THE UNCERTAIN CURRENTS OF T-SHIRT EXPRESSION IN THE UNITED STATES OF AMERICA[1]

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I Introduction

The United States of America (U.S.) Supreme Court's navigation of the turbulent waters of student expressive rights during the past three decades has produced three prominent decisions as reference points for lower courts. However, the topography of student expression has continued to change and these reference points have not always provided clear direction when federal courts must address new forms and venues of expression.[2] This article discusses the changing terrain of student expression and the difficult task that federal courts have in navigating new expressive terrain using the Supreme Court's three reference point decisions. More importantly though, as courts have struggled to define standards for acceptable student expression, that struggle has served to compound the daily challenge facing school officials who must apply this uncertain and unclear judicial set of standards to individual acts of student expression.

Tinker v. Des Moines Independent School District (*Tinker*)[3] decided almost thirty years ago still represents the single most influential Supreme Court reference point regarding the rights of students in public schools, if for no other reason than that it was the first decision to introduce student constitutional rights into the public schools.[4] Occurring as it did at a time when the Court had already expressed concern for the rights of minors in other settings,[5] *Tinker* served to reshape the relationship between students and public school administrators. The Supreme Court in Tinker determined that school officials could not punish students wearing black armbands for reasons grounded in solely in 'undifferentiated fear or apprehension of disturbance'.[6] *Tinker* imposed on school administrators two responsibilities: (1) to determine whether the content of student conduct represented expressive activity; and, (2) assuming that expressive activity existed, to determine whether the expressive content 'materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school'.[7] Post-*Tinker* federal courts have struggled with public school efforts to address student expression considered to be 'disrespectful, tasteless, or offensive', a standard that falls short of *Tinker*.[8]

Seventeen years after *Tinker*, the Supreme Court, in *Bethel School District No. 403 v Fraser* (*Fraser*)[9] introduced a second reference point for addressing student expression containing 'pervasive sexual innuendo'.[10] Observing that 'it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse',[11] the Court upheld the authority of school boards to 'inculcate the habits and manners of civility as values in

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themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation'.[12]

Two years after *Fraser*, the Supreme Court, in *Hazelwood School District v Kuhlmeier* (*Hazelwood*),[13] introduced its third reference point that permitted school administrator control over student expression in activities that 'may fairly be characterized as part of the school curriculum'.[14] The Court reasoned that, as long as school officials' conduct in addressing student expression in the curriculum is 'reasonably related to legitimate pedagogical concerns,[15] ... educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school'.[16]

Tinker, *Fraser*, and *Hazelwood* have provided federal courts with three reference points for addressing student speech, but as reflected in a recent Second Circuit decision, *Guiles v Marineau* (*Guiles*),[17] the decision how to apply these points is far from clear. The purposes of this article are to review the Second Circuit's decision in *Guiles* involving T-shirt expression, to analyse the approach taken in other federal courts concerning student expression in general and T-shirt expression in specific, and to consider what approach would best serve the interests of public school administrators and students in public schools.

The focus of this article is exclusively on the law of the United States. The number of recent federal court cases in that country reflect the lack of clarity in the law regarding the balance between the rights of students and the obligations of school officials to provide an appropriate school environment. In the U.S. legal hierarchy, the highest court of review is the U.S. Supreme Court as reflected in the *Tinker*, *Hazelwood*, and *Fraser* decisions discussed briefly above.[18] However, as frequently happens in the United States, the need for Supreme Court intervention in a legal area is prompted by differences among courts at the federal circuit courts of appeal level immediately below the Supreme Court. While litigation begins in the federal courts of general jurisdiction, federal district courts, decisions by justices at the thirteen federal courts of appeal draw the most interest because their decisions are binding on the district courts in a number of states.[19] The Supreme Court's most recent decision in *Morse v Frederick*[20] sustained the authority of school officials under *Fraser* and *Hazelwood* to punish expression that is in opposition to a public school's anti-drug message. In essence, the Court found that a student's banner displayed at a school event constituted school-sponsored speech and was not entitled to Tinker's disruption standard protection.

A *Guiles v Marineau: Facts of the Case*

A thirteen-year-old middle school student in Williamstown, Vermont wore a T-shirt to school containing an amalgam of images and text, criticising the U.S. President as a chicken-hawk president and accusing him of being a former alcohol and cocaine abuser.[21] To make its point, the shirt displayed small drawings depicting drugs and alcohol. The student, although home-schooled, attended the public middle school where he participated in music classes and the band. The student played trombone with the Vermont Youth Orchestra and was characterised as 'very articulate and mature for his age'.[22]

The school's student/parent handbook contained the following statement regarding student expression and offensiveness.

> Any aspect of a person's appearance, which otherwise constitutes a real hazard to the health and safety of self and others or is otherwise distracting, is unacceptable as an expression of personal taste. Example [Clothing displaying alcohol, drugs, violence, obscenity and racism is outside our responsibility guidelines as a school and is prohibited.][23]

The images and words on plaintiff's T-shirt that he had worn approximately once a week for two months went unreported until just prior to students left on a field trip when a parent complained to the school's student support specialist, the person responsible for enforcing school discipline. The support specialist, after gaining the assent of the superintendent, gave plaintiff three choices: '(1) turn the shirt inside out; (2) tape over the images of drugs and alcohol plus the word 'cocaine'; or (3) change shirts'.[24] Plaintiff chose not to go on the field trip but wore the shirt the following day and was sent home. The next day he wore the shirt again but 'covered the symbols depicting drugs and the word "cocaine" with duct tape … , wr[iting] "censored" on each piece of duct tape'.[25] The federal district court later noted that school officials had required other students to remove 'Budweiser' hats and T-shirts advertising alcohol, but plaintiff's shirt was the first article of censored clothing to include political content. Less than two weeks after censoring the T-shirt alcohol and drug references, plaintiff filed suit in federal district court challenging on free speech grounds the action of school officials.

II Federal District Court and Second Circuit Decisions

A *Federal District Court Decision*

The district court denied plaintiff injunctive relief to prevent the school from punishing him in the future for wearing the T-shirt. However, the court held that the school's initial act of censorship violated student's First and Fourteenth Amendment right to freedom of speech, and the school would have to expunge the plaintiff's disciplinary record related to that censorship. Although the court reached the merits of plaintiff's claim, it first determined that injunctive relief could be directed against school officials responsible for enforcing the censorship rule without also adding the school board as a defendant. The court reasoned that if plaintiff demonstrated that school officials had violated his constitutional rights 'the Court could enjoin the [individual] defendants from further acts of censorship'.[26]

In addressing plaintiff's censorship claim, the district court considered the three Supreme Court standards reflected in *Tinker*, *Fraser*, and *Hazelwood*.

> In general, if educators censor student speech based on its political content then, under *Tinker,* they must have specific grounds for suspecting that the speech will disrupt the educational environment. If the speech occurs in a school-sponsored forum, however, then *Hazelwood* applies and the censorship only needs to be reasonably related to educational goals. Finally, under *Fraser,* educators may censor speech if the censorship is unrelated to the political message of the speech and is intended only to ensure that the speech is not lewd or otherwise offensive.[27]

The *Guiles* district court eliminated the *Hazelwood* standard because plaintiff's 'T-shirt [was] not school-sponsored speech'.[28] In deciding whether to apply the *Fraser* or the *Hazelwood* standard, the court declared the central question to be 'whether the defendants have acted to censor a viewpoint or whether they have acted to censor a form of speech that is inappropriate for the middle school environment'.[29] If the former, school officials would have to produce evidence under *Tinker* that the political words on the T-shirt 'materially and substantially interfere[d] with

the educational environment'.[30] Because the court determined that the school could not produce evidence to satisfy the *Tinker* standard[31] and because, even after taping the words relating to drugs and alcohol, 'the shirt's anti-Bush message [was] still patently clear',[32] the court concluded that school officials '[had] acted pursuant to a neutral policy prohibiting dress bearing images of drugs and alcohol'.[33] After reaching the conclusion that the facts addressed 'a dress policy prohibiting images of drugs and alcohol that has been applied in a politically neutral manner', the court determined that '*Fraser* [was] applicable'[34] since the school's rule censored 'only the manner of speech rather than its substance'.[35] In the end, the district court distinguished between images of drugs and alcohol that the school could prohibit on plaintiff's T shirts under *Fraser* and comments about these items that could be prohibited only under *Tinker*. Because of this apparent confusion by school officials in addressing plaintiff's T shirt, the court directed that plaintiff's disciplinary record be expunged but did not grant injunctive relief against enforcement of the school policy.

B *Second Circuit Court Decision*

The Second Circuit affirmed the district court holding that the student's disciplinary record be expunged but vacated the district court's denial of declaratory judgment against enforcement of the policy. While the Second Circuit agreed with the district court that *Hazelwood* did not apply,[36] it disagreed with that court that *Fraser* applied to this set of facts. *Fraser*, the Second Circuit observed, permits schools to censor speech that is 'lewd', 'vulgar,' 'indecent,' or 'plainly offensive'.[37] The test, the Second Circuit reasoned, was not whether the 'images of a martini glass, a bottle and glass, a man drinking from a bottle, and lines of cocaine' were, as the district court had determined, '*offensive* or *inappropriate*', but whether they were 'lewd, vulgar, or indecent [or] ... plainly offensive'.[38] No one, the court of appeals concluded, would find the images 'lewd, vulgar, or indecent', because '[l]ewdness, vulgarity, and indecency normally connote sexual innuendo or profanity'.[39] This definition applied as well to 'plainly offensive' expression. To include within *Fraser*'s prohibition, expression that causes 'displeasure or resentment or is repugnant to accepted decency',[40] would, in effect, negate the Supreme Court's *Tinker* standard. After all, the Second Circuit reasoned, 'it could have been said that the school administrators in *Tinker* found wearing anti-war armbands offensive and repugnant to their sense of patriotism and decency'.[41] In effect, *Fraser* addressed 'the form and manner of speech, but does not address the content of the message'.[42] Thus, while 'the images of a martini glass, alcohol, and lines of cocaine [on plaintiff's T-shirt] … could be construed as insulting or in poor taste', they did not meet the 'plainly offensive' standard of *Fraser*.[43]

In addition to its concern that an expansive interpretation of *Fraser*'s 'plainly offensive' language could have the effect of 'eviscerate[ing] *Tinker*',[44] the Second Circuit was also concerned that the same language could be applied to a school's 'educational mission' or legitimate pedagogical concern under *Hazelwood*, in effect 'swallow[ing] *Hazelwood*'.[45] Concluding that neither *Fraser* nor *Hazelwood* applied, the Second Circuit held that *Tinker* did and, since the school admitted that the T-shirt had caused neither disruption nor confrontations, 'censorship of the images on Guiles's T-shirt violated his free speech rights'.[46] The Second Circuit went one step further though and rejected the school's 'no harm, no foul contention' claim that though they directed that the images be covered, the text and other images remained, and hence, the political message of the T-shirt was left intact.[47] In the absence of a violation of *Tinker*'s substantial disruption standard, the Second Circuit granted plaintiff's request for declaratory relief, finding that the school's dress code as applied to plaintiff violated his expressive rights. The court,

however, left unresolved 'whether images of illegal drugs and alcohol on a T-shirt that promotes drug and alcohol use could be censored under the Supreme Court's student-speech cases', in particular where, pursuant to *Hazelwood*, student images could be perceived as school sponsored under *Hazelwood*.[48]

III Analysis and Implications

The Second Circuit's decision in *Guiles* reflects the confusion regarding not only the appropriate standard to apply to student expression, but also the importance of factual interpretations that underlie application of a standard. As the court of appeals hinted in its opinion, the interpretation of student expression may well turn on such factual variables as the extent to which the students' words on T-shirts can be distinguished from visual images, the characterisation of the student expression, and the connection between the student's message and school sponsorship of that message. Theoretically, resolution of these factual questions should determine the appropriate *Tinker*, *Fraser*, or *Hazelwood* legal standard to apply. However, as is apparent from the district and court of appeals decisions in *Guiles*, federal courts disagree among themselves both as to the interpretation of facts in student expression cases and the application of a legal standard to the facts of those cases. This disagreement has resulted is a multi-dimensional analysis of student expression that, unfortunately, affords limited predictability for school administrators who must make decisions regarding the appropriateness of student expression.

Guiles highlights two legal problems for courts addressing student expression cases: defining the standards set forth by the Supreme Court in *Tinker*, *Fraser*, and *Hazelwood*; and, determining how the standards from these three cases interact with each other. The Second Circuit in *Guiles* reached one conclusion to these legal problems, but other federal courts have reached different results.

A *The Tinker, Fraser, and Hazelwood Standards*

1 *Tinker Standard*

The *Tinker, Fraser and Hazelwood* standards, fashioned as they were in the context of their own fact patterns, have not always been easy to apply to new sets of facts. *Tinker* dealt with four children's symbolic speech expressed through wearing black armbands in various Des Moines public schools where the principals had adopted a hastily fashioned rule, motivated by a concern to prevent in their schools the kind of violence that had occurred at anti-Vietnam War demonstrations throughout the country.[49] Although the armbands drew a variety of favorable and unfavorable student comments,[50] none of the student comments approached the Supreme Court's standard permitting school discipline only for conduct that '"materially and substantially interferes with the requirements of appropriate discipline in the operation of the school" and [] collid[es] with the rights of others'.[51] However, the Court, in dictum, suggested a narrowing of its standard, limiting it to situations involving 'the prohibition of expression of one particular opinion'.[52] Without elaborating, the Supreme Court observed that the principals' rule had not reached 'all symbols of political or controversial significance',[53] such as buttons relating to national political campaigns and Iron Crosses traditionally a symbol of Nazism,[54] leaving one to speculate whether the *Tinker* standard applied broadly to all expression regardless of content or only forms of expression involving the same content.

Post-*Tinker* federal cases reflecting the difficult task in applying *Tinker* have perhaps been best memorialised by Judge Newman's Second Circuit cryptic, yet cogent, comment in *Thomas v Board of Education, Granville Central School District* (*Thomas*)[55] that 'the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket'.[56] When *Fraser* reached the Supreme Court, Justice Stevens began his dissent in that case with the memorable words, 'Frankly, my dear, I don't give a damn', followed by his dismayed assessment that 'Clark Gable's four-letter expletive ... [can now be prohibited by school administrators] in classroom discussion and even in extracurricular activities that are sponsored by the school and held on school premises'.[57] Whether Justice Stevens accurately reflected the majority's standard in *Fraser* is relevant in light of the Second Circuit's interpretation of that standard in *Guiles*.

2 *Fraser Standard*

In *Fraser*, the Supreme Court upheld discipline for a student who delivered a student election campaign speech in a school assembly where attendance was voluntary.[58] The high school disciplinary rule invoked against Fraser prohibited 'Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures'.[59] Although Fraser's speech did not use profane language, the majority characterised Fraser's speech as an 'elaborate, graphic, and explicit sexual metaphor'.[60] Declaring that 'a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse',[61] the Court opined that a school does not have to 'tolerate[] lewd, indecent, or offensive speech and conduct' and, in particular, '[t]he pervasive sexual innuendo in Fraser's speech [that] was plainly offensive to both teachers and students'.[62] The Second Circuit in *Guiles* discounted the application of the *Fraser* standard to its case because the content of T-shirt message did not involve sexual innuendo, but other federal circuits have applied *Fraser* to student expression that did not necessarily contain sexual content.

Federal courts of appeal have struggled with the interpretation of *Fraser*'s categories of nonprotected speech, especially 'plainly offensive'. The Ninth Circuit in *Frederick v Morse* (*Frederick*)[63] addressed a school ten-day suspension of a student who displayed, while watching during school time the Olympic torch passing his school, a banner with the words, 'Bong Hits 4 Jesus'.[64] In vacating the federal district court's summary judgment for the school district, the Ninth Circuit reversed the district court's reliance on *Fraser* and observed that '[t]he phrase 'Bong Hits 4 Jesus' may be funny, stupid, or insulting, depending on one's point of view, but it is not 'plainly offensive' in the way sexual innuendo is'.[65] The Fourth Circuit in *Newsom v Albemarle County School Board (Newsom)*[66] reversed a federal district court decision granting summary judgment to a student suspended for wearing a T-shirt with 'three black silhouettes of men holding firearms superimposed on the letters "NRA" positioned above the phrase "SHOOTING SPORTS CAMP"'.[67] In overturning the district court's reliance on *Fraser*, the Fourth Circuit observed that *Fraser* accorded to school boards the authority to determine 'what manner of speech … is inappropriate' for purposes of encouraging the 'fundamental values of "habits and manners of civility"'.[68] However, while noting that school board authority to censor speech under *Fraser* applies to speech that is 'lewd, vulgar, indecent, or plainly offensive', the Fourth Circuit stopped short of limiting *Fraser* to speech 'filled with sexual metaphor'[69] and instead referenced other *Fraser* language that school discipline of student expression is limited to speech 'unrelated to any political viewpoint'.[70] In other words, the Fourth Circuit, in reversing the school's discipline of the student, opined that *Fraser* applied only to the manner of expression of 'plainly offensive' speech, not the content or viewpoint of that speech. In *Saxe v State College Area School District*

(*Saxe*),[71] the Third Circuit, in finding the school district's anti-harassment policy prohibiting a wide range of kinds of conduct and speech to be unconstitutionally overbroad,[72] rejected the district's reliance on a broad interpretation of *Fraser*, observing that '*Fraser* permits a school to prohibit ["lewd", "vulgar", "indecent", and "plainly offensive" speech] ... that "offend[s] for the same reasons that obscenity offends."'.[73] On the other hand, the Sixth Circuit, in *Boroff v Van Wert City Board of Education* (*Boroff*),[74] upheld a high school's dress code and the principal's refusal to permit a high school student to wear various Marilyn Manson T-shirts while in school.[75] The court of appeals upheld the district court's interpretation of *Fraser* 'that [a] school may prohibit a student from wearing a T-shirt that is offensive, but not obscene, on school grounds, even if the T-shirt has not been shown to cause a substantial disruption of the academic program'.[76]

These courts of appeal decisions reflect judicial lack of agreement regarding the definition of the *Fraser* categories. However, the assumption in all of these cases is that the offensive expression has been introduced by the student. Would the results be the same if a student's T-shirt message simply emulated a school's 'exposure [of students] to vulgar and offensive language and obnoxiously debasing portrayals of human sexuality[?]'.[77] In a non-T-shirt case, *Brown v Hot, Sexy and Safer Productions, Inc*. (Hot, Sexy, and Safer),[78] the First Circuit, in a case of first impression, noted that school officials permitting expression (part of the school's AIDS Awareness program)[79] in the form of 'sexually explicit monologues and [student] participat[ion] in sexually suggestive skits'[80] by a third party, that, presumably, would otherwise have been impermissible under Fraser if done by a student,[81] did not 'create a private cause of action [for damages] against state officials for [student] exposure to patently offensive language'.[82] What did not get addressed in *Hot, Sexy and Safer* was whether a school's creation of such a forum for third party sexually explicit expression would also open a forum for student expression using the same sexually explicit language permitted for the third party. In other words, could students have worn T-shirts displaying the graphic language and symbols used in the school assembly in *Hot Sexy, and Safer* without facing discipline under the *Fraser* standard? While students have raised an as-applied challenge to T-shirt messages where similar messages worn by other students have not been punished, [83] no case as yet has addressed whether such a challenge would be appropriate where a school that has permitted sexual explicitness, as in *Hot, Sexy, and Safer*, attempts to punish, under *Fraser*'s lewd, vulgar, indecent, or plainly offensive standard, a student wearing a T-shirt displaying the same explicitness. In effect, must a school that permits sexual explicitness similar to *Hot, Sexy, and Safer* forego use of the *Fraser* standard in disciplining students for display of similar sexual explicitness and, instead, limit itself solely to use of the *Tinker* disruption standard?

The recent Ninth Circuit decision in *Harper v Poway Unified School District* **(***Harper)*[84]reflects how one federal court of appeals has chosen to bridge the *Tinker* and *Fraser* standards.[85] In *Harper*, the Ninth Circuit reviewed both the *Fraser* and *Tinker* standards in denying injunctive relief to a student wearing to school a T-shirt during a Day of Silence sanctioned by the school to demonstrate tolerance for sexual orientation. On the front of the T-shirt was handwritten, 'I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED', and on the back, 'HOMOSEXUALITY IS SHAMEFUL "Romans 1:27"'.[86] Rather than relying on the normal *Tinker* disruption restriction on student expression,[87] the *Harper* court of appeals looked to different *Tinker* language, 'that schools may prohibit speech that "intrudes upon … the rights of other students"'.[88] Although the *Harper* court of appeals gave lip service to *Fraser* Court dictum regarding 'freedom to advocate unpopular and controversial views in schools and classrooms',[89] it found the T-shirt inconsistent with the school's 'inculcation of "fundamental values of habits and manners of civility essential

to a democratic society"'.[90] *Harper* reflects the slippery relationship, then, between *Tinker* and *Fraser* and suggests in the context of the *Hot, Sexy, and Safer* discussion in the prior paragraph that a school's choice of a message does not have to translate necessarily into a student's right to present a message on the same topic and in the same forum.[91]

School expression of their own message invokes the third of the Supreme Court standards in *Hazelwood*. This standard affords schools another rationale for supporting their expressive decisions under the broad rubric of curriculum without having to expand the expressive rights of students.[92] In *Harper*, the Ninth Circuit, in refusing to grant free speech protection to the student's T-shirt invoked *Hazelwood* for the principle that, '[a] school need not tolerate student speech that is inconsistent with its basic educational mission, [ ] even though the government could not censor similar speech outside the school'.[93]

3 *Hazelwood Standard*

Hazelwood, decided two years after *Fraser*, afforded another opportunity for the Supreme Court to reconsider the application of the *Tinker* standard to schools. In *Hazelwood*, the Supreme Court held that school officials have control over school curriculum with reduced free speech limitations by students on that control. In this case brought by three students regarding a school principal's excising two pages of a journalism course school newspaper out of concern for privacy and lack of good journalism practice in two of the articles, the Court distinguished between 'a student's personal expression that happens to occur on the school premises [private speech]' (e.g., a student's black armband as in *Tinker*) and 'educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school'.[94] In other words, because a school's restriction of student expression as part of its implementation of curriculum did not require that the school prove the likelihood of disruption before restricting student expression, school officials were entitled to regulate publication contents that were part of the school curriculum 'in any reasonable manner'.[95] The *Hazelwood* Court determined that whether 'a school [is required] to tolerate particular student speech' under *Tinker*'s disruption standard[96] did not reach the 'the question [in *Hazelwood*] whether the First Amendment requires a school affirmatively to promote particular student speech'.[97] The Court held that 'educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns'.[98] Thus, in terms of the authority of school officials to exercise control over expression within schools, *Hazelwood* introduced into the matrix of free speech analysis the concepts of 'school sponsored', 'imprimatur of the school', and 'legitimate pedagogical concerns' as the key terms to consider in determining whether a school can restrict student expression.

Although *Hazelwood* does not always factor in T-shirt cases, it has nonetheless become the method of analysis used by federal circuit courts of appeal in other kinds of student expression cases. Unlike many cases involving *Tinker* and *Fraser* standards, courts applying the *Hazelwood* generally discuss the kind of forum in which the student expression occurs.[99] Since cases invoking *Hazelwood* usually involve curricular matters, courts generally have found that a nonpublic forum is involved, a kind of forum that allows for greater government restrictions, but still with some restrictions. *Hazelwood* suggested that a nonpublic forum exists where government has not 'evinced an intention "by policy or practice" to designate [any part of the school or its programs] as a public forum'.[100] Access to a nonpublic forum can be restricted as long as the restrictions are

'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view ... [However], the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject'.[101]

Recent court of appeals' decisions reflect the dance that the judiciary engages in when assessing the balance between what schools consider to be nonpublic forums for curriculum purposes and what students allege to be a different kind of forum (designated or limited public forum) that has been created for their expression. Determining the nature of the forum is important because it affects both the kind of expression to which students are entitled and the standard that schools can invoke to limit that expression. To label a school venue as a nonpublic forum permits school officials greater latitude in restricting student expression. In *Bannon v School District of Palm Beach County* (*Bannon*),[102] the Eleventh Circuit found a nonpublic forum where students and student groups were solicited by the school to paint messages on wood divider panels placed in school halls as part of a long term renovation project.[103] In upholding the school's decision to remove certain religious references from the murals painted by students affiliated with Fellowship of Christian Athletes,[104]the Eleventh Circuit concluded that the murals were *Hazelwood* school sponsored speech occurring in the context of curricular activity[105] and, thus, the school had 'a legitimate pedagogical concern in avoiding the disruption to the school's learning environment caused by [plaintiff's] murals'.[106] The court also invoked forum analysis and determined that the murals were a nonpublic forum that had not 'intentionally' been opened for 'indiscriminate use … [as] a forum for expressing [students'] political or religious views'.[107] Conversely, the court rejected the student's private speech claim that under *Tinker*, the school had to permit her expression unless it was disruptive.[108]

The Seventh Circuit, in *Gernetzke v Kenosha Unified School District No. 1* (*Gernetzke*),[109] inferred a nonpublic forum where a Bible club, in response to the principal's invitation to all student groups to paint messages on sections of 4 x 5 foot paper placed on school hallway walls, included in their mural a heart, two doves, an open Bible with the passage from John 3:16, and a large cross. In upholding the principal's requiring that the cross be removed because retaining it 'might also require him to approve murals of a Satanic or neo-Nazi character, which would cause an uproar',[110] the Seventh Circuit turned to *Hazelwood* for the principle that '[a] school need not tolerate student speech that is inconsistent with its "basic educational mission"',[111] noting that '[o]rder and discipline are part of any high school's basic educational mission, [and] without them there is no education'.[112]

In *C.H. v Olivia* (*C.H.*),[113] the Third Circuit affirmed *en banc* a federal district court determination concerning the display of a student poster solicited by a kindergarten teacher as part of a Thanksgiving Day exercise 'to make posters depicting what they [the students] were "thankful for"'. [114] The student responded by producing a poster 'indicating that he was thankful for Jesus'.[115] In upholding school officials' decisions to not display and then to display the poster in a less noticeable place, an evenly divided Third Circuit in an *en banc* decision upheld a federal district court decision that the school and the classroom were nonpublic forums and, pursuant to *Hazelwood*, the school could impose 'content-based restrictions on speech [that] need only be "reasonable in light of the purpose served by the forum and … viewpoint neutral"'.[116]

However, not all federal courts of appeal have been willing to find that a finding of a nonpublic forum necessarily supports *Hazelwood*'s broad grant of authority to school officials to control matters considered to be curricular in nature. The Second Circuit, in *Peck v Baldswinsville Central School* (*Peck*),[117] found that the review of the school's display of a student's poster,

prepared by a student as part of an elementary school environmental unit and containing religious symbols, in a manner where the poster was partially covered over had occurred in the context of a nonpublic forum. However, contrary to the other three federal circuit decisions above, the Second Circuit observed that the school's being a nonpublic forum with respect to the creation and display of the posters as part of a curriculum assignment did not end the free speech analysis. Even if one considered this assignment and display to be to 'school-sponsored student speech', the Second Circuit interpreted *Hazelwood* that 'a manifestly viewpoint discriminatory restriction on school-sponsored speech is, prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests'.[118] On remand, a federal district court would have to determine whether the school officials had acted pursuant to a viewpoint neutral reason in the display of the poster, such as the poster did not meet the requirements of the course,[119] or not displaying the full poster was necessary so as not to violate the establishment clause.[120]

Despite the discussion of the nonpublic forum and curriculum in the courts of appeal decisions above, the connection between the nature of a forum and a school's curriculum, arguably, is somewhat tenuous under *Hazelwood*. While a finding of a nonpublic forum is useful in undergirding a school's curriculum argument, such a finding is neither necessary nor dispositive. Even in *Peck* where the Second Circuit imposed free speech viewpoint discrimination on the display of student work within a nonpublic forum, the discrimination disappears if, on remand, a federal district court finds that the student's poster had not satisfied the teacher's curricular assignment requirements.

B *Applying the Tinker, Fraser, and Hazelwood Standards to T-Shirts*

Since *Tinker*, *Fraser*, and *Hazelwood* arose out of non-T-shirt sets of facts, the challenge for school officials is determining how these cases apply to student use of T-shirts for expressive views. T-shirt expression, while it has generated only a relatively small number of cases, presents a unique problem for school administrators because a T-shirt message is readily noticeable and mobile. Thus, unlike situations where students may have a free speech right to hand out their religious materials in hallways and lunchroom time,[121] a T-shirt message is disseminated everywhere in the school, including the classrooms. School sponsorship concerns that may be somewhat muted when dissemination of student expression is restricted to noninstructional time[122] become more pronounced where student T-shirt messages are displayed in classroom settings from which other students cannot readily extricate themselves.

Guiles suggests that in applying the *Tinker*, *Fraser*, and *Hazelwood* standards to T-shirts, the *Tinker* standard is always the default standard. Thus, in the absence of evidence that the *Fraser* or *Hazelwood* standards are implicated, courts will limit their consideration to whether student expression has had a disruptive effect on the school. However, as reflected by the cases in this article, school efforts to invoke *Fraser* or *Hazelwood* encounter fluid definitions.[123] While *Guiles* limited *Fraser* to student expression with sexual content, not all courts have so limited *Fraser*.[124] If one is concerned about protecting students' opportunity for expression, the more that *Fraser*'s 'lewd', 'vulgar', and 'plainly offensive' criteria are permitted to stray from sexual content, the broader is the ability of school officials to punish student expression that may not satisfy *Tinker*'s disruption standard. Similarly, the broader the definition of what is considered curriculum, the more controlling that school officials can be regarding the content of student expression. Thus, for example, one can query whether the Eleventh Circuit's extension of curriculum in *Bannon* to include plywood panels installed in hallways to keep students away from construction locations represented just such an end-run around the disruption standard of *Tinker*.[125]

This disquieting uncertainty regarding the interpretation and application of the three Supreme Court's student expression decisions suggests three problems. First, the extent to which student expression is protected under the *Tinker* disruption standard appears to vary with the federal circuit in which the student is located. The difference between the federal district and court of appeals decisions in *Guiles* mirrors the confusion among the circuits as to which of the three standards applies in any particular factual setting. The situation has not been helped by the Supreme Court's failure to accept a student expression case in the eighteen years since *Hazelwood*.[126] Until the Court votes to hear another student expression case, the expressive rights of students will continue to depend to some extent on the geographic location of the student.[127]

Second, if *Guiles* is correct that *Tinker* is the default standard for student expression cases, this means that the *Tinker* standard is implicated only when the *Fraser* and *Hazelwood* standards do not apply. While this provides a useful cascade approach to applying multiple standards, it also means that courts can influence the application of *Tinker* by the breadth of definition of the Fraser and *Hazelwood* standards. An expanded definition of the *Fraser* ('lewd', 'vulgar', and 'plainly offensive') or *Hazelwood* (curriculum) standards by some courts suggests the relative ease by which *Tinker*'s disruption standard can be displaced.

Third, the judicial lack of clarity regarding the three Supreme Court student expression standards means that school officials face the unenviable task of parsing words and images to determine which standard, or standards, might apply to T-shirt messages. The Second Circuit's determination in *Guiles* that 'the images of a martini glass, alcohol, and lines of cocaine' on the student's T-shirt projected 'an anti-drug political message' (thus, invoking *Tinker*) rather than a plainly offensive one 'undermin[ing] the school's anti-drug message'[128] (implicating *Fraser*) suggests that deciding what student expression is unacceptable involves more than a consideration of the literal meaning of symbols. Although the Second Circuit in *Guiles* and the Ninth Circuit in *Harper* took differing views on the applicability of *Hazelwood* (the Second Circuit discounting it and the Ninth Circuit nominally relying on it),[129] one can query whether the courts were interpreting *Hazelwood* school sponsored messages in the same way. Arguably, images of alcohol and drugs on a T-shirt in *Guiles* just as much contradicted the school's message discouraging use of alcohol and drugs as did the school's claim in *Harper* that a student's T-shirt criticizing homosexuality compromised the school's message of tolerance. The difference appears to be the deference that courts are prepared to afford to the authority of schools to sponsor messages of importance to students.[130] In *Guiles*, the Second Circuit, in reversing discipline of the student, chose not to give deference to the school's message of anti-alcohol and anti-drugs while the Ninth Circuit in *Harper*, in affirming discipline of the student, chose to give such deference to a school sponsored message of tolerance.[131] Such confusion only serves to emphasise the lack of clarity in determining what words and symbols of student T-shirt expression is protectable and to punctuate the difficulty that school officials face in second-guessing the standard that their federal circuit court of appeals will apply.

IV Conclusion

While this article reflects only the law of the United States, the discussion, hopefully, can have a broader application to the handling of student expression. In countries where uniforms are the norm as a prescribed dress code, the need to address T-shirt messages will presumably be unnecessary. However, student expression can occur in a variety of fashions, such as the black armbands in *Tinker*, the student campaign speech in *Fraser*, and the student-written newspaper articles in *Hazelwood*. The Supreme Court's forthcoming decision in *Frederick* will provide some

insights into how the Court views student expression off school premises but presenting, at the same time, a viewpoint a odds with the school's anti-drug message.

Within the context of existing U.S. law, the Second Circuit's decision in *Guiles* provides a convenient flashpoint to examine the expressive rights that students have in the words and images on their T-shirts. Not all federal circuit courts of appeal have rendered decisions regarding T-shirt expression but virtually all circuits have one of more opinions addressing the broad subject of student expression.[132] However, the federal circuits lack of consistency as to how student expression can be restricted under *Tinker*, *Fraser*, and *Hazelwood* presents a problem for school officials who are called upon to design and enforce codes of student conduct that include appropriate student speech. Suggestions among some circuit court decisions that the *Fraser* and *Hazelwood* standards can be expanded to restrict student speech serves to give schools greater control over their students do so at the expense of diluting the disruption test under *Tinker*.[133] Even if one were to assume that students learn better without the distractions that might be associated with student T-shirt expression, the broad invocation of *Fraser* and *Hazelwood* standards would seem to have expanded deference to the point that neither school officials nor students have a comfortable understanding as to what expression is protected nor prohibited. A broad definition of *Fraser* and *Hazelwood* standards arguably allows school officials to avoid the hard decisions that must be made under the *Tinker* disruption standard, but one must question whether that short term advantage is outweighed by the long-term lessons that students will carry with them beyond the school that protection of constitutional rights can be manipulated and truncated by judicial deference to institutional convenience.

Keywords: Student expression; Discipline; School-sponsored speech; Censorship; Political speech; Nonpublic forum.

Endnotes

1. This Second Circuit Court of Appeals decision in *Guiles v Marineau*, 461 F 3d 320, 321 [212 *Education Law Reporter* 143] (2d Cir, 2006) expressed the uncertainty of T-shirt expression more colorfully, 'This case requires us to sail into the unsettled waters of free speech rights in public schools, waters rife with rocky shoals and uncertain currents'.
2. For examples as to where the free expression debate has taken itself, see, e.g., Joseph D. Herrold, 'Capturing the Dialogue: Free Speech Zones and the "Caging" of First Amendment Rights' (2006) 54 *Drake Law Review* 949; Rebecca Aviel, 'Compulsory Education and Substantive Due Process: Asserting Student Rights to a Safe and Healthy School Facility' (2006) 10 *Lewis & Clark Law Review* 201; Andrew P. Stanner, 'Toward an Improved True Threat Doctrine for Student Speakers' (2006) 81 *New York University Law Review* 385; Brett Thompson, 'Student Speech Rights in the Modern Era' (2006) 57 *Mercer Law Review* 857; Michael C. Jacobson, 'Chaos in Public Schools: Federal Courts Yield to Students While Administrators and Teachers Struggle to Control the Increasingly Violent and Disorderly Scholastic Environment' (2006) 3 *Cardozo Public Law Policy & Ethics Journal* 909; Ronald T. Hyman, 'Constitutional Issues when Testing Students for Drug Use, a Special Exception, and Telltale Metaphors' (2006) 35 *Journal of Law & Education* 1.
3. 393 U.S. 503 (1969).
4. *Tinker* is best known for the Supreme Court's introductory observation that 'It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate': ibid 506.
5. See Application of *Gault***,** 387 U.S. 1 (1967) (reversing State of Arizona's dismissal of writ of habeas corpus for 15-year-old juvenile committed as a juvenile delinquent to state industrial school, the Supreme Court holding that juvenile had right in his juvenile delinquency hearing to notice of

charges, to counsel, to confrontation and cross-examination of witnesses, and to privilege against self-incrimination.).

6. *Tinker*, 393 U.S. 503, 508.
7. Ibid 509.
8. See, e.g., *Baughman v Freienmuth***,** 478 F 2d 1345 (4th Cir, 1973) (invalidating school rule under prior restraint and vagueness where school rule required prior administrator approval before alleged obscene material could be distributed).
9. 478 U.S. 675 [32 *Education Law Reporter* 1243] (1986).
10. Ibid 683.
11. Ibid.
12. Ibid 681.
13. 484 U.S. 260 [43 *Education Law Reporter* 515] (1988).
14. Ibid 271.
15. Ibid 272.
16. Ibid 271.
17. 461 F 3d 320 (2d Cir, 2006).
18. For a discussion of the U.S. federal judiciary, see Ralph D. Mawdsley, 'The United States Federal Judiciary: Its Structure and Jurisdiction' (2006) 11 *Australia & New Zealand Journal of Law and Education* 95.
19. Mawdsley, above n 19, 97-98.
20. *Morse v Frederick*, 127 S Ct 2618 (2007).
21. *Guiles v Marineau*, 349 F Supp 2d 871, 874 [194 *Education Law Reporter* 880] (D.Vt., 2004). The shirt's largest text (found on both the front and the back) refers to President Bush as the 'Chicken-Hawk-in-Chief' who is engaged in a 'World Domination Tour.' In smaller text, the shirt accuses the President of being a 'crook,' 'AWOL draft dodger,' 'lying drunk driver' and an abuser of marijuana and cocaine. The shirt is covered with a variety of images including oil wells, dollar signs and chickens. Included among these images are some small drawings depicting drugs and alcohol. The front and the back of the shirt include a large image of President Bush wearing a helmet with 'AWOL' written on it. The President's small and very crudely drawn body appears to be the body of a chicken. In one 'wing' the President is holding a martini glass. In the other 'wing' the President is holding a straw. Next to the straw are three lines of cocaine and a razor blade. Other small images of drugs and alcohol are found on the T-shirt's sleeves. The left sleeve includes an image of a chicken with a champagne bottle on one side and three lines of cocaine on the other. The right sleeve has a coat of arms labeled 'Chicken Hawk Guard' and includes a drawing of a soldier drinking from a bottle. There is no question that, as a whole, the T-shirt communicates a very strong political message of disapproval (if not disdain and outright loathing) of the President's character and policies.
22. Ibid 873. The federal district court made an observation that 'plaintiffs in cases challenging school censorship tend to be especially bright and creative students', citing for reference to *Bethel School Dist. No. 403 v Fraser*, 478 U.S. 675 [32 *Education Law Reporter* 1243] (1986) (Stevens, J. dissenting) (In a case upholding school penalty for a student making a vulgar speech, Justice Stevens observed that, 'The respondent was an outstanding young man with a fine academic record'); *Pyle v S. Hadley School Community*, 861 F Supp. 157, 160 [94 *Education Law Reporter* 729] (D.Mass.1994) (upholding school dress code prohibiting students from wearing t-shirts displaying nondisruptive, vulgar messages, even if messages were political and observing that plaintiffs, sons of a constitutional law professor, were highly successful in academic and extracurricular activities). See also, *Shanley v Northeast Independent School Dist***.,** *Bexar County, Tex.*, 462 F 2d 960, 964 (5th Cir, 1972) (striking down suspensions of 'good' or 'excellent' students who 'were in the process of applying for highly competitive slots in colleges or for scholarships' where their underground newspaper distributed off-campus created no disruption at school). Assuming that these observations are accurate, the courts fail to inform as to why they are relevant.
23. *Guiles v Marineau*, 349 F Supp 2d 871, 875.
24. Ibid.

25. Ibid.
26. Ibid 877.
27. Ibid 879.
28. Ibid. The court relied on *Castorina v Madison County Sch. Bd*., 246 F 3d 536, 543 [152 *Education Law Reporter* 524] (6th Cir, 2001) where the Sixth Circuit reversed summary judgment for a school board that had refused to permit two students to wear a T shirt with a confederate flag where the court concluded that the *Hazelwood* standard was not apposite; in remanding for trial on the issue of the consistency of the school in enforcing its dress code, the court found that the students' 'actions were not school sponsored, nor did the school supply any of the resources involved in their wearing the T-shirts. Most importantly, no reasonable observer could conclude that the school had somehow endorsed the students' display of the Confederate flag'.
29. *Guiles v Marineau*, 349 F Supp 2d 871, 880.
30. Ibid.
31. Ibid 878. The district court referenced *Barber v Dearborn Pub. Schs*., 286 F Supp 2d 847, 857-858 [183 *Education Law Reporter* 79] (E.D.Mich.2003) where a Michigan federal district court found a free speech violation as to a student prohibited from wearing a T shirt displaying a picture of President Bush with the caption, 'International Terrorist'; the court found both Hazelwood and Fraser to be inapplicable and determined under Tinker that the high school's concern about the reaction of Iraqi students in the school whose families had fled the country under Hussein was unsubstantiated and did not reach the Tinker disruption standard.
32. *Guiles v Marineau*, 349 F Supp 2d 871, 880.
33. Ibid. Cf *Newsom v Albemarle County School Bd***.** 354 F 3d 249, 259-260 [184 *Education Law Reporter* 24] (4th Cir, 2003) where the Fourth Circuit reversed a federal district court's denial of a preliminary injunction for a student prevented from wearing a T shirt advertising the NRA (National Rifle Association) under a school dress code prohibiting 'messages on clothing, jewelry, and personal belongings that relate to drugs, alcohol, tobacco, weapons, violence, sex, vulgarity, or that reflect adversely upon persons because of their race or ethnic group'. The Fourth Circuit in remanding for trial determined that the prohibition on weapons as applied to the student was overbroad because no evidence indicated that the T shirt contained a message regarding weapons and no evidence had been introduced to indicate disruption.
34. *Guiles v Marineau*, 349 F Supp 2d 871.
35. Ibid 881. See *East High Gay/Straight Alliance v Board of Education of Salt Lake City School District*, 81 F Supp 2d 1166, 1193 [141 *Education Law Reporter* 776] (D.Utah, 1999) where a federal district court, in holding that a group with a 'gay positive' viewpoint had been denied the right under the Equal Access Act to meet during noninstructional time, observed that,

    > *Fraser* does not diminish *Tinker* 's protection of a student's right to express an unpopular view. Indeed, the Court points out that 'the penalties imposed in this case were unrelated to any political viewpoint.' Rather, *Fraser* addresses the *manner* in which that view may be expressed. Had the speaker in *Fraser* chosen a form other than sexually suggestive double entendres for his remarks, the school's 'interest in protecting minors from exposure to vulgar and offensive spoken language,' would not have been implicated.

36. The Second Circuit observed that *Hazelwood* did not apply because no one disputed that the school did not sponsor the T shirt of its message, and even if the school had a 'legitimate pedagogical concern' in an anti-drug and alcohol policy, the school could not look to *Hazelwood* for support 'absent school sponsorship': *Guiles v Marineau*, 461 F 3d 320, 327.
37. Ibid.
38. Ibid (emphasis in original).
39. Ibid.
40. Ibid 327-28. The Second Circuit quotes from *Merriam-Webster's Third International Dictionary* 1156; *Black's Law Dictionary* 1110 (7th ed, 1999).
41. Ibid 328.

42. Ibid 239, quoting from *Newsom v Albemarle County School Board*, 354 F 3d 249, 256 [184 *Education Law Reporter* 24] (4th Cir, 2003) (granting preliminary injunction to student wearing NRA T-shirt where symbols on T-shirt of three persons holding guns had not caused disruption in school as interpreted in *Tinker*, finding that the high school's dress code reached the content of speech 'disfavor[ing] weapons, displayed in any manner and in any context, and potentially any messages about weapons. It exclude[d] a broad range and scope of symbols, images, and political messages that are entirely legitimate and even laudatory.'). *Newsome*, 354 F 3d 249, 260.
43. *Guiles*, 461 F 3d 320, 329.The Second Circuit in *Guiles* rejected the Fourth Circuit's interpretation of *Fraser* in *Boroff v Van Wert City Board of Education*, 220 F 3d 465, 470 [146 *Education Law Reporter* 629] (6th Cir, 2000) that *Fraser* could be used to prohibit speech that is 'inconsistent with its basic educational mission', the Second Circuit choosing instead to limit *Fraser* to speech that has sexual connotations.
44. *Guiles*, 461 F 3d 320, 330.
45. Ibid.
46. Ibid.
47. Ibid 331.
48. Ibid.
49. See Appellate Brief for Petitioners at *4 where a school principal testified as follows: '… For the good of the school system we don't think this should be permitted. The schools are no place for demonstrations. We allow for free discussion of these things in the classes. The policy was based on a general school policy against anything that was a disturbing situation within the school. The school officials believe that the educational program would be disturbed by students wearing arm bands.'.
50. See Appellate Brief for Respondents at *5-*7; Appellate Brief for Petitioners at *4-*6 (Both Briefs agree that, while students expressed agreement or disagreement with those wearing the armbands, no one threatened disruption to the educational process). See also, *Tinker*, 393 U.S. 503, 740 ('[The students] wore [the armbands] to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder.').
51. *Tinker*, 393 U.S. 503, 513, quoting for the first part of the quotation from *Burnside v Byars*, 363 F 2d 744, 749 (5th Cir, 1966). Note that the *Tinker* Court adds the last part about colliding with the rights of other students.
52. *Tinker*, 393 U.S. 503, 511.
53. Ibid 510.
54. Ibid.
55. 607 F 2d 1043 (2nd Cir, 1979) (reversing suspensions for students involved in publishing off the high school campus and selling it only to high school students a satirical underground newspaper, Hard Times, lampooning various aspects of the high school program).
56. Ibid 1057 (Newman, J., concurring in result). The reference is to *Cohen v California*, 403 U.S. 15 (1971) where the Court reversed a criminal conviction for an anti-Vietnam protester wearing a jacket with the words, 'Fuck the Draft'. However, the Court in dictum indicated that regulation of such speech would be permissible to address special concern 'for the plight of the captive listener or viewer.': at 22.
57. *Fraser*, 478 U.S. 675, 691 (Stevens, J., dissenting).
58. See ibid 677.
59. Ibid 678.
60. The content of the speech was as follows:
'I know a man who is firm-he's firm in his pants, he's firm in his shirt, his character is firm — but most … of all, his belief in you, the students of Bethel, is firm.'; 'Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts — he drives hard, pushing and pushing until finally — he succeeds.'; 'Jeff is a man who will go to the very end — even the climax, for each and every one of you.'; 'So vote for Jeff for A.S.B. vice-president — he'll never come between you and the best our high school can be.': Ibid 687, (Brennan,

J., concurring).

61. Ibid 683.
62. Ibid.
63. 439 F 3d 1114 [206 *Education Law Reporter* 850] (9th Cir, 2006).
64. Conflict exists as to the meaning of the words. The student said 'that the "Bong Hits 4 Jesus" language was designed to be meaningless and funny, in order to get on television' while the principal said 'that "bong hits" means puffs of marijuana and the words promote marijuana use.': Ibid 1116.
65. Ibid 1119. However, with the Supreme Court's granting of certiorari in this case, the Court will have an opportunity to refine the definition of not only the *Fraser* test, but the *Hazelwood* and *Tinker* ones as well, since all three are implicated in the case.
66. 354 F 3d 249 [184 *Education Law Reporter* 24] (4th Cir, 2003).
67. Ibid 252.
68. Ibid 256. For another case distinguishing between the 'manner' and 'content' of expression on T-shirts, see *Castorina v Madison County County School Board*, 246 F 3d 536, 542 [152 *Education Law Reporter* 524] (6th Cir, 2001) (reversing summary judgment on behalf of school board as to student wearing T-shirt with picture of Hank Williams and a confederate flag, observing that since the student could attend school wearing a T-shirt with a flag in support of the U.S. Olympic team, 'it is the content of speech, not the manner, that the Madison County School Board wishes to regulate'.
69. *Newsom v Albemarle County School Board* 354 F 3d 249, 255.
70. Ibid 256, quoting *Fraser*, 478 U.S. 675, 685.
71. 240 F 3d 200 [151 *Education Law Reporter* 86] (3rd Cir, 2001) (involving a facial challenge, by persons identifying themselves as Christians, to a school district's sexual harassment policy prohibiting discrimination, harassment, and retaliation on a wide range of topics including sexual harassment, the claim of plaintiffs being that 'they [had] a right to speak out about the sinful nature and harmful effects of homosexuality [and felt] … compelled by their religion to speak out on other topics, especially moral issues'): at 203.
72. The Third Circuit determined that the school district's definitions of harassment included 'negative' or 'derogatory' speech about such contentious issues as 'racial customs', 'religious tradition', 'language', 'sexual orientation', and 'values'. The court of appeals determined that 'such speech, when it does not pose a realistic threat of substantial disruption, is within a student's First Amendment rights': Ibid 217.
73. Ibid 213, quoting from *Fraser*, 478 U.S. 675, 685.
74. 220 F 3d 465 [146 *Education Law Reporter* 629] (6th Cir, 2000).
75. The school's 'Dress and Grooming' policy provided that 'clothing with offensive illustrations, drug, alcohol, or tobacco slogans … [were] not acceptable'. Among other characterisations, Marilyn Manson is 'widely regarded as a user of illegal drugs'. The front of the student's first T-shirt depicted a three-faced Jesus, accompanied by the words 'See No Truth. Hear No Truth. Speak No Truth' and on the back the word 'BELIEVE' was spelled out in capital letters, with the letters 'LIE' highlighted. The other T-shirts were 'described as ghoulish and creepy': ibid 466-67.
76. Ibid 469. Compare the dissenting justice's opinion in *Boroff* that 'vulgar' and 'offensive' refer 'to words and phrases that are themselves coarse and crude, regardless of whether one disagrees with the overall message that the speaker is trying to convey', concluding that the T-shirt with the three-headed Jesus was found '"offensive" because it expresses a viewpoint that many people personally find repellent, not because it is vulgar': at 474 (Gilman, J., dissenting).
77. *Brown v Hot, Sexy and Safer Productions, Inc*., 68 F 3d 525, 534 [104 *Education Law Reporter* 106] (1st Cir, 1995).
78. See ibid.
79. See ibid 529.
80. Ibid 529. The complaint alleged that a third party hired to make a student assembly presentation during the school's Aids Awareness week engaged in the following conduct: 1) told the students that they were going to have a 'group sexual experience, with audience participation'; 2) used profane, lewd, and lascivious language to describe body parts and excretory functions; 3) advocated and approved

oral sex, masturbation, homosexual sexual activity, and condom use during promiscuous premarital sex; 4) simulated masturbation; 5) characterized the loose pants worn by one minor as 'erection wear'; 6) referred to being in 'deep sh--' after anal sex; 7) had a male minor lick an oversized condom with her, after which she had a female minor pull it over the male minor's entire head and blow it up; 8) encouraged a male minor to display his 'orgasm face' with her for the camera; 9) informed a male minor that he was not having enough orgasms; 10) closely inspected a minor and told him he had a 'nice butt'; and 11) made eighteen references to orgasms, six references to male genitals, and eight references to female genitals.

81. *Fraser* cited for the proposition that '[a] high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students': ibid 534.
82. Ibid.
83. See *Boroff*, 220 F 3d 465, 469, where the student's argument that 'similar T-shirts promoting other bands, such as Slayer and Megadeth, were not prohibited' in an effort to transfer the analysis from a *Fraser* 'offensive' test to a *Tinker* 'disruption' test was rejected by the court of appeals.
84. 445 F 3d 1166 [208 *Education Law Reporter* 164] (9th Cir, 2006).
85. The relationship between *Fraser* and *Tinker* is, at best, murky. Cf *Nixon v Northern Local School District Board of Education.* 383 F Supp 2d 965 [201 *Education Law Reporter* 904] (S.D.Ohio 2005) (granting preliminary injunction to student wearing T-shirt with Christian Bible verse on front and message 'homosexuality is a sin, Islam is a lie, abortion is murder, some issues are just black and white' on the back where no evidence of disruption under *Tinker*; court rejected school district's use of its dress code prohibiting 'clothing with suggestive, obscene, or offensive or gang related words and/or pictures' to suspend student using a *Fraser* test) with *Smith v Mount Pleasant Pub. Schools,* 285 F Supp 2d 987, 997 [182 *Education Law Reporter* 520] (E.D.Mich.2003), where a court upheld a high school's suspension of one of its students for reading aloud a commentary about the school's tardy policy, the court noting that the portion of the student's commentary referring to the sexual activity of school administrators constituted 'lewd and vulgar speech, which falls into the category of sanctionable expression under *Fraser*'. Other district courts have found *Fraser* inapplicable to some cases. See, e.g., *Barber v Dearborn Public Schools,* 286 F Supp 2d 847, 856 [183 *Education Law Reporter* 79] (E.D.Mich.2003) (*Fraser* inapplicable to a student's shirt displaying a photo of George W. Bush and the phrase 'International Terrorist' since the shirt did not refer to alcohol, drugs, or sex and was neither obscene, lewd, nor vulgar); *Bragg v Swanson,* 371 F Supp 2d 814, 823 [199 *Education Law Reporter* 162] (W.D.W.Va.2005) (*Fraser* inapplicable to a student wearing a Confederate flag shirt since the display of the flag is not per se patently offensive).
86. *Harper*, 445 F 3d 1166, 1171.
87. See ibid 1193 (Kozinski, J., dissenting). The only evidence of disruption was a teacher who said that several students in class were 'off-task talking about [the] content of "Chase's shirt" when they should have been working', but since, as the dissenting judge observed, 'it is not unusual in a high school classroom for students to be "off-task"', he found this evidence 'ludicrously weak support for banning Harper's t-shirt on the ground that it would "materially disrupt[ ] classwork"'.
88. *Harper*, 445 F 3d 1166, 1175, quoting from *Tinker,* 393 U.S. 503, 508.
89. *Harper*, 445 F 3d 1166, 1182, quoting from *Fraser,* 478 U.S. 675, 681.
90. *Harper*, 445 F 3d 1166, 1185, quoting from *Fraser*, 478 U.S. 675, 681.
91. In response to plaintiff's claim that not being permitted to display his T-shirt message infringed on his religious speech, the Ninth Circuit opined that,

    school officials' statements and any other school activity intended to teach Harper the virtues of tolerance constitute a proper exercise of a school's educational function, even if the message conflicts with the views of a particular religion. A public school's teaching of secular democratic values does not constitute an unconstitutional attempt to influence students' religious beliefs. Rather, it simply reflects the public school's performance of its duty to educate children regarding appropriate secular subjects in an appropriate secular manner: *Harper*, 445 F 3d 1166, 1190.
92. Although not raised in *Hot, Sexy, and Safer*, the school's *Hazelwood* claim would arguably be related to its curriculum because the assembly with the explicit sexual expression was part of the school's

'AIDS awareness program': *Hot, Sexy, and Safer*, 68 F 3d 525, 529.

93. *Harper*, 445 F 3d 1166, 1185, quoting from *Hazelwood*, 484 U.S. 260, 266.
94. *Hazelwood*, 484 U.S. 260, 271.
95. Ibid.
96. Ibid. See *Tinker*, 393 U.S. 503, 513 (the standard for private student speech is whether it will 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others.').
97. *Hazelwood*, 484 U.S. 260, 270-71.
98. Ibid 273.
99. Forum analysis is a judicially-constructed process for balancing government actions to control use of its premises with the limitations free speech imposes on those actions. The level of scrutiny applicable to the government's actions differs depending on the nature of forum from which an individual or organisation has been excluded. The Supreme Court in *Perry Education Association v Perry Local Educators' Association*, 460 U.S. 37, 45-46 [9 *Education Law Reporter* 23] (1983), identified three kinds of forums: traditional public forum; designated public forum; and, nonpublic forum. A traditional public forum normally applies to public areas set aside by government for public use, such as sidewalks and parks, and, thus, government restriction on free expression in these areas is limited to time, place, and manner of expression, as well as to prevention of clear threats to safety. Traditional public forums are places in one in which 'by long tradition or by government fiat have been devoted to assembly and debate, ... streets and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."': ibid at 45, quoting from *Hague v CIO*, 307 U.S. 496, 515, (1939). A designated public forum applies to 'public property which the state has opened for use by the public as a place for expressive activity, ... [a]lthough a state is not required to indefinitely retain the open character of the facility...': ibid at 46. However, once government opens a forum, 'a state regulation of speech should be content-neutral', *Widmar v Vincent*, 454 U.S. 263, 277 [1 *Education Law Reporter* 13] (1981), and restriction of expression requires 'a compelling governmental interest', *Cornelius v NAACP Legal Defense & Educational Fund*, 473 U.S. 788, 800 (1985), and is subject to a strict scrutiny standard of review. The third kind of *Perry* forum, nonpublic, provides for greater government control but still has limitations. A nonpublic forum exists where government has not 'evinced an intention "by policy or practice" to designate [any part of the school or its programs] as a public forum'. A fourth kind of forum, limited public forum was not expressly discussed in *Perry* but has become the predominant form of analysis where religious issues in public schools are concerned. However, as reflected by the Seventh Circuit in *Walker*, courts have not been clear as to how limited public forum fits into the three forums in *Perry*. In *Good News Club v Milford Central School*, 533 U.S. 98, 106 (2001), referencing the Court's analysis in *Lamb's Chapel v Center Moriches Union Free School District*, 508 U.S. 384, 392 (1993), the Supreme Court identified a limited public forum as subject to the same reasonableness test as for a nonpublic forum, but with the caveat *Lamb's Chapel v Center Moriches Union Free School District (Lamb's Chapel)*, 508 U.S. 384, 392 (1993), that exclusion of expression based on religious content must be 'reasonable and viewpoint neutral': *Lamb's Chapel* at 393. To add to the confusion, the Supreme Court in *R.A.V. v City of St Paul, Minnesota*, 505 U.S. 377, 427 (1992) (Stevens, J. concurring) and *Cornelius v NAACP Legal Defense & Education Fund Inc*., 473 U.S. at 796, suggested that limited public forum can describe a subcategory of 'designated public forum', meaning that it would be subject to the strict scrutiny test.
100. See *Bannon v School District of Palm Beach County*, 387 F 3d 1208, 1213 [193 *Education Law Reporter* 78] (11th Cir, 2004), quoting from *Hazelwood School District v Kuhlmeier*, 484 U.S. 260, 267 [43 *Education Law Reporter* 515] (1988) (in *Bannon*, the Eleventh Circuit found that panels in school hallways were nonpublic forums, finding support in Hazelwood that a designated public forum can be created only by a 'policy or practice [in opening] facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations'.).
101. See *Cornelius v NAACP Legal Defense & Educational Fund*, 473 U.S. 788, 800 (1985) (Cornelius addressed whether the federal government violated free speech by excluding legal defense or advocacy

organisations from its combined charity fund drive; the Court did not reach the merits of the case and remanded to determine whether the government had engaged in viewpoint discrimination.).

102. 387 F 3d 1208 [193 *Education Law Reporter* 78] (11th Cir, 2004), rehearing en banc denied, 125 *Fed Appx* 984 (11th Cir, 2004), cert. denied, 126 S Ct 330 (2005).
103. The only instructions given to students were that their artwork could not be 'profane or offensive to anyone': ibid at 1210. While *Fraser* was not a factor in this case, the school's requirement mirrors the *Fraser* standard; '[v]ulgar expression is student expression that is lewd, offensive, or indecent, and schools may freely curtail it': ibid at 1213. See *Fraser*, 478 U.S. 685, 685 ('The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. … [I]t was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education.').
104. Plaintiff in this case, along with several of her colleagues in the Fellowship of Christian Athletes, painted three murals with religious content: a crucifix and the words, 'Because He ♥ ed, He Gave'; 'Jesus has time for you; do you have time for Him?;', and 'God Loves You. What Part of Thou Shalt Not Didn't You Understand? God': *Bannon v School District of Palm Beach County* 387 F 3d 1208, 1211.
105. The Eleventh Circuit treated the murals as curricular in nature even though 'students were not required to participate, they received no grade or credit for participation, the murals were painted on Saturday outside of regular school hours, and students paid a small fee to participate.': ibid at 1215. By identifying the murals as curricular and 'school sponsored' speech, the Eleventh Circuit treated the school's directive as a permissible content-based restriction under *Hazelwood* as opposed to viewpoint discrimination that is not permissible under *Lamb's Chapel v Center Moriches School District*, 508 U.S. 384 [83 *Education Law Reporter* 30] (1993) (holding that school district, in denying permission for church to use school after 7 P.M. to show films on child rearing constituted viewpoint discrimination in violation of free speech where other child rearing expression had been permitted from a secular viewpoint).
106. *Bannon v School District of Palm Beach County* 387 F 3d 1208, 1217.
107. Ibid 1217, 1213.
108. See *Tinker*, 393 U.S. 503, 513-14 (1969) ('When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, [a student] may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others.').
109. 274 F 3d 464 [160 *Education Law Reporter* 24] (7th Cir, 2001), cert. denied, 535 U.S. 1017 (2002).
110. *Gernetzke*, 274 F 3d 464, 466.
111. Ibid 467, quoting from *Hazelwood*, 484 U.S. 260 at 266.
112. *Gernetzke*, 274 F 3d 464, 467.
113. 990 F Supp 341 [124 *Education Law Reporter* 890] (D.N.J. 1997, aff'd en banc, 226 F 3d 198 [148 *Education Law Reporter* 585] (3rd Cir, 2000), cert. denied, 533 U.S. 915 (2001).
114. *C.H.*, 226 F 3d 198, 201.
115. Ibid.
116. *C.H. v Oliva*, 990 F Supp 341 [124 *Education Law Reporter* 890] (D.N.J. 1997), quoting from *Duran v Nitsche*, 780 F Supp 1048, 1052 [72 *Education Law Reporter* 170] (E.D.Pa.1991) (in *Duran*, the federal district court held that prohibiting a fifth grade student from distributing a survey on God and requiring that student give her oral presentation on a religious theme project were reasonably related to the school's pedagogical interests of not exposing fifth grade students to material considered to be inappropriate for their emotional maturity.) Worth noting in *C.H.* though is the strong dissenting opinion of, then court of appeals and now Supreme Court, Justice Samuel Alito: *C.H.*, 226 F 3d 198 at 203-214.
117. 426 F 3d 617 [202 *Education Law Reporter* 512] (2d Cir, 2005), cert. denied, ___ S.Ct.___-, 2006 WL 151587 (2006).

118. Ibid 633 (emphasis in original). The court of appeals relies on *Searcey v Harris*, 888 F 2d 1314, 1325 [56 *Education Law Reporter* 1134] (11th Cir, 1989) that 'require[d] school officials to make decisions relating to speech which are viewpoint neutral'. In *Searcey*, the Eleventh Circuit invalidated on free speech grounds a school's decision not to permit a peace organisation to present material to students during a career day, finding that, even though the career day was a nonpublic forum and the school district could impose content based restrictions that are reasonable, the restrictions were unconstitutional here because they were not content neutral.
119. *Peck v Baldswinsville Central School* 426 F 3d 617, 630 ('In our judgment, however, the district court overlooked evidence that, if construed in the light most favorable to [plaintiffs], suggested that [the student's] poster was censored *not* because it was unresponsive to the assignment, and not because [the teacher] and [the principal] believed that [the mother] rather than Antonio was responsible for the poster's content, but because it offered a religious perspective on the topic of how to save the environment.') (emphasis in original).
120. See ibid at 633 ('The District has proffered its interest in avoiding the perception of religious *endorsement* as a rationale for not including Antonio's full poster in the environmental assembly. On the facts before us we cannot say, at this time, as a matter of law that The District's concern in this regard would justify viewpoint discrimination.') (emphasis in original).
121. See, e.g., *Walz v Egg Harbor Township Board of Education*, 342 F 3d 271 [180 *Education Law Reporter* [115]] (3rd Cir, 2003) (while student could not distribute pencils with religious message during class time, he could distribute them during noninstructional time, such as in the hallways and at lunch); *Westfield High School L.I.F.E. Club v City of Westfield*, 249 F Supp 2d 98, 114 [175 *Education Law Reporter* [506]] (D.Mass. 2003) (holding that an elementary student could distribute candy canes with proselytizing religious messages as part of 'private, school-tolerated speech.').
122. See, e.g., *Prince v Jacoby***,** 303 F 3d 1074 (9th Cir, 2002) (upholding free speech right of student group to have access to resources without violating the school sponsorship provisions of the Equal Access Act, and citing to *Hazelwood* for the principle that 'school facilities may be deemed to be public forums if school authorities have "by policy or by practice" opened those facilities to some segment of the public, including student organizations'): ibid at 1091, quoting from *Hazelwood*, 484 F 2d 260 at 267.
123. However, courts of appeal vary as to the role of disruption in limiting student speech. In *Harper*, the Ninth Circuit inferred disruption to the educational studies of homosexual students without proof of individual intimidation or ridicule while in *Boroff*, the Sixth Circuit considered disruption irrelevant as long as the T-shirt content satisfied the *Fraser* standard.
124. See discussion, above n 63-73.
125. See, e.g., Ralph Mawdsley, 'The Profane, The Offensive, And The Religious: The Use Of *Hazelwood* To Prohibit Religious Activity In Public Schools' (2005) 195 *Education Law Reporter* 425 (arguing that school district designation after the fact of plywood panels as curriculum was disingenuous where students painting on the panels had never been instructed at the time they painted on the panels that they were considered part of the curriculum).
126. The Supreme Court has issued two decisions defining the religious free speech rights of students and community organisations that have not had a dramatic effect on the interpretation or application of *Tinker*, *Fraser*, and *Hazelwood*. See *Lamb's Chapel v Center Moriches Union Free School District*, 508 U.S. 384 [83 *Education Law Reporter* 30] (1993) (unanimous Court protecting religious speech in limited public forums but with no reference to *Tinker, Fraser, or Hazelwood*); *Good News v Milford Central School*, 533 U.S. 98 [154 *Education Law Reporter* 45] (2001) (protecting free speech right of religious community organisations under forum analysis to have same access to public schools as other similar organisations without references to *Tinker, Fraser, or Hazelwood*). For a pre-*Hazelwood* case prohibiting parents constitutional right to effect curricular changes for their children, see *Mozert v Hawkins County Board of Education***,** 827 F 2d 1058 [41 *Education Law Reporter* 473] (6th Cir, 1987) (although predating *Hazelwood* by one year, the result would not change under *Hazelwood*).
127. Petition for certiorari was filed in *Frederick v Morse*, 439 F 3d 1114 (9th Cir, 2006) and the Supreme Court reversed the Ninth Circuit in *Morse v. Frederick*, 127 S.Ct. 2618 (2007), observing that "a

principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use." Id. at 2625.

128. *Guiles*, 461 F 3d 320, 329.
129. Cf *Guiles*, 461 F 3d 320, 326 ('The deferential standard of *Hazelwood*, which permits schools to regulate student speech so long as the regulation reasonably relates to 'legitimate pedagogical concerns,' comes into play only when the student speech is 'school-sponsored' or when a reasonable observer would believe it to be so sponsored') with *Harper*, 445 F 3d 1116 at 1185, quoting from Hazelwood, 485 U.S. 260, 266 ('A school need not tolerate student speech that is inconsistent with its basic educational mission, [ ] even though the government could not censor similar speech outside the school.').
130. *See Hazelwood*, 484 U.S. 260, 273,

    [W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. … This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.
131. The deference in *Guiles* and lack of deference in *Harper* reflects the different approaches the two circuits took to evidence of harm. In *Harper*, the school produced no evidence of intimidation or ridicule of individual homosexual students in the school based on plaintiff's T-shirt, but the Ninth Circuit inferred individual harm ['To say that homosexuality is shameful is to say, necessarily, that gays and lesbians are shameful'], [*Harper*, 445 F 3d 1116, 1181] while the Second Circuit refused such inference because the school could not produce evidence that 'clothing that depicts anti-alcohol, drug, or cigarette messages is just as harmful to students as clothing that advertises it': *Guiles*, 461F 3d 320, 323. This lack of deference in *Guiles* is somewhat disingenuous because the Second Circuit concluded that the student's T-shirt images were 'anti-drug' rather than 'political' which, besides being a rather stretched interpretation of the facts, placed the school then in the untenuous position of attempting to prohibit that which it was sponsoring, namely an anti-drug message. See ibid at 330.
132. For a comprehensive discussion of student expressive rights, see Charles Russo and Ralph Mawdsley, 'Student Rights' in *Education Law* (2006).
133. See, e.g., *Boroff*, 220 F 3d 465, 470-71 (expanding *Fraser* to defer to school officials' authority to prohibit a Marilyn Manson T-shirt 'because this particular rock group promotes *disruptive and demoralizing values* which are inconsistent with and counter-productive to education.' (emphasis added)).