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"'The Constitution gives me freedom, thank you. And I'll take my freedom to pierce my nostril, ears and eyebrow. That's me; that's my freedom.'"

—Student Proclamation[1]

I. INTRODUCTION

It seems that adolescents love nothing more than to fight with adults about their appearance. In the 1920s and '30s, teenage girls refused to wear petticoats or corsets to school, instead choosing silk stockings and the provocative "flapper" dress styles.[2] In the 1960s and '70s, young men refused to cut their hair, provoking conflicts with both parents and school officials.[3] Now, at the beginning of the twenty-first century, adolescents have found a new physical expression of individuality and rebellion: body piercing.

This "body modification" has gone far beyond the traditional pierced ear lobe. It now includes the piercing of ear cartilage, the tongue, lips, eyebrows, nipples, navel, and genitals. As usual, schools are on the front lines of this cultural fad. Many schools have adopted dress codes and school policies which prohibit students from wearing exotic body piercing to school.[4] School attorneys are beginning to re-

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1. Donald B. Sweeney, Jr., *Body Piercing: A Protected Right?*, ALABAMA SCHOOL BOARDS BOARDMANSHIP BASICS (Apr. 1, 1999) (last visited Mar. 6, 2001) <http://www.theaasb.org/education_law.cfm?docID=268> (quoting a familiar student refrain).
2. *See* Bruce Bliven, *Flapper Jane,* THE NEW REPUBLIC, Sept. 9, 1925, *available at* Pandora's Box.com (last visited Mar. 6, 2001) <http://www.pandorasbox.com/jane.html>.
3. *See generally* Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971).
4. *See, e.g.*, R.J. BARR MIDDLE SCHOOL (GRAND ISLAND, NEB.) STUDENT HANDBOOK (last visited Mar. 23, 2001) <http://www.gi.esu.k12.ne.us/SDGI/Barr/Student Handbook/Student_Handbook.html>; FREMONT ELEMENTARY SCHOOLS (FREMONT,

ceive calls from school administrators seeking either assurance that these policies are enforceable or advice on how to craft such a policy from scratch. School administrators want to act because body modification is causing significant distraction within the educational environment, creating disruption, and interfering with the learning process.

As public schools begin to write and enforce rules against body piercing, the inevitable threat of legal challenges looms ahead. This article examines whether school policies prohibiting body piercing are enforceable in the face of constitutional challenge. It begins with a report on the popularity of and risks associated with body piercing. Then it examines the First and Fourteenth Amendment implications of body piercing prohibitions. Finally, it concludes with some observations on how schools can craft a body piercing policy without running afoul of students' rights.

II. BODY PIERCING: THE LATEST CRAZE (AND YOU THOUGHT PET ROCKS WERE WEIRD)

Body piercing is one of the nation's hottest fashion trends. Evidence of the popularity of body piercing is necessarily anecdotal because no statistics are kept by the largely unregulated industry. Media coverage of the craze universally reports that the practice is growing exponentially, particularly among adolescents.[5] Adolescents and young adults are lining up at tattoo parlors, tee-shirt factories, music festivals, head shops, and in-home "salons" to have metal rings or other items attached through holes made in the skin.[6]

Body piercing is a relatively simple and inexpensive process. The cost of a piercing can range from $10 for an earlobe, to $65 for a piercing on the genital region, to $100 for piercing a navel. The jewelry can

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NEB.) STUDENT HANDBOOK (last visited Mar. 23, 2001) <http://mail.esu2.org.Fremont/Elementary_Admin/student_handbook.htm>.

5. *See* Karen Thomas, *States Take Stab at Regulating Teen Body Piercing*, USA TODAY, July 7, 1999, at 5D. Body art has become so popular that in 1997, the American Body Art Association (ABAA) was founded. The mission of the ABAA is to educate tattoo artists and body piercers in proper sterile, aseptic techniques; educate clientele for proper after-care of new body art; provide a liaison between practitioners and lawmakers to ensure the continued growth of the industry without undue regulation; provide practitioners with training and certification in aseptic techniques, basic business principles, and a forum to speak freely on all issues related to the industry; assist practitioners in determining applicable laws and regulations in their respective locale. *See* American Body Art Association (last visited Dec. 1, 2000) <http://www.body-art.com/abaa.htm> (printed version of internet source available from author).

6. *See* Thomas, *supra* note 5, at 5D.

range in price from $15, depending on the type of metal used to make the jewelry.[7]

The practice has grown to such proportions that all four branches of the United States Military have been forced to address the issue specifically in their service policies.[8] The 2000 Midwest Dental Conference featured a session training dentists on how to deal with patients with oral piercings.[9] The phenomenon of piercing body parts is now so common that advertisers are using models with exotic piercings to sell their products.[10]

However, this is not another harmless, if annoying, fad like Cindi Lauper's jangling metal bracelets or Marky Mark's underwear-revealing waistline. The medical community is expressing growing alarm about the serious health risks of body piercing. Body modification can cause health problems which range from tender skin to life-threatening illness. Body modification involves breaching one of the body's main protective barriers — the skin. Medical journals and mainstream media report deaths caused by infections contracted from body piercings.[11] Emergency room doctors report that piercings get in the way of emergency medical treatment.[12] Medical case studies, in-

7. *See Passage Piercing* (last visited Mar. 6, 2001) <http://www.interlog.com/~passage/piercing/main.html>.

8. *See* Major L.M. Campanella, *The Regulation of "Body Art" in the Military: Piercing the Veil of Service Members' Constitutional Rights,* 161 MIL. L. REV. 56 (1999).

9. The conference featured a session entitled "Oral/Facial Piercings and Their Dental Implications," which explained that:

> As tongue and other oral piercings become more common in the general population, they also will become common in the general dentist's office. Dental professionals must become familiar with the possible oral and systemic ramifications associated with this trend. This course will describe how to provide comprehensive care for patients with oral/facial piercings and the recognition of oral sequella associated with piercings. A review of anatomical considerations of the tongue, oral mucosa and facial structures will be included, as well as case studies, radiographic interpretation, treatment options, patient education suggestions, and appropriate referral protocol.

University of Missouri-Kansas City School of Dentistry, *Science Sessions 2000 Midwest Dental Conference* (last visited Mar. 6, 2001) <http://www.umkc.edu/dentistry/exponline/1999/Fall99/mdc2000.htm>.

10. *See* Shelley Cannup, *Piercing Makes Its Mark,* THE STANDARD-TIMES (May 4, 1997) (last visited Mar. 30, 2001) <http://204.27.188.70/daily/05-97/05-04-97/e04li226.htm>.

11. *See, e.g.*, Simon de Bruxelles, *Piercing Led to Woman's Death,* THE TIMES (London) (Sept. 29, 2000) (last visited Mar. 6, 2001) <http://www.times-archive.co.uk/news/pages/tim/2000/09/29/timnwsnws01008.html>; Robin Eisner, *Body Piercing Nightmares: Doctors See the Dangerous Side of Body Piercing,* ABC NEWS.COM (Sept. 27, 2000) (last visited Mar. 6, 2001) <http://204.202.137.110/sections/living/DailyNews/bodypiercing000927.html>.

12. *See* Eisner, *supra* note 11. Eisner relates the story of a 19 year-old woman who had stopped breathing and was rushed to a Salt Lake City, Utah, hospital. Doctors tried to put a breathing tube down her throat, but their path was blocked by

cluding studies cited by the American Academy of Pediatrics, report infections that can require treatment with intravenous antibiotics and surgery, frequently resulting in a permanent deformity.[13] Medical professionals relate stories of serious injuries when nipple rings are ripped from the skin, either from accidentally catching on clothing or a vindictive lover pulling off the ring.[14]

Recent medical reports indicate that one of every five piercings becomes infected, largely due to dirty puncture wounds.[15] Twenty-four percent of piercings result in bacterial infections accompanied by purulent discharge.[16] Health officials voice concerns that piercing parlors can cause an increased risk of Hepatitis B and C, HIV/AIDS, tetanus, syphilis, and tuberculosis.[17] The American Red Cross is concerned enough about the risks of body piercing that it is a factor which disqualifies a potential blood donor for a full year.[18] Less serious local infections and allergic reactions can cause illness, deformity, and scarring.[19] One Los Angeles area hospital says it treats allergic reactions to body piercing at least once a week.[20] Many of these infections can be contagious through contact, and in the case of oral piercings, through sharing food or drink.

Oral piercing presents some special concerns. Oral piercing often involves the lips, cheeks, tongue, uvula, or any combination of these sites, with the tongue being the most commonly pierced oral site. However, the moist, active environment of the mouth provides an

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three tongue studs. A doctor at the scene stated, "'One doctor got to the point where he said, 'If you have to rip her tongue, just do it.' Eventually, we got the tongue out of the way, but her body piercing could have cost her her life.'" *Id.* (quoting Dr. Shari Welch of LDS Hospital, Salt Lake City).

13. *See* Ronna Staley et al., *Auricular Infections Caused by High Ear Piercing in Adolescents*, 99 PEDIATRICS 610, 611 (1997) (using case studies to explain the problems associated with piercing, including the risk of infection with pseudomonas and staphylococcus and resulting deformities of the ear.)
14. *See* Eisner, *supra* note 11.
15. *See id.*
16. *See* S. Samantha M. Tweeten & Leland S. Rickman, *Infectious Complications of Body Piercing*, 26 CLINICAL INFECTIOUS DISEASES, 735, 737 (1998).
17. *See* Canadian Dental Association, *Langue Percée et Dent Fracturée* (last visited Mar. 23, 2001) <http://www.cda-adc.ca/jadc/vol-64/issue-11/803.html>; Texas Dep't of Health, *Health Hazards of Body Modification*, DISEASE PREVENTION NEWS, Apr. 14, 1997, at 3; *Fresh Warnings on the Perils of Piercing*, N.Y. TIMES, (Apr. 4, 2000) (last visited Mar. 30, 2001) <http://www.nytimes.com/library/national/science/health/040400hth-brody.html>; *Is Body Piercing Safe?*, TEENS HEALTH (last visited Mar. 30, 2001) <http://kidshealth.org/teen/body_basics/body_piercing_safe.html>.
18. *See* American Red Cross, *Donation Information* (last visited Mar. 23, 2001) <http://www.redcross.org/ro/midatlanticblood/info/faq/html>.
19. *See id.*; *see also Piercing Woes: Allergic Reactions to Jewelry a Pointed Problem*, CNN INTERACTIVE (last visited Mar. 6, 2001) <http://www.cnn.com/HEALTH/9812/04/body.piercing/index.html>.
20. *See* Eisner, *supra* note 11.

ideal setting for piercing-based infection and injury. The piercing of oral structures presents a high risk of infection because of the vast amount of bacteria in the mouth.[21]

The American Academy of General Dentistry warns that dental problems can arise from oral piercings. Dentists report patients with chipped teeth, uncontrollable drooling, gum damage, nerve damage, loss of taste, tooth loss, and infection.[22] According to a study published in *General Dentistry*, fractured teeth are a common problem resulting from tongue piercing.[23] Patients with barbell-shaped jewelry in pierced tongues have developed gingivitis from habitually rubbing the ball of the jewelry along the front of their gums.[24] In at least one case study in *General Dentistry*, damaged gum tissue had to be replaced with tissue from the back of the patient's mouth.[25]

The health risks of body piercing are exacerbated by the fact that the industry is largely unregulated. Only ten states have health and sanitation standards for body piercing studios.[26] In response to parent complaints, state legislatures have started to enact statutes to limit the accessibility of body piercing for minors. Some states require written parental consent,[27] some require a parent to be present when a minor is pierced,[28] and others will allow either written permission or a parent's physical presence.[29] In Mississippi, children under eighteen years of age are prohibited from having a body piercing at all.[30] This particular concern about piercing minors stems not only from the

21. *See* Sheila Price & Maurice Lewis, *Body Piercing Involving Oral Sites*, 128 J. AM. DENTAL ASS'N 1017, 1017-20 (1997).
22. *See Is It Dangerous to Get Your Tongue Pierced?*, ORLANDO SENTINEL, June 13, 2000, at E4, *available in* 2000 WL 3606944.
23. *See id.*
24. *See* Sherice L. Shields, *Popular Piercing Opens Possibility of Serious Illness: The Hole in the Trend May Be Hepatitis, HIV Years from Now*, USA TODAY, July 19, 2000, at 09D, *available in* 2000 WL 5784312.
25. *See id.*
26. *See* Thomas, *supra* note 5.
27. *See, e.g.*, ALA. CODE § 22-17A2 (Supp. 2000); ALASKA STAT. § 08.13.217 (2000); DEL. CODE ANN. tit. 11, § 1114 (Supp. 2000); 720 ILL. COMP. STAT. ANN. 5/12-10.1 (Supp. 2000); KAN. STAT. ANN. § 65-1953 (Supp. 1999); ME. REV. STAT. ANN. tit. 32, § 4323 (West 1964); MICH. COMP. LAWS ANN. § 333.13102 (Supp. 2000); MO. ANN. STAT. § 324.520 (Supp. 2001); N.C. GEN. STAT. § 14-400 (1999); OKLA. STAT. ANN. tit. 21, § 842.1 (Supp. 2001); TENN. CODE ANN. § 62-38-302 (Supp. 2000); TEX. HEALTH & SAFETY CODE ANN. § 146.0125 (2000). Connecticut currently has legislation pending requiring written permission from a minor's parent before being pierced. *See* 1999 Conn. Legis. Serv. June Sp. Sess. 99-2 (H.B. 7501).
28. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3721 (Supp. 2000); LA. REV. STAT. ANN. § 14:93.2 (Supp. 2001); R.I. GEN. LAWS § 23-1-39 (Supp. 1999); UTAH CODE ANN. § 76-10-2201 (1999); VA. CODE ANN. § 18.2-371.3 (Supp. 2000).
29. *See, e.g.*, CAL. PENAL CODE § 652 (1999); FLA. STAT. ANN. § 381.0075(7) (Supp. 2001); IND. CODE ANN. § 35-42-2-7 (Supp. 2000); S.C. CODE ANN. § 44-32-120 (Law Co-op. Supp. 2000).
30. *See* MISS. CODE ANN. § 73-62-1(5) (Supp. 2000).

states' natural protection of parental control, but from the unique dangers that body piercing poses to adolescents. Experts report that minors contract infections in piercing at higher rates, and that a spurt of tissue growth can dramatically shift the position of a piercing.[31]

Like the medical community, schools were initially caught off guard by the body piercing craze. However, when kids started disrupting classes by displaying new piercings, asking the school nurse to treat infected piercings, and advising each other on how to pierce themselves, many schools took action. The question now is: are anti-piercing rules constitutionally permissible?

III. FIRST AMENDMENT PROTECTION OF BODY PIERCING (OR HOW CAN YOU EXERCISE FREE SPEECH WITH THAT THING IN YOUR MOUTH?)

When schools have enforced policies prohibiting body piercing at school, some students and parents have asserted that their display of exotic piercings is protected by the First Amendment.[32] Confusion persists about the extent to which school systems may regulate student attire and appearance. The bottom line is that, while students do have constitutionally protected rights while at school, they will search in vain to find a provision in the Constitution that specifically enables them to pierce their eyebrows, noses, or navels.

A. Student First Amendment Rights

In 1966, public students' free speech rights were first recognized by a United States Circuit Court of Appeals in *Burnside v. Byars*.[33] At issue was whether students could be suspended for wearing "freedom buttons" which were worn to encourage blacks to exercise their civil rights.[34] The students were suspended under a disciplinary regulation which insured that students and faculty were not subject to "annoying, distracting or disorderly conduct."[35] Because maintaining and protecting the public school system was a compelling interest, the court balanced the regulation against the First Amendment rights of the students.[36] The principal of the school claimed that the buttons did not bear on the students' education, would disturb the school program, and would cause a commotion in the classroom.[37] There was no evidence, however, that regular school activities were hampered or

31. *See* Thomas, *supra* note 5.
32. *See, e.g.*, Sara Grell, *A Distraction or a Right?: Former Aurora Students Fight School Rules on Tongue Rings*, GRAND ISLAND INDEPENDENT, Jan. 17, 1999, at 1A.
33. 363 F.2d 744 (5th Cir. 1966).
34. *See id.* at 746-47.
35. *Id.* at 746 n.2, 747.
36. *See id.* at 748.
37. *See id.* at 746-47.

that the school schedule was otherwise disturbed.[38] In fact, the principal testified that the students were suspended merely for violating the regulation and not for interfering or disrupting classes.[39] The Court held that, although school officials had a wide latitude of discretion to protect the educational system, the policy forbidding the wearing of "freedom buttons" was "arbitrary and unreasonable."[40]

Three years later, in *Tinker v. Des Moines Independent Community School District*[41] the United States Supreme Court explicitly held that students retain First Amendment rights while at school.[42] In *Tinker*, a disciplinary policy initiated by local school officials banned students from wearing black armbands in protest of the Vietnam war while on school property.[43] Five students who did not comply with the ban were suspended.[44]

In one of the Court's most famous passages, the majority embraced the notion that students retain First Amendment freedoms at school. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[45] In *Tinker*, the Court was particularly troubled by the fact that the school seemed anxious to prohibit the students' expression due to the viewpoint it expressed, rather than any actual fear of educational disruption:[46]

> [T]he action of the school authorities appears to have been *based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam.* It is revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper. (The student was dissuaded).[47]

The Supreme Court found that school authorities could not justify prohibition of student expression unless the school could prove that the conduct would "'materially and substantially interfere[] with the requirements of appropriate discipline in the operation of the school'" or "colli[de] with the rights of others."[48] Using this line of reasoning, a restriction on student clothing that arguably had some expressive function must be supported by a showing, or reasonable forecast, of a

38. *See id.* at 748.
39. *See id.*
40. *Id.* at 748-49.
41. 393 U.S. 503 (1969).
42. *See id.* at 506.
43. *See id.* at 504.
44. *See id.* at 508.
45. *Id.* at 506.
46. *See id.* at 508, 514.
47. *Id.* at 510 (emphasis added).
48. *Id.* at 513.

material, substantial disruption.[49] This establishes a high bar for school administrators to meet.

A closer look at *Tinker*, however, reveals a much less expansive view of students' rights to choose their personal appearance while at school. First, the Supreme Court acknowledged the requirements of appropriate discipline in the operation of schools. The Court held that expressive conduct could be prohibited if it *substantially* and *materially* interfered with the invasion of other's rights or caused disruption.[50] The problem in *Tinker* was that the school district failed to provide the necessary evidence of actual or even threatened disruption.[51]

Furthermore, and more important for this discussion, *Tinker*'s "material and substantial disruption" standard may not not even apply to dress codes. In *Tinker*, the Court wrote:

> The problem posed by the present case *does not relate to regulation of the length of skirts or the type of clothing, to hairstyle*, or deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech."[52]

This language suggests that the Court may have viewed a student's choice of clothing, hair style, and body adornment for school as being completely devoid of constitutional protection. If this reading of *Tinker* is correct, schools should be able to regulate student appearance in any way which is rationally related to their educational mission.

Tinker also provides important limits to students' First Amendment rights not found in typical non-school First Amendment rights cases which characterize freedom of speech as the touchstone of individual liberty. For example, Justice Cardozo described the freedom of speech as "the matrix, the indispensable condition, of nearly every other form of freedom."[53] The right to free speech in our society is extensive and robust.[54] Supporting this view, Justice Holmes observed "it is . . . not free thought for those who agree with us but freedom for the thought that we hate."[55] Another example of the breadth and depth of the First Amendment right to free speech is found in a Supreme Court case involving race-baiting speech. The High Court wrote, "a function of free speech under our system of government is to

49. *See* Pyle v. South Hadley Sch. Comm., 55 F.3d 20 (1st Cir. 1994).
50. *See Tinker*, 393 U.S. at 508-09, 511, 513-14.
51. *See id.* at 514.
52. *Id.* at 507-08 (citations omitted) (emphasis added).
53. Palko v. Connecticut, 302 U.S. 319, 327 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).
54. *See, e.g.,* Texas v. Johnson, 491 U.S. 397 (1989)(burning the American flag as protected form of speech).
55. United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting), *overruled in part by* Girouard v. United States, 328 U.S. 61 (1946).

invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[56]

This type of ringing First Amendment defense is conspicuously absent from the *Tinker* opinion. Rather, *Tinker* is full of qualifying statements about collision with the rights of others and careful reservation of the rights of administrators to limit aggressive and disruptive speech. Even the famous "schoolhouse gate" declaration is preceded by this sentence: "First Amendment rights, *applied in light of the special characteristics of the school environment*, are available to teachers and students."[57] The Supreme Court, while acknowledging that students possess constitutional rights, did not imbue them with the robustness found outside the schoolhouse gate. The Court clearly views the school as a special place. The role of the State, as educator, is different from the role of the State as sovereign.

Subsequent Supreme Court cases dealing with conflicts between First Amendment rights and the needs of the State's educational system underscore this point. For example, in 1972, the Court addressed the First Amendment rights of protesters on or near school grounds in *Grayned v. City of Rockford*.[58] The anti-noise ordinance "prohibit[ed] a person while on grounds adjacent to a building in which a school is in session from willfully making a noise or diversion that disturbs or tends to disturb the peace or good order of the school session."[59] The demonstrators were arrested for marching around a sidewalk approximately one hundred feet from the school while holding signs which demanded racial equality in the school.[60] One of the arrested demonstrators challenged the ordinance as an unconstitutional regulation of protected activity.[61] The Supreme Court disagreed with respect to the anti-noise ordinance.[62] Justice Marshall used the material disruption/substantial disorder standard to conclude that noisy protesting was incompatible with the normal activities of the school during school hours.[63] Although there was conflicting evidence as to whether the protesters actually disrupted school procedure, the Court found that the ordinance furthered the compelling interest of maintaining a quiet, undisturbed school session conducive to students' learning.[64]

56. Terminello v. Chicago, 337 U.S. 1, 4 (1949).
57. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) (emphasis added).
58. 408 U.S. 104 (1972).
59. *Id.* at 104.
60. *See id.* at 105.
61. *See id.* at 106.
62. *See id.* at 117.
63. *See id.* at 118-120.
64. *See id.* at 105-06, 119.

The Court further held that the law did not unnecessarily interfere with First Amendment rights of the students.[65]

When student speech interferes with the social order within the school building, the Court has also curtailed the First Amendment rights of the pupils. In *Bethel School District No. 403 v. Fraser*,[66] the Court held that a school district was within its permissible authority in disciplining a high school student for giving a lewd speech at a class assembly.[67] Specifically, the student recited a graphic and sexually explicit speech while nominating a fellow student for student council.[68] The speech would undoubtedly be constitutionally-protected if it were coming from an adult in some public forum.[69] The school board suspended the student for three days, of which he served two, under a school disciplinary rule which prohibited the use of obscene language in the school.[70] The student then brought suit claiming his First Amendment rights of freedom of speech were violated by the school board.[71] The Supreme Court, in a 7-2 decision, stated that the controversial view of the student had to be balanced against the school's interest in teaching students about socially acceptable behavior.[72] The Court gave the school district the right to decide when freedom of expression undermined the values of the school, mainly protecting students from exposure to vulgar and offensive speech.[73] The Court also allowed the school unfettered discretion when deciding when that free speech could be subject to inter-school discipline.[74]

If, under *Fraser*, school authorities can sanction student speech that is lewd, vulgar, or offensive, a standard easier to meet than the obscenity standard found in the wider society, it seems that the schoolhouse is a special place in which student expression is viewed differently than speech that takes place outside the schoolhouse. *Tinker* asserted that students have a freedom to express their ideas only when that expression does not collide with the rights of other students. *Fraser* eased the standard in that the sensibilities of others must be taken into account when viewing the propriety of student speech. This is a far cry from the pronouncements of Justices Cardozo and Holmes on the necessary vitality and robustness of free speech when the State acts as sovereign. Sensibility is an easier constitu-

65. *See id.* at 115, 119.
66. 478 U.S. 675 (1986).
67. *See id.* at 685.
68. *See id.* at 677-78.
69. The complete text of Fraser's speech is included in Justice Brennan's concurring opinion. *See id.* at 687 (Brennan, J., concurring).
70. *See id.* at 678-79.
71. *See id.* at 679.
72. *See id.* at 681.
73. *See id.* at 683, 685.
74. *See id.* at 686.

tional standard for dress codes to meet than the collision with the rights of others. Sensibility resides within the individual, whereas rights are granted from external authority.

The United States Supreme Court has not specifically ruled on the constitutionality of school regulations of student dress and appearance.[75] However, legal commentators have noted a judicial trend toward reducing the rights of students to choose their appearance at school and expanding the discretion of school authorities.[76] Students who have tried to rely on *Tinker* to challenge regulation of their personal appearance while at school have been rebuffed by the courts. They have failed in the main because the schools' dress code rules have not restricted conduct which was sufficiently speech-laden. Most students who challenge dress and grooming codes want to base their appearance on personal expression, fashion, or other social reasons. Consequently, courts have supported school districts and rejected First Amendment challenges to a variety of school dress and grooming codes.

Bivens v. Albuquerque Public Schools[77] provides a good example of this trend. In response to a gang problem, Albuquerque Public Schools adopted a school dress code against wearing sagging pants. A student challenged this policy asserting that he wore "sagging pants as a statement of his identity as a black youth and as a way for him to express his link with black culture and the styles of black urban youth."[78] He claimed that the ban was unconstitutional because the school could not show that sagging pants interfered with appropriate discipline in the operation of the school.[79] The court rejected the First Amendment claim. The conduct of wearing sagging pants failed to pass the "particularized message" test necessary for First Amendment protection.[80] The court upheld the dress code and noted that individuality is not within the scope of First Amendment protection.[81]

75. *See, e.g.*, Olff v. East Side Union High Sch. Dist., 404 U.S. 1042, 1042 (1972) (denying certiorari on the issue of the constitutionality of a school's restrictions on student hairstyles).

76. *See, e.g.*, N. Denise Burke, *Restricting Gang Clothing in the Public Schools*, 80 EDUC. L. REP. 513, 522 (Apr. 8, 1993) ("*Fraser* indicates a judicial trend toward greater deference to school boards to determine what speech 'intrudes upon the work of the school or the rights of other students.'"); Lawrence F. Rossow & Jerry R. Parkinson, *Schoolboys and Earrings: A Significant Threat to School Discipline?*, 37 SCH. L. REP. 1, 2 (1995) ("Certainly the *Barber* and *Hines* decisions are consistent with recent law restricting the individual rights of students."); Perry A. Zirkel, *With Few Exceptions, Courts Uphold Dress Codes*, AASA LEADERSHIP NEWS, Sept. 23, 1998, at 3 ("In general, school officials win most modern dress or grooming cases.").

77. 899 F. Supp. 556 (D.N.M. 1995).

78. *Id.* at 558.

79. *See id.* at 559.

80. *See id.* at 560.

81. *See id.* (citing Olesen v. Bd. of Educ., 676 F. Supp. 820, 822 (N.D. Ill. 1987)).

Inappropriate t-shirts were the targets of a school dress code in *Pyle v. South Hadley School Committee*.[82] Two students wore controversial t-shirts to school. One student's t-shirt stated "See Dick Drink. See Dick Drive. See Dick Die. Don't be a Dick."[83] The other student's t-shirt stated "Co-ed Naked Band: Do It To The Rhythm."[84] On separate occasions, the students were sent home to change. Thereafter, the students individually reported to school wearing a variety of t-shirts designed to test the school's policy against sexually suggestive t-shirts.[85] Finally, the school disciplined each of the students, who then sued.[86] The students each claimed that the school's dress code violated their First Amendment rights.[87] The court ruled in favor of the school.[88] While recognizing students' right to express themselves freely, the court also recognized the need for affirming the comprehensive authority of the school officials, to prescribe and control the conduct in schools.[89]

Similarly, in *Bishop v. Colaw*[90] a male student sued his St. Charles, Missouri high school, claiming that the hair-length regulation violated his First Amendment Rights. The school required male students to have:

> A. All hair . . . neatly trimmed around the ears and back of the neck, and no longer than the top of the collar on a regular dress or sport shirt when standing erect. The eyebrows must be visible, and no part of the ear can be covered. The hair can be cut in a block cut.
>
> B. The maximum length for sideburns shall be to the bottom of the ear lobe.[91]

Bishop was expelled for repeatedly violating this rule by wearing his hair too long in back and over the ears.[92] He sued, claiming that the regulation violated the First Amendment and other provisions of the United States Constitution.[93] The court rejected the First Amendment claim. The plaintiffs conceded that the student had never considered his hairstyle to be symbolic of any idea.[94] They nevertheless claimed that "a [nonconforming hairstyle] need not symbolize anything at all . . . to be a constitutionally protected expression."[95] The

82. 861 F. Supp. 157 (D. Mass. 1994).
83. *Id.* at 162.
84. *Id.* at 161.
85. *See id.* at 163.
86. *See id.*
87. *See id.* at 158.
88. *See id.* at 158-59.
89. *See id.* at 159.
90. 450 F.2d 1069 (8th Cir. 1971).
91. *Id.* at 1070-71.
92. *See id.* at 1071.
93. *See id.* at 1070.
94. *See id.* at 1074.
95. *Id.*

court rejected this "unusually broad reading of the First Amendment."[96]

Other examples of student challenges to school personal appearance regulations abound. Students have challenged a school rule banning clothing that identifies a professional sports team,[97] a prohibition against clothes that advertise alcohol,[98] discipline of a student who wore a tee-shirt proclaiming that "Drugs Suck,"[99] and a school's refusal to allow a brother and sister to attend a prom dressed as a person of the opposite sex.[100] In each of these cases, the court held that the school district had not violated students' free speech rights. As one judge noted, "not every defiant act by a high school student is constitutionally protected speech."[101]

B. Body Piercings as "Speech"

In order to prove a violation of the First Amendment rights secured them by *Tinker*, students must show that the state has somehow restricted his or her speech. The United States Supreme Court has applied the protections of the First Amendment to many forms of expression, including forms of conduct that are sufficiently expressive to be deemed symbolic speech. The "Constitution looks beyond written or spoken words as mediums of expression."[102] Examples of constitutionally protected symbolic conduct include parades,[103] marching and displaying swastikas,[104] wearing an armband,[105] saluting or re-

96. *Id.* The court did, however, hold that Bishop's expulsion violated the Fourteenth Amendment. *See id.* at 1075-76; *infra* notes 138-141 and accompanying text.

97. *See, e.g.*, Jeglin v. San Jacinto Unified Sch. Dist., 827 F. Supp. 1459 (C.D. Cal. 1993). Although the court affirmed the regulation at the district's high schools, the district's ban was invalidated in the middle schools and elementary schools, where the court found no evidence that such clothing caused any disruption. For a discussion on legal issues surrounding so-called "gang clothing" in schools, see Burke, *supra* note 76.

98. *See, e.g.*, McIntire v. Bethel Indep. Sch. Dist. No. 3, 804 F. Supp. 1415 (W.D. Okla. 1992). In this case, however, the school failed to prove that the t-shirt it objected to was an alcohol advertisement. *See id.* at 1425.

99. *See, e.g.*, Broussard v. School Bd., 801 F. Supp. 1526, 1528 (E.D. Va. 1992) (stating that the word "suck" was considered offensive and vulgar).

100. *See, e.g.*, Harper v. Edgewood Bd. of Educ., 655 F. Supp. 1353 (S.D. Ohio 1987). The court found the regulation to be reasonable because it was related to the valid educational purposes of maintaining discipline and teaching community values.

101. Bivens v. Albuquerque Pub. Sch., 899 F. Supp. 556, 560 (D.N.M. 1995).

102. Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 569 (1995).

103. *See id.*

104. *See* National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 43-44 (1997).

105. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505-06 (1969).

fusing to salute a flag,[106] and displaying a red flag.[107] Exhibition of the human body can also be protected expression, whether nude, dancing, or otherwise.[108]

Conduct does not take on the quality of speech simply because "the person engaging in the conduct intends thereby to express an idea."[109] Before constitutional protection is given to so-called symbolic speech, the Supreme Court requires that the conduct or speech has sufficient communicative content under a two-part test.[110] First, the person "speaking" must intend to convey a particular message.[111] Second, there must be a great likelihood that the message will be understood by those observing it.[112]

Very few courts have been presented with the question of whether body piercing constitutes "speech" under the First Amendment.[113] In *Olesen v. Board of Education,*[114] a high school student challenged the constitutionality of a school rule prohibiting male students from wearing earrings to school. The student claimed that the rule violated his First Amendment rights.[115] The court disagreed.[116] The court explained that, in order to claim the protection of the First Amendment, the student was required to demonstrate that his conduct was intended to convey a particularized message and that the likelihood was great that the message would be understood by those who observed the conduct.[117] The court concluded that the student's only message, that of his individuality, was not within the scope of the amendment.[118]

Similarly, courts which have considered whether tattooing, another form of "body art," constitutes "speech" have held that it does

106. *See* West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 632, 642 (1943).

107. *See* Stromberg v. California, 283 U.S. 359, 369 (1931).

108. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981).

109. United States v. O'Brien, 391 U.S. 367, 376 (1968).

110. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989).

111. *See* Spence v. Washington, 418 U.S. 405 (1974); United States v. O'Brien, 391 U.S. 367, 376 (1968).

112. *See O'Brien,* 391 U.S. at 376.

113. Two reported cases, discussed *infra,* do challenge school regulations prohibiting boys from attending school wearing a pierced earring. *See* Hines v. Caston Sch. Corp., 651 N.E.2d 330 (Ind. Ct. App. 1995); Barber v. Colorado Indep. Sch. Dist., 901 S.W.2d 447 (Tex. 1995). However, in *Hines,* the plaintiff conceded that wearing an earring was not "speech" protected by the First Amendment. *See* 651 N.E.2d at 333. In *Barber,* the plaintiff did not plead any violation of the First Amendment. *See* 901 S.W.2d at 447.

114. 676 F. Supp. 820 (N.D. Ill. 1987).

115. *See id.* at 821.

116. *See id.* at 823.

117. *See id.* at 822.

118. *See id.*

not.[119] Typical of this line of cases is *People v. O'Sullivan*.[120] There, a New York appellate court declared, "[W]e do not deem [tattooing] speech or even symbolic speech."[121]

Yurkew v. Sinclair[122] concluded that "[w]herever the amorphous line of demarcation exists between protected and unprotected conduct for First Amendment purposes . . . tattooing falls on the unprotected side of the line."[123] The court in *Yurkew* made a bright-line distinction between the display of tattoos as speech and the creation of tattoos as conduct, and held that "merely because Yurkew intends to express an idea through the tattooing process does not raise the conduct to a level protected by the First Amendment."[124]

In *State Medical Licensing Board v. Brady*,[125] the court observed that "all courts presented with this issue have found that the process of tattooing is neither protected speech nor even symbolic speech."[126] The court agreed with *Yurkew*, stating that tattooing falls on the unprotected side of the "amorphous line" between protected and unprotected conduct.[127]

Finally, in *Stephenson v. Davenport Community School District*,[128] a public high school student challenged a school rule forbidding the wearing of gang symbols under which she was directed to remove a tattoo in order to continue attending school. The United States Court of Appeals for the Eighth Circuit held that the tattoo was not protected "speech" under the First Amendment: "[T]he tattoo is nothing more than 'self-expression,' unlike other forms of expression or conduct which receive first amendment protections."[129]

Given the lowered standard for student speech within the hallways of the public schools, student dress that does not convey ideas should not receive constitutional protection. In other words, if a lewd slogan on a tee-shirt is not protected speech, then a pierced tongue, eyebrow or nose surely will not be deemed protected speech. As the Court in *Fraser* explained, "[T]he determination of what manner of speech in

119. *But see* Lanphear v. Massachusetts, No. 99-1896-B, slip op. at 4 (Mass. Sup. Ct. Oct. 20, 2000) (holding that tattoos are "speech" protected by the First Amendment).
120. 409 N.Y.S.2d 332 (N.Y. App. Div. 1978).
121. *Id.* at 333.
122. 495 F. Supp. 1248 (D. Minn. 1980).
123. *Id.* at 1253.
124. *Id.* at 1254.
125. 492 N.E.2d 34 (Ind. Ct. App. 1986).
126. *Id.* at 39.
127. *See id.*
128. 110 F.3d 1303 (8th Cir. 1997).
129. *Id.* at 1307 n.4. The court struck down the school's rule on the grounds that the prohibited "gang symbols" were so ill-defined that the rule violated the void for vagueness doctrine embodied in the Due Process clauses of the Fifth and Fourteenth Amendments. *See id.* at 1308-12.

the classroom or in a school assembly is inappropriate properly rests with the school board."[130] Further supporting school regulation of student appearance, the Court "reaffirmed that the constitutional rights of students in public school[s] are not automatically coextensive with the rights of adults in other settings."[131] While adults have wide freedom in matters of public discourse, it does not follow that "the same latitude must be permitted to children in public school."[132] As the majority in *Fraser* succinctly summed it up, "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket."[133]

IV. FOURTEENTH AMENDMENT PROTECTION OF BODY PIERCING (OR HOW CAN YOU EVEN MENTION "RATIONAL" AND "BODY PIERCING" IN THE SAME BREATH?)

Though body piercing is most likely not "speech" protected by the First Amendment, that does not mean it is totally without constitutional protection. Courts have held that students have a constitutional interest in their appearance and have identified the Due Process Clause of the Fourteenth Amendment and the privacy penumbra of the Bill of Rights as the sources of that right. This distinction between the First and Fourteenth Amendments is significant because generalized liberty interests under the Constitution are not always afforded as much protection as free speech rights.[134] If body piercing does have some Fourteenth Amendment protection, the protection would only require the school's prohibition to bear some rational relationship to a legitimate interest of the school.[135] Consequently,

130. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

131. *Id.* at 682.

132. *Id.*

133. *Id.* (quoting Thomas v. Board of Educ., 607 F.2d 1043, 1057 (Newman, J., concurring)). The court is referring to a United States Supreme Court decision determining whether a citizen named Cohen had a right to wear a jacket with "FUCK the Draft" emblazoned on the back. *See* Cohen v. California, 403 U.S. 15 (1971).

134. *See* Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)(supporting the notion that only the fundamental liberties which are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," are protected by the Fourteenth Amendment's Due Process Clause with the heightened scrutiny used in First Amendment free speech claims). Under *Palko* and its progeny, body piercing is not likely to be considered a fundamental liberty implicit in ordered liberty. Therefore, only a rational relationship between a law restricting it and a legitimate state interest is needed to assure the law's constitutionality.

135. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37-40 (1972) (holding that the rational basis test is the proper standard when neither a suspect class nor a fundamental constitutional right is implicated); Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174, 177 (4th Cir. 1996) (holding that under

schools can regulate students' personal appearance if they establish that the regulation somehow enhances their educational mission.

In *Bishop v. Colaw*,[136] the United States Court of Appeals for the Eighth Circuit held that, though a student did not have a First Amendment right to wear his hair long, the school policy prohibiting male students from wearing long hair had no rational relationship to any government interest. The court found that the regulation therefore violated the Due Process Clause of the Fourteenth Amendment and the privacy penumbra of the Bill of Rights.[137] A careful reading of *Bishop* confirms that the court was reacting to the school district's failure to proffer any justifications for its regulation. The district claimed, among other things, that male students with long hair created a sanitation problem in the swimming pool, could create confusion over appropriate dressing room and restroom facilities, and that one group of students who wore their hair longer had once been disrespectful to a teacher.[138] The panel was unimpressed. As Judge Lay explained in his concurring opinion:

> After due consideration I fail to find any rational connection between the health, discipline or achievement of a particular child wearing a hair style which touches his ears or curls around his neck, and the child who does not. The gamut of rationalizations for justifying this restriction fails in light of reasoned analysis. When school authorities complain variously that such hair styles are inspired by a communist conspiracy, that they make boys look like girls, that they promote confusion as to the use of rest rooms and that they destroy the students' moral fiber, then it is little wonder even moderate students complain of "getting up tight." In final analysis, I am satisfied a comprehensive school restriction on male student hair styles accomplishes little more than to project the prejudices and personal tastes of certain adults in authority on to the impressionable young student.[139]

Similarly, in *Stephenson v. Davenport Community School District*,[140] the school district failed to provide a cogent explanation for how it determined whether student dress was "gang related." The rule in question prohibited "[g]ang related activities such as display of 'colors,' symbols, signals, signs." However, the district failed to provide any definition of "gang related activities," "colors," or any of its other terms. Stephenson had a small cross tattooed on her hand. When school officials consulted with local police and determined that the cross could be a gang symbol,[141] they required the student to have

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the Fourteenth Amendment, courts examine whether government intrusions into citizens' liberties are justified by adequate state interests).

136. 450 F.2d 1069 (8th Cir. 1971).

137. *See id.* at 1075; *see also* Massie v. Henry, 455 F.2d 779, 783 (4th Cir. 1972) (holding that the defendant had a due process right, although not absolute, to select the length of his hair).

138. *See Bishop*, 450 F.2d at 1076.

139. *Id.* at 1078 (Lay, J., concurring).

140. 110 F.3d 1303 (8th Cir. 1997).

141. *See id.* at 1305.

the tattoo removed.[142] Although there was no evidence that Stephenson was involved in gang activity, the district nevertheless threatened expulsion unless the tattoo was removed.[143] As a result, Stephenson had to endure a procedure in which a doctor "burnt through four layers of . . . skin [and] then [followed up the procedure with] two months of various appointments [where the] skin was scraped off with a razor blade to prevent the bleeding of the tattoo."[144] Stephenson then filed suit.

The United States Court of Appeals for the Eighth Circuit held that the district's regulation was unconstitutional under the Fourteenth Amendment's void for vagueness doctrine. The court began by observing that common religious symbols could be considered gang symbols under this rule as written.[145] The court therefore concluded that, even given the deference owed to public school officials, it had to apply a higher level of scrutiny due to the potential impact on protected speech.[146] The court then determined that the regulation was impermissibly void for two basic reasons. First, the term "gang" was so imprecise that persons of common intelligence could only guess as to the rule's meaning.[147] Second, the rule allowed school administrators and local police unfettered discretion to determine what represented a gang symbol.[148]

The lesson to be learned from *Bishop* and *Stephenson* is that school officials should carefully explain the reasoning behind implementation of regulations on student appearance. When school districts have more carefully crafted their appearance regulations, they have been able to successfully justify them to the courts.

For example, in *Jones v. W.T. Henning Elementary School*,[149] a second grade student and his parents challenged a school prohibition against boys wearing earrings. The school district offered three objectives the regulation was designed to accomplish: "(1) the avoidance of disruption and distraction in the classroom; (2) the fostering of respect for authority and discipline; and (3) the conformation to community standards."[150] When the district offered evidence in support of each of these professed objectives, both the trial court and the appellate court found these justifications to be "valid."[151]

142. *See id.* at 1306.
143. *See id.* at 1305.
144. *Id.* at 1306 (first two sets of brackets in original).
145. *See id.* at 1308.
146. *See id.* at 1307.
147. *See id.* at 1310.
148. *See id.* at 1311.
149. 721 So. 2d 530 (La. App. 1998).
150. *Id.* at 532.
151. *See id.* The United States Supreme Court has declared that a class based upon gender must survive "intermediate scrutiny." *See* Reed v. Reed, 404 U.S. 71, 75

Hines v. Caston School Corp.[152] involved a school's policy prohibiting students from wearing "jewelry or other attachments not consistent with community standards or that could pose a health or safety hazard to either the student himself or to other students in his presence."[153] School administrators interpreted this policy as preventing a male student from wearing an earring to school. The student challenged the policy, arguing that this prohibition denied his fundamental right to control of his own person in matters of appearance. School board members and administrators testified in support of the policy. They stated that "the earring ban serves to prevent 'disrespect for authority and disrespect for discipline within the school' by maintaining 'a basic standard for the children to live by'"[154] and "it discourages rebellion against local community standards."[155]

The court ruled in favor of the school. It held that in order to prevail, the student had the burden of establishing that "the earring ban serves no purpose rationally related to the educational function of the school."[156] It concluded that the student had not carried this burden. The court reasoned that the primary duty of school officials and teachers is the education and training of young people, and that the state has a compelling interest in assuring that schools meet this responsibility. Teachers cannot begin to educate students without first establishing discipline and order in the classrooms and school. The court concluded by stating it is reasonable that a community's schools should be permitted to reflect its values within constitutional limits.

Barber v. Colorado Independent School District[157] was a class action filed on behalf of all male students who had reached the age of majority. It challenged the legality of the school district's prohibition against male high school students wearing earrings. There was testimony at the trial that it was important for schools to teach students how to live in society. Rules such as the grooming regulations at issue were one way to teach students discipline and respect for authority, as well as personal grooming and hygiene. The high school principal testified that the regulation was an educational tool to teach compliance with rules. He testified that it was part of the school's responsibility to teach students that they must comply with rules even if they do not

(1971). "To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

152. 651 N.E.2d 330 (Ind. Ct. App. 1995).

153. *Id.* at 331.

154. *Id.* at 335

155. *Id.* at 334.

156. *Id.* at 335.

157. 901 S.W.2d 447 (Tex. 1995).

agree with the rules, and that the failure to comply will have consequences.[158]

Each of these cases demonstrates that schools can craft policies that regulate student appearance which will pass constitutional muster. The difference between rules which survived a court challenge and those that did not lay in the reasons the schools proffered to justify their actions.

V. CRAFTING A CONSTITUTIONALLY ACCEPTABLE REGULATION

What interests, then, do schools have in restricting the right of students to wear body piercing jewelry to school? In general, school districts have expressed three areas of concern: 1) health and hygiene; 2) disruption; 3) discipline. The courts have held that each of these concerns falls within the legitimate realm of school regulation.

A. Health & Hygiene

One reason schools may wish to prohibit body piercing is the students' health and hygiene. The health risks of exotic body piercing are well-documented.[159] Medical studies have revealed that students who are infected due to body piercing can pass that infection on to their unpierced peers.[160] These health risks are exacerbated in smaller communities with piercing salons. If students are allowed to display piercings at school, the desire of others to be pierced can lead to self-piercing. The risk of infection increases when people pierce themselves and each other. They are likely to use unsterile instruments and share them without proper cleaning between uses. Because they are less mature, more impulsive, and less likely to carefully consider potential consequences, students are more likely than others to engage in self-piercing.

B. Disruption

Body piercing also has the potential to cause significant disruption in the classroom. As any teacher will tell you, high school and particularly junior high school students are easily distracted. It is a rare student who will be able to resist the temptation to display his or her new tongue ring.

In addition to the potential disruption from the display of exotic body piercing, students' care of recently pierced body parts can also disrupt the education environment. Recent piercings require multiple

158. *See id.*
159. *See supra* notes 11-32 and accompanying text.
160. *See supra* notes 15-22 and accompanying text.

cleansing on a daily basis if they are to avoid infection. For example, a recently pierced tongue must be rinsed with hydrogen peroxide a dozen times daily for 6-8 weeks and each time after the student consumes any food or drink.[161]

Additionally, recently pierced sites tend to break open and bleed, causing substantial classroom disruption. Those who sport an eyebrow piercing often play with it, twisting the ring tightly into the flesh. This manipulation will cause even an old piercing to bleed. Of course, students who are bleeding must be immediately excused to the nurse's office, and a janitor must be summoned to disinfect any area on which blood may have fallen.

C. Discipline

Although schools do not operate like army boot camp, the majority of administrators are legitimately concerned about instilling a measure of discipline and respect for authority in their students. Body piercing, with its anti-authority implications, undermines that purpose. The courts have agreed that schools can fulfill their duty to teach socialization into society. School districts have a responsibility to teach civil, acceptable behavior. The United States Supreme Court stated that:

> The role and purpose of the American public school system were well described by two historians, who stated: '[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.' C. Beard & M. Beard, New Basic History of the United States 228 (1968). In *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979), we echoed the essence of this statement of the objectives of public education as the 'inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.'[162]

The Court also emphasized that teachers, adults, and students act as role models for other students. It wrote:

> Consciously or otherwise, teachers - and indeed the older students - demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models.[163]

The modern practice of body piercing originated as a symbol of sado-masochism.[164] In fact, a 1985 survey of subscribers to *Piercing Fans International Quarterly* (a popular piercing magazine) revealed

161. *See* Carol J. Mulvihill & Carla Peterman, Student Health Services of the University of Pittsburgh at Bradford, *Piercing Care and Precautions* (May 1997) (last visited Mar. 6, 2001) <http://www.pitt.edu/~cjm6/s97pierc.html>.

162. Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

163. *Id.* at 683.

164. *See* John Leo, *The Modern Primitives*, U.S. NEWS & WORLD REPORT, July 31, 1995, at 16.

that fifty-seven percent of its subscribers practiced sexual sado-masochism.[165] Body piercing retains strong sexual connotations. An internet search for the terms "tongue body AND piercing" yielded the following results: five of the first twenty sites were dedicated exclusively to pornographic and other sexually explicit material; over half of the remaining fifteen sites contained photos depicting frontal nudity.[166]

Body piercing has been seen by those in "punk" and anti-establishment subcultures as symbolic of deviance and rebellion.[167] Counterculture youth are thought to be more inclined toward facial piercings that may provide increased shock value.

Finally, students who go to a studio to have piercing performed will frequently be exposed to a seamy part of society that most adults agree is not an appropriate venue for young people. Indulging the current adolescent interest in body piercing encourages student exposure to social influences which are generally considered culturally deviant and universally considered inappropriate for young people.

In addition to these justifications, schools may have unique experiences that will provide additional or independent support for a ban on body piercing. No matter what reasons underlie a school district's decision to regulate body piercing, it is vital that the school board's rationale be carefully documented. Districts which have a "legislative history" showing that a policy was only adopted after reasoned consideration have a far greater chance of prevailing if challenged in court.

VI. CONCLUSION

Adolescents in each generation will continue to try their parents' patience and their teachers' tolerance with new and unusual fashion fads. However, when popular crazes pose serious health risks, schools should act to discourage their students from endangering themselves and others. If school administrators decide that body piercing is a dangerous and disruptive fad, they are not rendered powerless by the United States Constitution. School districts that carefully document their consideration of rational and legitimate state interests should be able to craft enforceable body piercing regulations. And then, when the piercing craze subsides, and a new rage hits, administrators will begin the process all over again.

165. *See* Daniel Wattenberg, *A Parents' Guide to Body Piercing*, FORBES, Sept. 22, 1997, at 166-73.

166. Search conducted through <http://msn.com> on Oct. 13, 1998 (search results on file with the author).

167. *See* Tweeten & Rickman, *supra* note 16, at 735-40.