

**TESTING THE OUTER LIMITS OF THE FIRST AMENDMENT IN STUDENT FREE-SPEECH CASES:  
*ZAMECNIK V. INDIAN PRAIRIE SCHOOL DISTRICT # 204***

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I. INTRODUCTION

The Supreme Court first addressed the First Amendment constitutional rights of students in 1969 holding that they do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>1</sup> With this pronouncement Justice Fortas set forth two separate standards that state a school cannot prohibit student speech unless it “materially and substantially disrupt[s] the work and discipline of [the] school” *or* “collides with the rights of others.”<sup>2</sup> *Tinker’s* meaning, however, has proven elusive throughout its forty-year history, leaving the application of school speech law largely to the lower courts.<sup>3</sup>

In March, the Seventh Circuit decided *Zamecnik v. Indian Prairie School District # 204*,<sup>4</sup> holding that high school students have a First Amendment right to wear t-shirts critical of homosexuality while on school grounds.<sup>5</sup> Citing *Tinker*, Judge Posner reasoned that the Indian Prairie School District (the “District”) did not provide enough facts that would reasonably lead schools officials to forecast substantial disruption and, in turn, could not infringe on the rights of religious free speech of students.<sup>6</sup> This Note argues however, that the Seventh Circuit misapplied the *Tinker* standard by failing to examine the fact pattern through the second aspect

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<sup>1</sup> *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969). See *infra* Part II for a discussion of *Tinker* and its progeny.

<sup>2</sup> *Id.* at 513.

<sup>3</sup> See *Recent Case: Constitutional Law—Freedom of Speech—Ninth Circuit Upholds Public School’s Prohibition of Anti-Gay T-Shirts*, 120 HARV. L. REV. 1691 (2007) (noting that the Supreme Court has only addressed the topic head-on twice since *Tinker*).

<sup>4</sup> *Zamenick v. Indian Prairie School District #204*, 2011 WL 692059, Mar. 1, 2011. The appeal heard by the Seventh Circuit was a consolidation of two appeals, of which Posner refers to as functionally one appeal that will be treated as such.

<sup>5</sup> *Id.* at 8.

<sup>6</sup> *Id.* at 2 (noting that the District could have cited, among other things, a decline in test scores, an upsurge in truancy).

of the **disjunctive** *Tinker* holding—the invasion of rights justification.<sup>7</sup> Finally this Note will suggest the Seventh Circuit should look to its sister court—the Ninth Circuit—for guidance as to the appropriate standard and application of the *Tinker* test.

## II. HISTORY OF THE FIRST AMENDMENT AND REGULATION OF STUDENT SPEECH

In *Tinker*, school administrators in Des Moines, Iowa sought to punish students who wore black armbands in silent protest of the Vietnam War.<sup>8</sup> Upholding the students' First Amendment right to wear the armbands, the Court emphasized that there was no evidence that the silent protest concerned speech that intruded upon the work of the schools or the rights of other students.<sup>9</sup> Noting that this is the very type of speech the First Amendment sought to protect, the Court did, however, provide guidance, albeit ambiguous, as to when a school can curtail a student's 1<sup>st</sup> Amendment right to expression—when it involves a substantial disorder or invasion of the rights of others.<sup>10</sup>

Since *Tinker* courts have struggled to apply this standard and strike an appropriate balance between the free speech rights of students—including protecting the marketplace of ideas—and the special need to maintain a safe, secure and effective learning environment to educate the future leaders of the Nation.<sup>11</sup> In *Bethel School District No. 403 v. Fraser*<sup>12</sup>, the United States Supreme Court upheld the suspension of a high school student who employed an

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<sup>7</sup> See *infra* Part IV for a detailed discussion on the Seventh Circuit's misapplication of *Tinker*.

<sup>8</sup> *Tinker*, 393 U.S. at 504

<sup>9</sup> *Id.* at 508 (noting that the students experienced a few negative comments but there were no actual threats or acts of violence on school premises.)

<sup>10</sup> *Id.* at 513. Judge Posner, the author of the *Zamecnik* opinion concedes that *Tinker* has not proved to be a model of clarity in its application. *Zamecnik*, 2011 WL 692059 at 3.

<sup>11</sup> See *e.g.*, *Harper v. Poway United Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006) (recognizing the competing interests public schools have in educating tolerant, informed citizens while not unconstitutionally infringing on their First Amendment rights).

<sup>12</sup> 478 U.S. 675 (1986).

“elaborate, graphic and sexually explicit sexual metaphor” at a high school assembly.<sup>13</sup> Two years later the Supreme Court further restricted *Tinker’s* pro-First Amendment stance in *Hazelwood Sch. Dist. v. Kuhlmeier*<sup>14</sup> holding that school sponsored publications can be regulated by the school if the school has a legitimate pedagogical concern in regulating the speech.<sup>15</sup>

Most recently, the Supreme Court held in 2007 that a school could take reasonable steps to safeguard those entrusted in their care from speech that can be reasonably regarded as promoting drug use in *Morse v. Frederick*.<sup>16</sup> Chief Justice Roberts determined that two important principles can be derived from *Hazelwood* and *Bethel* that illuminated a more contemporary reading of *Tinker* and guided the Court’s opinion in *Morse*: (1) students do not shed their constitutional rights at the public school gates, but they are not absolute or automatically coextensive to adults in other settings; and (2) the substantial disruption “prong” of *Tinker* is not definitive.<sup>17</sup>

Judge Posner’s almost outright reliance on the outdated logic of *Tinker* and its substantial disruption test is inconsistent with the subsequent precedent and increasing recognition of school autonomy in protecting all students from insidious comments. Although the factual situations and nature of speech at issue in the *Tinker-Bethel-Hazelwood-Morse* strand of cases differ from those in *Zamecnik*, they are tantamount in understanding how *Tinker* has been applied and marginalized by the Supreme Court during the past 40 years.

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<sup>13</sup> *Id.* at 678. The Court held that it was within the school’s authority to impose sanctions in response to the student’s lewd and offensive speech.

<sup>14</sup> 484 U.S. 260 (1988).

<sup>15</sup> *Id.* at 273. In *Hazelwood* the principal of the school chose to cut stories about teenage pregnancy and divorce after determining that some of the students may not be mature enough to handle the information.

<sup>16</sup> 551 U.S. 393 (2007). The student in *Morse* was at an off campus, school-sponsored Olympic Torch Relay in Juneau Alaska, en route to Salt Lake City, where he held a banner that read BONG HiTS 4 JESUS.

<sup>17</sup> *Id.* at 394. It is important to note that the student’s speech in *Bethel* would have undoubtedly been protected if he was outside of the school setting, the student’s actions in *Morse* would have been acceptable if he was not at a school sponsored event, and the principal’s action in *Hazelwood* directly ignores *Tinker* instead choosing to emphasize the school’s right to limit dissemination of student expression as long it is reasonably related to a legitimate pedagogical concern.

One final case, *Harper v. Poway United School District*,<sup>18</sup>—a 2006 Ninth Circuit decision factually on par with *Zamecnik*—is particularly helpful in determining the appropriate standard for evaluating whether a school can restrict the religious free speech rights of students who wear clothing critical of homosexuality.<sup>19</sup> Using the “rights of others” prong of *Tinker*, the Court held, “[p]ublic school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses.”<sup>20</sup> The Ninth Circuit’s analysis concluded that Harper’s t-shirt infringed upon other students in the most fundamental way by denying the right to “be secure and to be left alone.”<sup>21</sup>

### III. DISCUSSION

The question of how to strike the appropriate balance between protecting individual free speech rights and protecting a student population from derogatory expressions arose in the Seventh Circuit when two students at Neuqua Valley High School (“NVHS”), a large public high school located in Naperville, Illinois brought suit against the District in 2007 seeking a preliminary injunction allowing them to wear t-shirts expressing their religious opposition to homosexuality.<sup>22</sup> After four years of fierce debate, decisions, appeals, and confusion, the Seventh Circuit Court of Appeals has recently ruled in the plaintiffs’ favor allowing them to

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<sup>18</sup> 445 F.3d 1166 (9th Cir. 2006). In *Harper* the school prohibited a student from wearing a t-shirt that stated “BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD CONDEMEND” on the front and “HOMOSEXUALITY IS SHAMEFUL, Romans, I:27” on the back. *Id.* at 1170.

<sup>19</sup> See *infra* Part IV for a detailed analysis of *Harper* in light of *Zamecnik*.

<sup>20</sup> *Harper*, 445 F.3d. at 1178.

<sup>21</sup> Marcia E. Powers, *Unraveling Tinker: The Seventh Circuit Leaves Student Speech Hanging By a Thread*, 4 SEVENTH CIRCUIT REV. 215 (2008) (citing *Harper*, 445 F.3d. at 1178).

<sup>22</sup> *Zamecnik v. Indian Prairie Sch. Dist.* #204, 2007 WL 1141597.

wear the t-shirts on school grounds. This Section will discuss the key facts, the complex procedural history of the case, and the holding and rationale of Judge Posner’s opinion.<sup>23</sup>

#### A. KEY FACTS

The Gay/Straight Alliance student group at NVHS annually participates in a “Day of Silence” to protest anti-gay discrimination and express support for tolerance of homosexuals.<sup>24</sup> In 2006, then junior Heidi Zamecnik, chose to remain silent the day following the “Day of Silence” in protest of the “Day of Silence” and in support of the “Day of Truth,” an event sponsored by the Alliance Defense Fund—an organization whose mission is to spread the Gospel through the legal defense of religious freedom, sanctity of life, marriage, and the family.<sup>25</sup> In addition to remaining silent, she wore a t-shirt that stated “Be Happy, Not Gay” on the back.<sup>26</sup> Unidentified students complained to school staff about Zamecnik’s shirt prompting a meeting with her and the Dean of Students.<sup>27</sup> The Dean advised Ms. Zamecnik that some students were offended by her shirt, spoke with Zamecnik’s mother on the phone, and crossed out the “Not Gay” part of her shirt.<sup>28</sup>

#### B. THE PROCEDURAL HISTORY

In March of 2007 Zamecnik and sophomore classmate Alexander Nuxoll, through their parents, filed a verified complaint and moved for a Preliminary Injunction on April 4, 2007 seeking to prohibit the District from precluding them from wearing t-shirts critical of

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<sup>23</sup> See *infra* Part III.A for a discussion of key facts, Part III.B for a review of the procedural history and III.C for an examination of the Seventh Circuit’s opinion.

<sup>24</sup> *Zamecnik*, 2007 WL 1141597 at 1 (noting that NVHS has participated since 2003). The Day of Silence is a nationally recognized event where schools and students voluntarily chose to stand in solidarity with their peers and friends. The symbolic message is one of inclusion that seeks to promote equality and awareness of anti-gay bullying. See <http://dayofsilence.org> (last visited Apr. 9, 2011)

<sup>25</sup> *Zamecnik*, 2007 WL 1141597 at 2; See also <http://www.alliancedefensefund.org/About> (last visited Apr. 9, 2011). It should be noted that the Alliance Defense Fund also served as Plaintiffs’ counsel during the course of this litigation.

<sup>26</sup> *Zamecnik*, 2007 WL 1141597 at 2

<sup>27</sup> *Id.* at 5

<sup>28</sup> *Id.*

homosexuality on the 2007 Day of Truth.<sup>29</sup> Relying on the Ninth Circuit decision in *Harper*, District Court Judge William Hart issued a memorandum and order denying the plaintiffs' motion holding that NVHS had a legitimate pedagogical interest in promoting policies of tolerance toward and respect for differences among students.<sup>30</sup> On January 8, 2008, Nuxoll filed an appeal of Judge Hart's order to the Seventh Circuit Court of Appeals.<sup>31</sup> The Seventh Circuit reversed the District Court's order with directions to enter a preliminary injunction, limited to a t-shirt reciting the specific phrase "Be Happy, Not Gay" on the 2008 Day of Truth.<sup>32</sup> Judge Posner, the author of the opinion, recognized that neither party will be content with the limited injunction and recommended further proceedings to determine whether a broader injunction should be issued as permanent relief.<sup>33</sup>

On September 9, 2009, Zamecnik and Nuxoll filed a Motion for Summary Judgment requesting nominal damages, declaratory relief, and a permanent injunction allowing Nuxoll—at this point, a senior—to express this message through his t-shirt and other mediums at NVHS.<sup>34</sup> The District Court granted the Motion for Summary Judgment, in part, allowing a permanent injunction on April 29, 2010 and the defendants filed a notice of appeal on June 18, 2010.<sup>35</sup>

### C. THE DECISION

Judge Posner writing for the Seventh Circuit, for the second time in two years, issued an opinion in favor of the Plaintiffs' right to display the expression "Be Happy, Not Gay" on school

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<sup>29</sup> Brief of the Defendant-Appellant Indian Prairie School District #204, Board of Education, *Zamecnik v. Indian Prairie Sch. Dist.*, 2011 WL 692059 (Aug. 2, 2010) (hereinafter "Brief of the Defendant.")

<sup>30</sup> *Zamecnik*, 2007 WL 1141597 at 10 (noting that the language on Zamecnik's shirt was not as invective as that in *Harper*, but a principal nonetheless needs discretion in prohibiting such negative statements about homosexuals). The plaintiffs then amended their complaint and sought another injunction with a more expansive request including protection bringing and discussing his Bible at school concerning their beliefs about homosexuality.

<sup>31</sup> Brief of the Defendant, *Zamecnik v. Indian Prairie Sch. Dist.*, 2011 WL 692059 at 4 (Aug. 2, 2010).

<sup>32</sup> *Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668, 676 (7th Cir. 2008).

<sup>33</sup> *Id.* The District Court entered the very limited preliminary injunction and dismissed all other related claims after Defendant's motion to dismiss the Plaintiffs' second amended complaint. Brief of the Defendant, *Zamecnik v. Indian Prairie Sch. Dist.*, 2011 WL 692059 at 4 (Aug. 2, 2010).

<sup>34</sup> Brief of the Defendant, *Zamecnik v. Indian Prairie Sch. Dist.*, 2011 WL 692059 at 4 (Aug. 2, 2010).

<sup>35</sup> *Id.* at 5.

grounds.<sup>36</sup> The Court framed the issue by laying out the competing interests—the plaintiffs’ constitutional right to make non-inflammatory negative statements about members of any group and the school’s countervailing interest in protecting its students from offensive speech by their classmates.<sup>37</sup>

Judge Posner declared that people do not have a legal right to prevent criticism of their way of life, despite his explicit acknowledgment of the District’s argument that they were just protecting the rights of their students against whom derogatory comments were directed.<sup>38</sup> The Court then shifted its attention *Tinker* holding that the School District would have to present facts which might reasonably lead school officials to forecast substantial disruption.<sup>39</sup> The Court distinguished *Harper* claiming the phrase “Be Happy, Not Gay” was not derogatory or demeaning but rather simply “tepidly negative.”<sup>40</sup>

The Court rather callously proceeded to assert that the case law does not “establish a generalized hurt feelings defense to a high school’s violation of the First Amendment right of its students.”<sup>41</sup> The Court disregarded the School District’s evidence by reasoning the previous incidents of harassment of homosexuals were vague and unsubstantiated,<sup>42</sup> the actions directed at

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<sup>36</sup> *Zamecnik*, 2011 WL 692059 at 7. The Seventh Circuit also awarded nominal monetary damages in the amount of 25 dollars to the Plaintiffs because Zamecnik’s shirt was defaced and Nuxoll’s desire to wear the shirt was thwarted repeatedly in 2007. *Id.* Although an issue on appeal, this Note will not address the alleged mootness of the injunction as argued by the School District because Zamecnik had graduated and Nuxoll was graduating the following month.

<sup>37</sup> *Zamecnik*, 2011 WL 692059 at 2.

<sup>38</sup> *Id.* (citing *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 394 (1992)). The *R.A.V.* opinion did not pertain to a school environment.

<sup>39</sup> *Zamecnik*, 2011 WL 692059 at 2 (citing examples of a substantial disruption to include decline in students’ test scores, an upsurge in truancy or other symptoms of a sick school). See *infra* Part IV arguing that the School District did not have a chance to present such information since the issue was decided by Summary Judgment.

<sup>40</sup> *Id.* at 3 (claiming the words were not fighting words nor would they likely poison the educational atmosphere).

<sup>41</sup> *Zamecnik*, 2011 WL 692059 at 3 (citing *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243 (3d. Cir. 2002) that held that the speech at issue must give rise to a well-founded fear of disruption or interference with the rights of others).

<sup>42</sup> *Zamecnik*, 2011 WL 692059 at 5 (noting that the deposed school official could not confirm the details of the incidents or recall the disciplinary actions taken).

Ms. Zamecnik were protected by the Heckler's veto,<sup>43</sup> and the expert psychologist's assertion that the slogan was particularly insidious as mere speculation not supported by facts.<sup>44</sup> Ultimately, the Court concluded that the tepidly negative "Be Happy, Not Gay" was protected under the First Amendment right to free speech and affirmed the District Court's grant of summary judgment in favor of the plaintiffs.<sup>45</sup>

#### IV. ANALYSIS

The Court in *Zamecnik* issued an opinion that not only dials back 40 years of evolving jurisprudence, but at times even contradicts itself. Posner explicitly states that school authorities are entitled to exercise discretion in determining when student speech crosses the line between hurt feelings and substantial disruption of the educational mission because of their relevant knowledge and responsibility for the consequences.<sup>46</sup> He also states he is sympathetic to an expansive interpretation of fighting words when the speech in question is that of students.<sup>47</sup> After noting the great expertise and scope of authority normally given to schools to shape their basic educational mission, he nevertheless sides with the students based on the antiquated and hard to apply substantial disruption test.<sup>48</sup>

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<sup>43</sup> *Zamecnik*, 2011 WL 692059 at 5 (noting that statements met by violence or threats or other unprivileged retaliation by persons offended by them cannot be lawfully suppressed because of the conduct).

<sup>44</sup> *Zamecnik*, 2011 WL 692059 at 7 (asserting that the expert's 38 page report did not meet Rule 702 of the Federal Rules of Evidence)

<sup>45</sup> *Id.* at 8.

<sup>46</sup> *Zamecnik*, 2011 WL 692059 at 3; *See also Nuxoll*, 523 F.3d at 671 (When first hearing the case Posner even notes that "a judicial policy of hands off (within reason) of school regulation of student speech has much to recommend it").

<sup>47</sup> *Zamecnik*, 2011 WL 692059 at 3. Posner then recognized the previous Seventh Circuit decision *Muller ex. rel. Muller v. Jefferson Lighthouse School*, 98 F.3d 1530, 1538–39 (7th Cir. 1996) that held that the younger the children, the more latitude the schools have in limiting expression. Posner devotes attention to the fact that many of the students at NVHS will soon have to vote on the "highly controversial" issue of gay marriage. *Zamecnik*, 2011 WL 692059 at 2. Posner does not, however, recognize that a high school contains as many impressionable, immature 14 year olds as it does 18 year olds.

<sup>48</sup> *See generally*, Arthur S. Leonard, *Another Shot in the T-Shirt Wars: 7th Circuit Affirms Damage Award to High-Schoolers Who Sought to Wear Anti-Gay T-Shirts*, Leonard Link, Mar. 3, 2011, <http://newyorklawschool.typepad.com/leonardlink/2011/03/another-shot-in-the-t-shirt-wars-7th-circuit-affirms-damage-award-to-high-schoolers-who-sought-to-we.html>

NVHS in fact did have an anti-harassment policies in their student handbook that read that students could not wear “garments...which are derogatory, inflammatory...or discriminatory” or possess literature or images that refer to race...sexual orientation, or disability....”<sup>49</sup> Additionally, the Seventh Circuit has previously emphasized the school’s pedagogical interests and applied a highly deferential standard to the review of the restrictions school officials place on student speech.<sup>50</sup> Schools must be given space and discretion in order to properly perform their traditional function of inculcating the habit and manners of civility into their students.<sup>51</sup>

Furthermore, the Seventh Circuit improperly affirmed the injunction before trial asserting the school had not presented enough evidence that it had "a reasonable belief" the T-shirt would cause "substantial disruption."<sup>52</sup> There was limited pre-trial discovery but the issue was not tried as to the substantial disruption, nor even considered for the other *Tinker* rights of others prong.<sup>53</sup> The District provided evidence of the hate messages received by Zamecennik on social media websites and cited specific examples of students who were upsets by the message of the shirt.<sup>54</sup> The District did have a psychologist, who despite Posner’s quick dismissal, is an expert on the psychology of students and the effects of this verbal bullying, even in this “tepid” form, yet his

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<sup>49</sup> See *Zamecnik*, 2007 WL 11141597. These provisions, under the findings of fact section of Judge Hart’s memorandum and order also detail that this policy was enacted to numerous disruptive situations the school has faced arising from derogatory, offensive or demeaning statements. *Id.* at 3.

<sup>50</sup> See e.g. *Brandt v. Bd. of Educ. of Chicago*, 480 F.3d 460 (7th Cir. 2007) (involving a school’s refusal to allow eighth graders to wear t-shirts that protested the official class shirt); *Gerntezke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464 (concerning a high school that forbid a cross to be painted on a school mural).

<sup>51</sup> First Amendment aside, a point that has been consistently cited from *Brown v. Board* through the present.

<sup>52</sup> Dana Rudolph, *Legal Matters: Courts Struggle to Find Balance in School Cases*, BAY AREA REPORTER, Apr. 7, 2011, available at, <http://www.ebar.com/news/article.php?sec=news&article=5620>

<sup>53</sup> See *id.* Lead attorney for the District, Jack Canna, stated, “We felt there were issues related to the impact these messages have on kids,” but the court “just wasn’t impressed with the severity or derogatory nature of this piece of expression.”

<sup>54</sup> When the Seventh Circuit first heard the case in 2008, they acknowledged that the psychological effects of a derogatory message as set forth in *Morse* was permissible to take into consideration as a substantial concern. *Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668, 674.

testimony was never heard or tested.<sup>55</sup> To support the notion that Nuxoll and Zamecnik did not intend to make a tepidly negative statement is evidenced by the fact that both students claimed themselves the shirt was negative and intended to be an overt statement against homosexuality.<sup>56</sup>

The kaleidoscope of fact patterns in student speech cases often render a direct comparison to *Tinker/Frasier/Hazelwood* an exercise in futility.<sup>57</sup> *Harper* on the other hand—a factually identical case in the Ninth Circuit—properly set aside the vague substantial disruption standard that proves tougher to forecast and instead focused on the interference with the rights of others, which is more at issue with insidious comments directed at homosexuals.<sup>58</sup> It is insignificant that the comments in *Harper* and *Zamecnik* were not directed at an individual, but rather general comments because, as *Tinker* recognized, there is a fundamental right be secure and left alone.<sup>59</sup>

## V. CONCLUSION

Court precedent is not static, nor is our understanding of the First Amendment, and more importantly its application. It demands that courts constantly reexamine the negative effects that demeaning statements and other types of bullying have upon students to ensure the growing

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<sup>55</sup> See Brief Amicus Curiae The American Civil Liberties Union of Illinois Inc. in Support of Neither Party, (Feb. 15, 2008) (No. 08-1050), 523 F.3d 668. The ACLU chose to support neither party but instead focused on the importance of a trial to explore the impact of derogatory speech which provides “appropriate “play in the joints” between, on the one hand, potential lawsuits brought by student speakers alleging excessive restriction of protected derogatory speech, and on the other hand, potential lawsuits brought by minority students alleging insufficient restriction of unprotected harassing speech.”

<sup>56</sup> See Brief Amicus Curiae The American Civil Liberties Union of Illinois Inc. in Support of Neither Party, (Feb. 15, 2008) (No. 08-1050), 523 F.3d 668 (noting that they were wary of Nuxoll’s intentions—an issue that could have been unpacked at trial).

<sup>57</sup> Brief Amicus Curiae Illinois Association of School Boards, Inc. in Support of Indian Prairie School District, (Mar. 12, 2008) (No. 08-1050), *Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668 (7<sup>th</sup> Cir. 2008) (explaining that the BONG HiTS 4 JESUS, the illegal drug promotion in *Morse* did not fit the previous strand of cases, but ran contrary to the school’s mission of curbing illicit drug use and an appropriate exception was made).

<sup>58</sup> See Andrew Etter, Casenote, *Student Speech, the Rights of Others, and a Dual- Reasonableness Standard: Zamecnik ex rel. Zamecnik v. Prairie District No. 204 Board of Education*, 2007 WL 1141597 (N.D. Ill.), 76 U. CIN. L. REV. 1343, 1348 (2008) (arguing that the Ninth Circuit relied on a broader, more meaningful standard than the Seventh despite nearly identical fact patterns).

<sup>59</sup> *Harper*, 445 F.3d at 1178 (quoting *Tinker*, 393 U.S. at 508). The Court expands and states that “[b]eing secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.”).

difficulty faced by school districts trying to maintain a civil and orderly environment conducive to fundamental educational purposes does not spin out of control.<sup>60</sup> The Seventh Circuit perverted *Tinker* without a proper hearing on the actual impact on the rights of others prong set forth in *Tinker* and as applied in *Harper*.

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<sup>60</sup> See Brief of the Defendant-Appellant Indian Prairie School District #204, Board of Education, *Zamecnik v. Indian Prairie School District*, 2011 WL 692059 (Aug. 2, 2010) (claiming the issue of specific speech here is narrow, but when viewed in the larger context, this problem necessitates a serious look).