or similar groups. Now, however, schools are just as likely to be challenged by mainstream Christian organizations that believe that the schools are stifling religious freedom, or discriminating against students or teachers who express a religious point of view.

Schools get accused of indoctrinating children in religion. Schools get accused of "taking God out of the classroom." It all goes back to the 1960s and the pivotal rulings by the Supreme Court about officially approved prayer in the schools.

In *Abington School District v. Schempp*, 374 U.S. 203 (1963), the Supreme Court held that a school district in Pennsylvania was violating the Establishment Clause by opening each day of school with ten verses of the Bible and the Lord's Prayer read over the public address system. The Bible reading was actually required by state law. The statute permitted parents to have their children excused from class during the reading. The suit was brought by a family who belonged to the Unitarian Church and believed that the practices of the school district had the effect of endorsing and promoting Protestant Christianity.

During oral argument, one justice asked the lawyer representing the family (Mr. Sawyer) about religious tradition:

> COURT: Mr. Sawyer, what do you say to Mr. Ward's argument that, well, even if it is religion, it's religious tradition?
>
> MR. SAWYER: I think tradition is not to be scoffed at. But let me say this very candidly. I think it is the final arrogance to talk constantly about "our religious tradition" in this country and equate it with this Bible. Sure, religious tradition. Whose religious tradition? It isn't any part of the religious tradition of a substantial number of Americans, of a great many….And it's just to me a little bit easy and I say arrogant to keep talking about "our religious tradition." It suggests that the public schools, at least of Pennsylvania, are a kind of Protestant institution to which others are cordially invited.

That argument carried the day. Many have noted that there will be prayer in our public schools as long as there are math tests, but the Supreme Court has made it clear that such prayer should be a private practice. Students can pray privately, or even in a group, so long as there is no

coercion involved. Teachers can pray privately, or in a group in a way that does not disrupt school activities. These broad principles, however, still leave much room for controversy.

Two recent Circuit Court decisions illustrate. *Kennedy v. Bremerton School District* 869 F.3d 813 (9th Cir. 2017) presented all of the ingredients for a made-for-TV movie: high school football, a praying coach, and the law. Culture warriors lined up on opposite sidelines.

Win or lose, Coach Kennedy liked to say a prayer after the football game. He liked to do it smack dab on the 50-yard line. Lots of players joined him. This went on for quite a while, but eventually someone complained to a school administrator. This led to an exchange of lawyerly crafted correspondence between superintendent and coach. The message to the coach was plain: Coach—you can't do this anymore. The response of the coach went straight to the media:

> Kennedy's legal representatives responded to the District's letter by informing the media that the only acceptable outcome would be for the District to permit Kennedy to pray on the 50-yard line immediately after games.

The Coach eventually sought an injunction to permit him to continue to pray. The court denied it. He appealed to the 9th Circuit, which ruled against him as well. The court held that Coach Kennedy was not "speaking as a citizen" when he prayed. He was speaking as a school employee:

> …by kneeling and praying on the 50-yard line immediately after games while in view of students and parents, Kennedy was sending a message about what he values as a coach, what the District considers appropriate behavior, and what students should believe, or how they ought to behave. Because such demonstrative communication fell within the scope of Kennedy's professional obligations, the constitutional significance of Kennedy's job responsibilities is plain—he spoke as a public employee, not as a private citizen, and his speech was therefore unprotected.

The court spelled out the many ways in which Coach Kennedy could practice his religion and then added:

> What he cannot do is claim the First Amendment's protection…when he kneels and prays on the 50-yard line immediately after games in school logoed attire in view of students and parents.

In support of its decision, the 9th Circuit cited cases that came to the same conclusion in similar circumstances from the 3rd, 6th, 7th and 5th Circuits. *See Borden v. Sch. Dist. of Tp. of E. Brunswick*, 523 F.3d 153 (3rd Cir. 2008); *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402 (5th Cir. 1995); *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332 (6th Cir. 2010); *Mayer v. Monroe Cty. Cmty. Sch. Corp*., 474 F.3d 477 (7th Cir. 2007); *Grossman v. S. Shore Pub. Sch. Dist*., 507 F.3d 1097 (7th Cir. 2007).

Importantly, this decision does not address whether or not Coach Kennedy's conduct amounted to an "Establishment of Religion." Instead, the court held that he failed the First Amendment test because he was speaking "as a citizen" rather than as an employee. Coach Kennedy based his suit on a claim of retaliation for the exercise of his First Amendment rights. His suit ran aground because public employees are protected from retaliation only when they speak

"as a citizen" on "matters of public concern." Coach Kennedy was acting as a coach. He was on the clock, carrying out his official duties, and thus subject to directives from his supervisors.

If no one makes a movie about that case, perhaps they will take up the equally colorful case of *Freedom from Religion Foundation v. Concord Community Schools*, 885 F.3d 1038 (7th Cir. 2018). Here, the 7th Circuit approved the Christmas Spectacular production at Concord High School in Elkhart, Indiana, despite the fact that the program included a nativity scene and other religious content. This litigation has been going on since 2014 when the Freedom from Religion Foundation challenged this annual event in a small Indiana town.

This program is a holiday tradition going back to the 1970s when the high school marching band attended the Radio City Christmas Spectacular in New York. I'm sure that the Radio City program is impressive, but those Yankees got nothin' on these Hoosiers. Concord High produces a program that involves two string orchestras, a symphony orchestra, a concert band, two jazz bands, five choirs, and small chamber groups. That's just the music. The program also includes dance teams and drama department players. Throw in the stage technicians and crew, and you have 600 of the high school's 1700 students involved in this 90-minute production. Perhaps there is a partridge in a pear tree as well.

Until the famously litigious "Doe" family got involved, the program was exclusively about Christmas. There were secular songs, like Jingle Bells and White Christmas, but there was no mention of other faiths and their winter celebrations. Moreover, the program concluded with "The Story of Christmas" which included readings taken directly from the Gospels. This was accompanied by a live nativity scene, with students in costumes portraying Mary, Joseph, angels, shepherds and the three wise men. In short, the program at the public high school looked very much like what you might expect at First Baptist.

The Doe family, supported by the Freedom from Religion Foundation, filed suit, seeking to force changes in the program for 2014. In response, the school immediately offered to make some changes. The school dropped the Gospel readings, and added songs pertaining to Hanukah and Kwanzaa. These holidays, along with Christmas, would be introduced in the program with a short reading about the cultural significance of each. But the nativity scene was still in the program. And the "Story of Christmas" portion was to last 20 minutes, compared to three or four minutes honoring the other traditions.

The federal district court in Indiana ruled that this did not go far enough. The court held that the program, as proposed by the school, would still amount to a governmental endorsement of religion, in violation of the First Amendment.

So the school made additional changes for the 2015 program. The Doe Family continued to object, but the court found the 2015 program to be significantly different from previous Christmas Spectaculars. Those differences were enough for the program to pass muster. The plaintiffs appealed this decision to the 7th Circuit, and now that court has affirmed the ruling.

Some Key Quotes:

About the nativity scene….

> Let us start with the most inherently religious aspect of the show: the nativity scene. We are not prepared to say that a nativity scene in a school performance automatically constitutes an Establishment Clause violation. Each show must be assessed within its own context. Nevertheless, the nativity story is a core part of Christianity, and it would be silly to pretend otherwise. Many nativity scenes therefore run a serious risk of giving a reasonable viewer the impression of religious endorsement. But in Concord's 2015 show, the nativity tableau no longer stands out. Instead of serving as the centerpiece for much of the second half and the finale, it has become just another visual complement for a single song.

What about Christmas Carols?

> Without the biblical narration and live nativity, the performance of Christmas carols alone does not inevitably convey a religious message. These songs, played with regularity in workplaces and stores and on TVs and radios have permeated mainstream society.

Bottom line….

> The current Spectacular is primarily entertainment and pedagogy. The nativity scene, which was problematic in the 2014 and proposed versions, is no longer the second half's main event. Instead, as we have already said, it accompanies just one song, serving the same aesthetic purpose as the images projected on screens and other visuals.

Hint….

> This would have been an easier case if the Christmas spectacular had devoted a more proportionate amount of stage time to other holidays.

This case is a great illustration of how the culture wars in our society play out in the public school. The court noted that there was a Facebook page entitled "Save Concord's Christmas Spec's Nativity Scene" with over 7,000 "likes." Hundreds of people in the small town wore t-shirts promoting the cause to a school board meeting. Yard signs were on display in the community and someone (a Christian????) sent a death threat to the FFRF.

Moreover, the court noted that there was a "powerful ovation" from the audience when the nativity scene was displayed.

And how did the judges feel about this case?

> The parties put us in the uncomfortable position of Grinch, examining the details of an impressive high school production. But we accept this position, because we live in a society where all religions are welcome.

This case is a reminder of the fine line public schools have to walk when celebrating holidays that have religious origins. Public schools are not expected to ignore the role of religion, or the religious roots of some of our holidays. But neither are they to endorse the majority view.

A holiday program at the public school should not be indistinguishable from the program at the local church.

SEXUALITY

Our first issue leads directly to the second. After the "school prayer" decisions in the 1960s a political movement gained traction to amend the Constitution to overturn these rulings. This reached a high point in 1998 when the House of Representatives voted in favor of the proposed amendment. However, the vote was 61 votes short of the two-thirds majority it required.

Four years earlier, Congress passed the Equal Access Act. This was the backup plan for those who wanted the Constitutional amendment. Under the Equal Access Act, any secondary school that received federal financial assistance would be required to allow religious groups to meet at school under the same terms and conditions as any other non-curriculum related student group. The motivating energy behind the Equal Access Act was to allow students to have Bible studies or prayer groups in the public school building.

While the Act accomplished that goal, it quickly became clear that the primary beneficiary of the Equal Access Act was not The Fellowship for Christian Athletes. It was the Gay Straight Alliance. Numerous lawsuits were filed, and won, on behalf of student organizations that supported gay and lesbian students.

We all want the public schools to reflect and promote our values, but with regard to sexuality, we do not share the same values. We certainly do not all share the same view as to what, when, and by whom our children should be taught about sexual topics. This controversy rages today as reflected in the #MeToo movement, the fight over Justice Kavanaugh's nomination and the current fury over the proposed Title IX regulations.

Meanwhile, transgender students have come forward to demand access to the bathrooms and locker rooms that reflect their gender identity. The Obama Administration generally supported that demand and the Trump Administration opposes it. Where are we?

This is another culture war topic in which schools can be attacked from either side. There is a considerable amount of litigation over this issue, as evidenced by NSBA's excellent Transgender Litigation Chart. NSBA, *Transgender Student Litigation Char* (last updated Dec. 19, 2016), *available at* https://www.nsba.org/my-account/login?destination=transgender-litigation-chart. District courts and state courts have come to a variety of conclusions, but we have three Circuit Court decisions, all of which rule in favor of the transgender student.

In the 6th Circuit, a district court issued an injunction, ordering Highland Local School District to permit an 11-year old special needs transgender student to continue to use the girls' bathroom, in conformity with her gender identity. The Circuit Court refused to stay the injunction, noting that the district was not likely to succeed on the merits:

> We are not convinced that Highland has made its required showing of a likelihood of success on appeal. Under settled law in this Circuit, gender nonconformity, as defined in *Smith v. City of Salem*, is an individual's "fail[ure] to act and/or identify with his or her gender….Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination." 378 F.3d 566, 575 (6th Cir. 2004).

Furthermore, the balancing of equities favored the student, not the school. The court pronounced that "we are not convinced that Highland's allegations of harm rise to the level of irreparable harm." But what about the student?

> However, the record reflects that Doe, a vulnerable eleven year old with special needs, will suffer irreparable harm if prohibited from using the girls' restroom….Highland's exclusion of Doe from the girls' restrooms has already had substantial and immediate adverse effects on the daily life and well-being of an eleven-year old child (i.e., multiple suicide attempSyts prior to entry of the injunction). These are not distant or speculative injuries…*Dodds v. United States Department of Education*, 845 F.3d 217, 221 (6th Cir. 2016).

The 7th Circuit has ruled that a school in Wisconsin must permit a transgender boy to use the boys' bathroom. The court held that offering the student the use of a private, gender neutral bathroom was not adequate. The court held that the school's policy about bathroom use amounted to discrimination based on sex in violation of Title IX, and a denial of equal protection in violation of the 14th Amendment to the U.S. Constitution.

The arguments made by both sides in this case are, by now, very familiar. The student claimed that he was being stigmatized, singled out for no good reason, discriminated against. The school cited the desire for privacy for other students as they use the bathroom.

Different courts are going to come to different conclusions on these issues until the Supreme Court settles the matter. This might be the case that goes to the Supreme Court. The 7th Circuit seems to tee it up nicely for SCOTUS, relying heavily on the SCOTUS decision from 1989, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). That's the case where the Court held that discrimination based on "gender non-conformity" was a form of sex discrimination. Here's a quote from the 7th Circuit:

> A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.

The court dismissed the school's argument about the privacy rights of its other 22,160 students:

> What the record demonstrates here is that the School District's privacy argument is based upon sheer conjecture and abstraction. For nearly six months Ash used the boys' bathroom while at school and school sponsored-events without incident or complaint from another student.

And the court drew a distinction between concerns of the adults vs. those of the students:

> In fact, it was only when *a teacher* witnessed Ash washing his hands in the restroom that his bathroom usage once more became an issue in the School District's eyes.
>
> …neither party has offered any evidence or even alleged that the School District has received any complaints *from other students.* (Emphasis in original).

The court not only addressed the law on this subject—it also discussed biology:

> Further, it is unclear that the sex marker on a birth certificate can even be used as a true proxy for an individual's biological sex. The marker does not take into account an individual's chromosomal makeup, which is also a key component of one's biological sex. Therefore, one's birth certificate could reflect a male sex, while the individual's chromosomal makeup reflects another. *Whitaker v. Kenosha USD,* 858 F.3d 1034 (7th Cir. 2017).

In the 3rd Circuit, parents of students in Boyertown Area School District in Pennsylvania claimed that the district was violating their children's constitutional rights by allowing transgender students to use the bathrooms that corresponded to gender identity, rather than original biological sex. The case drew considerable interest from advocacy groups on both sides of this cultural issue as it worked its way to a Circuit Court. The three-member panel of the court ruled decisively against the parents.

The district changed its policy in the 2016-17 school year. Prior to that, all students were required to use the facility that matched their birth sex. But in 2016-17 the district allowed transgender students at the high school to use the facility that matched their gender identity. For districts dealing with this issue, the court's description of how the school went about this would be worth studying:

> In initiating this policy [the high school] adopted a very careful process that included student-specific analysis. Permission was granted on a case-by-case basis.
>
> The District required the student claiming to be transgender to meet with counselors who were trained and licensed to address these issues and the counselors often consulted with additional counselors, principals, and school administrators. Once a transgender student was approved to use the bathroom or locker room that aligned with his or her gender identity, the student was required to use only those facilities. The student could no longer use the facilities corresponding to that student's sex at birth.

Moreover, the high school was well equipped to handle this:

> [The high school] has several multi-user bathrooms. Each has individual toilet stalls. Additionally, [the high school] has between four and eight single-user restrooms that are available to all students, depending on the time of day. Four of these restrooms are always available for student use.

The court relied heavily on expert opinion about the difficulties transgender students face:

> …transgender students face extraordinary social, psychological, and medical risks and the School District clearly had a compelling state interest in shielding them from discrimination. There can be "no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity." *Whitaker,* 858 F.3d at 1051.

The plaintiffs in this case claimed that their children's right to privacy was being invaded. The court did not see it that way, and particularly viewed any possible incursion on privacy as

small potatoes compared to the harm that might befall a transgender student who was not accommodated, *Doe v. Boyertown Area School District*, 897 F.3d 518 (3rd Cir. 2018).

PATRIOTISM

The National Football League may be able to punish football players who refuse to stand for the National Anthem. As a private entity, the NFL is not restricted by the U.S. Constitution. But what about the public school?

Symbolic protests during patriotic exercises have happened before. At the height of patriotic fervor, in the middle of "The Good War" our Supreme Court decided that students in public schools could not be forced to stand and recite the Pledge of Allegiance. The challenge in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) came from Jehovah's Witnesses who objected to the Pledge on religious grounds. But the Court's decision was more expansive, relying on the First Amendment guarantee of freedom of speech. Thus any student, for any reason, can refuse to recite the Pledge.

Having been decided by our highest court over 70 years ago, the right of a student to refuse to recite the Pledge is "clearly established." Thus a teacher in Texas who is accused of retaliating against a student after the student refused to stand and recite is facing possible personal liability. The student sued the district alleging that she was punished and harassed after refusing to recite the Pledge. The teacher filed a Motion to Dismiss based, in part, on qualified immunity. Government officials are entitled to qualified immunity unless they violate legal standards that are "clearly established." The court held that the teacher was not entitled to immunity:

> The law establishing that student speech can only be limited when it interferes with "the work of the school or impinges upon the rights of other students" is clearly established. The Supreme Court also clearly established, over 70 years ago, that it is unconstitutional to require a child to stand for the Pledge of Allegiance.

Arceneaux v. Klein ISD, 2018 WL 3496737 (S.D. Tex. 2018).

The court also declined to dismiss the case against the district, holding that the allegations in the suit stated a possible violation of the constitutional rights of a student. So the case continues. The suit alleges that the 17-year old girl was repeatedly harassed and treated badly by teachers for her refusal to stand for the Pledge. Texas law allows a student to not participate in this daily exercise with parental approval. Tex. Educ. Code § 25.082(c). This student's parent approved. So the student should have been excused from participation, but the suit alleges that the girl caught ten kinds of grief from teachers who objected to her viewpoint, while the school administration did nothing about it.

Of course the district had all the proper written policies in place, but the court held that there was something else going on, or at least, that the lawsuit alleged this to be the case:

> The plaintiffs' allegations support an inference that Klein ISD had an unwritten custom or practice of requiring students to stand during the Pledge and of disciplining and harassing students who refused to stand.

The suit enumerates several incidents involving several teachers. The most gobsmacking allegation in the case is that one teacher compared those who refuse to stand with "Soviet communists, members of the Islamic faith seeking to impose Sharia law, and those who condone pedophilia." Whoa. This same teacher required the kids to listen to and reflect upon Bruce Springsteen's "Born in the USA." The court noted that the teacher "apparently did not listen to the words or he did not understand them." The court's ruling on the preliminary motion to dismiss can be found at 2018 WL 2317565.

What about symbolic protests during extracurricular activities? When Colin Kaepernick's "take a knee" protest became widespread in the NFL we knew that the issue was going to surface at a high school football game. The first reported case on the issue comes from a federal court in California, which ruled that an athlete kneeling during the National Anthem at a school sponsored athletic event is a form of constitutionally protected speech. The court issued an injunction ordering the school officials not to restrict "students from kneeling or sitting during the playing or singing of the National Anthem at extracurricular events, including athletic events." The school was also ordered not to "require any action from Plaintiff or other students during the playing or singing of the National Anthem at extracurricular events, including athletic events."

The court seemed to think it was a pretty simple and straightforward issue. Kneeling during the National Anthem is a form of symbolic speech. It did not cause, nor was it likely to cause, a material or substantial disruption of school activities. It sounds very much like a student wearing a black armband to school to protest America's involvement in the war in Vietnam. *V.A. v. San Pasqual Valley USD*, 2017 WL 6541447 (S.D. Cal. 2017). The court later awarded the plaintiff attorneys' fees and costs to the tune of $195,258. 2018 WL 3956050.

Note, however, that there is an important distinction that can be made between Mary Beth Tinker's armband and the football player's symbolic "take a knee" protest. Young Ms. Tinker was acting as an individual, just one of the hundreds of students in a particular public school on a given day. That football player, on the other hand, is equipped, dressed and identified as a representative of the public school. He stands on the football field not as an individual, but rather, as a member of a team that bears the name of the school. He is about to participate in a competition on behalf of the team, the school, the community. Would it not be permissible for the public school to restrict the freedom of speech, just a bit, under those circumstances?

To date, no court has drawn that distinction in a reported case. Meanwhile there is a state court decision in Texas strongly supporting the notion that students who are equipped, dressed and identified as representatives of the school retain full, individual free speech rights. The case involved cheerleaders who painted Scripture verses, often of an overtly Christian nature, on the banner that the team runs through at the start of the game. The cheerleaders in Kountze, Texas eschew the violent language customarily used on these banners ("Smash the Hornets; Kill the Tigers") and prefer sentiments along the lines of "But thanks be to God, which gives us victory though our Lord Jesus Christ."

According to the elected judges on the Court of Appeals in Beaumont, those cheerleader banners are the private, constitutionally protected expression of the cheerleaders. So if they want to express a religious message, they have the right to do so. The Texas Supreme Court decided not to hear the case, thus affirming the decision of the Court of Appeals.

I have not yet met a school lawyer who agrees with that decision, but there it is. *Kountze ISD v. Matthews*, 2017 WL 4319908 (Tex. App. Beaumont, 2017).

THE LAWYER

These "culture war" issues that school districts deal with are among the things that make the practice of school law so interesting. And challenging. The lawyer, of course, brings her own view on these matters to the board meeting. How is the lawyer to advise on hot button issues? We offer some suggestions:

1. We should point out to our clients that this comes with the territory. As stated above, everyone wants the public schools to reflect our community's values. As soon as we all agree on those values, life will be a lot easier, but it does not look like that will happen anytime soon.

2. As a society we express our values through the slow, cumbersome process of legislation. Over the past decade we have seen a remarkable change in societal values. Consider, for example, the legal use of marijuana. There is definitely a nationwide change in our values about marijuana use, but some states move more quickly than others. The same is true with views about same sex marriage and the treatment of transgender individuals. Society is changing, but it is uneven.

3. Litigation occurs when values clash. Major cases usually involve a clash of good values. Consider some of the major court cases in our history:

   Tinker v. Des Moines: Free Speech v. Respect for Authority;

   Brown v. Board of Education: Equal Protection of the Law v. Local Control of schools;

   West Virginia SBOE v. Barnette: Free Speech v. Patriotism

4. Lawyers should point out that there are many good values, but not all of them arise from the Constitution or our laws. For example, "patriotism" is a value that almost all Americans believe in. But our Constitution does not require that our government nurture the love of country. It requires that our government endorse the freedom of speech. That's why *Barnette* was decided as it was. *Barnette,* 319 U.S. at 631.

5. Furthermore, sometimes courts deal with two good values, but have to decide which is more important. *Brown v. Board of Education* is a good example of this. *Brown v. Board of Education*, 347 U.S. 483 (1954). The idea that local schools should be controlled by local people is generally accepted as a good value. But when that value is used to justify treating people differently based on race, it is clear that it has to give way. Racial equality is more important.

The lawyer plays a critical role in how public schools deal with these issues. Obviously, the lawyer is not supposed to allow his personal views to dictate his legal advice to his client. But a good lawyer offers counsel that goes beyond narrow legal concerns. The following Comment to R.P.C. 2.1 is particularly relevant to the school lawyer:

> Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied. Model Rules of Prof'l Conduct r. 2.1 cmt. 2 (Am. Bar Ass'n 1983).

The good lawyer also needs to be strategic in conveying advice to clients on controversial issues. A Comment to R.P.C. 2.1 encourages the lawyer to think about how the advice is given:

> A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. *In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits.* However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client. Model Rules of Prof'l Conduct r. 2.1 cmt. 1 (Am. Bar Ass'n 1983).

Finally, school lawyers should remind clients that this cumbersome, frustrating, slow process of sorting out values by litigation may be a poor way to do business, but no one has come up with a better one. In a society dedicated to individual liberty and democratic government, it's hard to see what other choices we have. In some societies values are sorted out through violence. In other societies, an autocratic government dictates values. Our constitution and laws point us in a different direction. Thus it will continue, and school district lawyers are privileged to play an important part in this value-sorting process.