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# Lawyer



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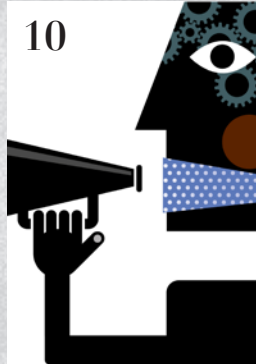
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# Schultz v. Medina Valley ISD: When Cultures and Beliefs Collide (Or How Air Conditioning Changed Texas)

By Hon. Fred Biery

The following remarks were originally presented at the William S. Sessions American Inns Of Court on October 18, 2012.

In *To Kill a Mockingbird*, Harper Lee's character, Scout, observed the Christian Women's Missionary Society speaking intolerantly of local Negroes, but nevertheless collected money for missionaries to bring salvation to people of the same race in Africa. Seeing this hypocrisy, Scout said, "Humans are a peculiar lot." In this case, the Court also wrote in the third person, but referred to that species as *Homo sapiens*.

As we know, Scout's father, Atticus Finch, did his duty, as every lawyer must when our oath to the Rule of Law and the Constitution requires us to do so.

This evening's program is about that kind of case and those kinds of lawyers: Craig Wood who advocated for First Amendment freedom of religious expression and Greg Lipper who advocated for First Amendment freedom from government imposition of particular sectarian practices.

While we will never know what went on behind the closed doors of the mediation, we can be reasonably sure that we would not be having this program without the skillfulness of Mediator Don Philbin helping to craft the settlement. We would not be here because this case would still be in litigation or on appeal.

This controversy has its microcosmic genesis in small-town Texas before air-conditioning made it possible for foreign *Homo sapiens* to come across the Red River and not leave in May when the temperature began to rise. Indeed, some of us believe we should forget about guarding the Rio Grande River and pay more attention to the migration across the Red River.

That north to south diaspora has

caused the population of this five-county area to grow from 500,000 in 1950 to 2.2 million today, with basically the same water supply. But that is a program for another day.

Migration brought not only quantity to the census, but also differences in culture and spiritual beliefs.

The "city" of San Antonio was but a big small town. Loop 410 and North Star Mall did not exist, and the airport was surrounded by cows, not cars.

Going to Karen Monsen's hometown of Pflugerville, or to Boerne or Castroville in the 1960s, one would find a single flashing yellow traffic light and maybe a Dairy Queen. Round Rock, Texas, had a 2A high school. It now has five or six high schools and is effectively part of Austin. Ironically, one of the Round Rock high schools this year had a valedictorian of the Muslim faith who spoke while wearing her traditional Muslim hijab, but she did not exhort the audience to join in her beliefs.

Those culturally and religiously homogenous small towns of Texas are a thing of the past.

But in a serendipitous happenstance of post-World War II San Antonio, some of us were fortunate to grow up in a neighborhood whose triangular boundaries generally went from Woodlawn Lake to St. Mary's University and back to Jefferson High School.

The Lopez, Tamez and Carreño families went to Mass at St. Ann's, Little Flower, or St. Paul's. Across the street from the latter, the Bremers practiced their Mormon faith. Six blocks down the street, Agudas Achim Synagogue was the spiritual home of the Epstein, Lauterstein, and Katz families. By the way, Mrs. Katz

still bore the tattoo number intolerantly given to her by Nazi Christians. Within bicycle-riding distance, there were numerous Protestant<sup>1</sup> churches, where white people and black people worshipped the same Risen Lord, but did so in separation rather than communion with each other. Some distance away, the Cassebs, Merys, and Karams were at St. George Maronite as Lebanese Christians, and the Bournias family went to St. Sophia's in the Greek Orthodox tradition.

While we were Sabbath segregated by race, ethnicity, and creed, we were school integrated, resulting in not only academic knowledge but also exposure to, and hopefully tolerance of, different cultural traditions and beliefs.

Notwithstanding that diversity, when this case gained national attention, several Jewish friends called or wrote and reminded me that they were still required to stand up every morning and recite the Lord's Prayer with the rest of us. One of "us" was my friend, Lynn. We spent the night in each other's homes in elementary school and were captains of the school patrol and later captains of the high school football and basketball teams. Lynn went on to coach football for many years at Medina Valley High School and is now the high school security officer. A small world, indeed.

Another example of how things have changed from the days of isolated small-town Texas is the impact of technology. An example of that technology is an early cell phone from the 1989-90 Texas Supreme Court race. It weighed about four pounds, cost \$3,000, and its use was pretty much limited to the Interstate 35 and Interstate 10 corridors.

While that technology fosters com-

munication, it doesn't always improve cultural understanding.

Twenty-five years ago, a young Jewish lawyer from New Jersey had his first job as a law clerk for a South Texas Hispanic federal judge. In New Jersey, his nickname for "Henry" would be "Hank." In San Antonio culture, Henry is Enrique, and the nickname, Kike, is pronounced "Kee-Kay." On the first day of work, the federal judge, trying to make a new law clerk feel welcome, sent him a note which read: "Hey, Kike, where would you like to go to lunch?" But the Jewish law clerk reading the note saw it this way: "Hey, Kike, where would you like to go to lunch?" Clearly, "Kike" is a pejorative term to those of the Jewish faith and not a term of endearment. Same spelling, different interpretations. The young law clerk is now United States Magistrate Judge Henry Bemporad, and the judge is United States Circuit Judge Ed Prado.

Bottom line, ladies and gentlemen: When everyone in a community is culturally and religiously similar, no one complains or files a lawsuit. When society changes and new people move in, the issues are joined, and the courts must decide. The alternatives are the religious wars of European history or the sectarian strife of the Middle East today.

#### Postscripts

1. Some have asked how judges deal with these high profile, and sometimes

dangerous, cases. I suggest regular readings of Rudyard Kipling's "If" (If you can keep your head when all about you are losing theirs and blaming it on you...) and modest amounts of red wine.

2. The Non-Kumbaya Order apparently received considerable attention. A young lawyer approached me in Washington, D.C. and asked, "Are you the Judge Biery who wrote the Non-Kumbaya Order?" I said, "Yes." And she said, "Your order has gone viral on the Internet." After she explained to me what the Internet is, I said, "Well, young lady, at this age, if I can't be virile, I can at least be viral."

#### Endnotes

<sup>1</sup> Manor Baptist (white), West End Baptist (black), Woodlawn and Jefferson Methodist (white), Sanford Chapel Methodist (black), Zion Lutheran, Woodlawn Christian, Trinity Episcopal, Grace Presbyterian, Jefferson Church of Christ.



*The Honorable Fred Biery has served as a United States District Judge for the Western District of Texas since 1994. He became Chief Judge of the Western District of Texas on June 1, 2010.*

## A Limerick

By David Evans

There once was a girl from Medina  
Who served her son's school with subpoena  
Judge Biery: "No nexus —  
Not even in Texas —  
'Tween football and lecti divina."



*David Evans is a trial attorney and Shareholder at Langley & Banack, Inc. in San Antonio. His practice focuses on employment law and commercial litigation. He currently serves as a Director of the San Antonio Bar Association.*



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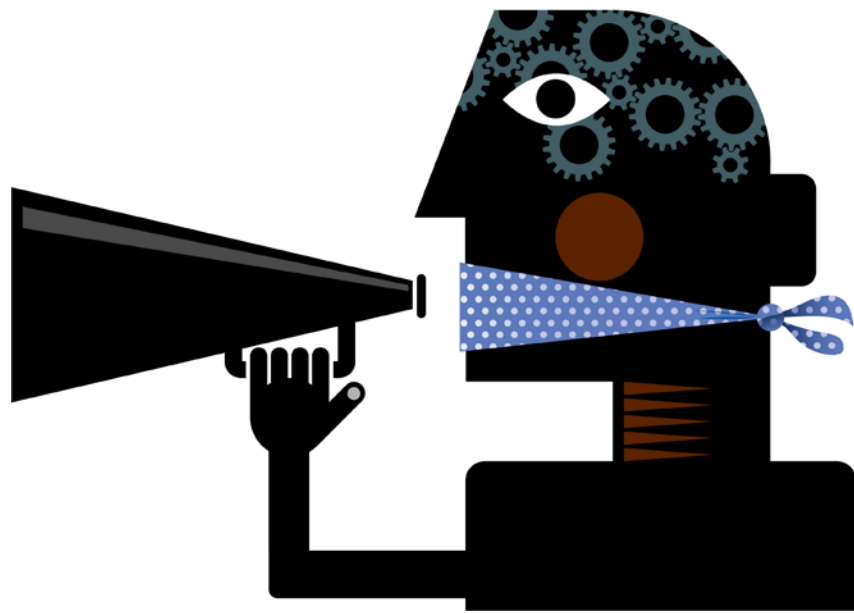
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# When First Amendment Rights Collide

By Karen Monsen



“Merry Christmas!” “Happy Hanukkah!”

These are the words that, if spoken in a school setting, some say will spark litigation. They certainly sparked the Texas Legislature to take action. During the 2013 legislative session, Governor Rick Perry signed the Merry Christmas Bill into law, permitting teachers to use traditional holiday phrases and symbols in school without incurring liability. “It’s a shame that a bill like this one I’m signing today is even required, but I’m glad that we’re standing up for religious freedom in this state,” he said. Standing up against what? One of the bill’s authors said the law is in response to “political correctness that’s run a-muck.”

Notably present at the signing were the Kountze High School cheerleaders who were briefly barred by their school district from displaying banners with Bible verses at football games, until a court ordered that the squad be allowed to hold up the banners. The Merry Christmas Bill did not directly affect the kind of speech they had demonstrated, but they said they were there to make a point, to protect free student speech in public schools. This tiny east Texas town’s cheerleaders and their story became briefly notorious, making headlines in the *New York Times* in the fall of 2012.

The Merry Christmas Bill and the Kountze cheerleader-flap are the legacy of a San Antonio case, *Schultz v. Medina Valley Independent School District*, in which almost every action stirred controversy across the country’s media and during the Presidential campaign in late 2011

and early 2012. The case, and the ensuing debate, pitted constitutional rights against one another: the prohibition of making any law respecting an establishment of religion (often referred to as the “Establishment Clause”), impeding the free exercise of religion (the “Free Exercise Clause”), or abridging the freedom of speech (the “Free Speech Clause”). The various *Schultz* opinions authored by Chief United States District Judge Fred Biery have inspired many, while at the same time fomenting fear among some that judges have “run amok,” landing death threats at Judge Biery’s door.

All of the participants in the matter are bound to some degree of silence due to the parties’ settlement agreement, which remains subject to the court’s jurisdiction for ten years following an order approving that agreement. Some misplaced words by one of the parties following the entry of that agreement drew a now-notorious “Non-Kumbaya Order” from the court, ensuring that silence by judicial force in the near future. This article is an attempt to tell the parties’ story.

The dispute began when the Schultz family in Medina Valley ISD asserted that they were “forced to hear prayers” at school events in violation of the Establishment Clause, even when students are the ones delivering the prayers. As the Schultz family anticipated its second son’s graduation, it took to task the School District, whose high school is located in Castroville, for the publicly made prayers during school graduation. Having suffered humiliation at their first son’s graduation when they had

refused to stand during the prayers, their mother, Christa, allegedly asked the School District to include a moment of silence rather than prayer at the 2011 graduation ceremony. The School District did not respond, and a group called Americans United for Separation of Church and State entered the fray to represent the family. The Schultzes sued the School District on May 26, 2011, seeking a temporary restraining order to enjoin student-led prayers at the graduation ceremony.

The Schultzes had previously complained about the use of prayer at the high school except for three minor incidents: the principal’s use of the phrase “God Bless” over the loudspeaker; the vice-principal’s plaque in his window-sill stating, “Trust in the Lord with all your heart”; and an attendance clerk’s stating that she “would pray for him.” The Schultzes were directed on how to make a complaint with the Board of Trustees, but they never did so. The School Board learned about the Schultzes’ allegations for the first time when the lawsuit was filed. Based on the Board members’ lack of knowledge, among other grounds, the School District, represented by local attorney Craig Wood, tried but failed to dismiss the lawsuit.

In the meantime, the graduation was soon to take place, and the Schultzes pushed for the temporary restraining order to prevent prayer during the ceremony. The court granted the TRO, citing more than ten cases, requiring the School District to replace the words “benediction” and “invocation” with “opening remarks” and “closing

remarks" in the graduation programs, and ordering student speakers to modify their remarks to be statements of their own beliefs rather than leading the audience in prayer. All speakers in the ceremony were instructed not to ask audience members to "stand," "join in prayer," "bow their heads," or use the words "amen," "in [a diety's name] we pray," or "prayer." The court modified its order to allow a student to use the word "prayer" in expressing the student's own personal belief.

The court relied upon such Supreme Court cases as *Lee v. Weisman*, 505 U.S. 577, 587 (1992), in which permanent injunctive relief prevented "inclusion of clergy-led invocations in form of prayer in graduation ceremonies of city public schools"; and *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 310-12 (2000), in which injunctive relief was "granted to prevent inclusion of student-led prayer invocations before football games of Texas public schools." The court ordered the injunction be enforced by "incarceration or other sanctions."

Governor Perry called Judge Biery's order "reprehensible." A Wichita Falls-

based religious group responded by planning what it called a "peaceful convergence" of people at the Medina Valley I.S.D. graduation ceremony to show its disagreement with Judge Biery's order. At the same time the public was reacting to Judge Biery's order, the School District filed an emergency motion with the Fifth Circuit Court of Appeals to dissolve the order. The School District pointed out that the court's order would force it to violate the Texas Religious Viewpoints Antidiscrimination Act, while also violating the students' rights to free speech and free exercise of religion under the United States Constitution.

The Texas Legislature had passed the Religious Viewpoints Act in 2007, requiring school districts to adopt a policy establishing a limited public forum for student speakers at all school events at which a student or students are expected to speak, including graduation. The student speakers cannot be discriminated against based on expression of a religious viewpoint. The School District pointed out to the Court of Appeals that even its federal funding under the No Child Left Behind Act is predicated on the district's

certifying that its policies do not prevent constitutionally protected religious or anti-religious content in its public schools.

The Court of Appeals granted the motion and dissolved the temporary restraining order, stating, "On this incomplete record..., we are not persuaded the plaintiffs have shown that they are substantially likely to prevail on the merits, particularly on the issue that the individual prayers or other remarks to be given by students at graduation are, in fact, school sponsored...." Apparently persuasive to the Court of Appeals was the fact that the School District abandoned the inclusion of the words "invocation" and "benediction" in the graduation program. The matter was remanded to the trial court.

The Liberty Institute, which represented the student who maintained her right to say the prayer at her own graduation, hailed the Court of Appeals' order as a victory for religious freedom. The graduation ceremony proceeded with student-led prayer. As a result, Corwyn Schultz and his family skipped his graduation ceremony.

Discovery ensued through the

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remainder of 2011, but the debate would be inflamed that fall when the campaign for the Republican Party's Presidential candidate heated up. The series of orders had already prompted emotional responses from both sides of the debate, religious groups versus groups claiming prayers in school are unconstitutional, both claiming that their position better protected religious freedoms.

Specifically, during the Iowa caucus debates, Republican candidate Newt Gingrich railed on Judge Biery for his "judicial activism." Mr. Gingrich criticized Judge Biery for his "aggressively anti-American" and "anti-free speech" stance, an example of a court system "run amok." He suggested that judges such as Biery "be hauled before Congress and possibly impeached." As the last of Gingrich's vitriol died down, the case itself lit up the board again, when the parties finally resolved their differences with a lengthy and detailed settlement agreement, brokered by local mediator Don Philbin.

Discovery had revealed the extent to which religious icons, objects, and quotations were present in the school, in addition to the opening and closing prayers during the 2011 graduation ceremony, called on the audience to "pray with me." One teacher posted a newspaper article entitled "Medina Valley Graduates Hear Prayers Aplenty" in the classroom. A framed sign reciting "The Prayer of a Sportsman" under the school's logo was displayed in the boys' locker room. Religious plaques, signs, cups, pens, over a dozen crosses, and over a dozen religious icons were present in classrooms. Claiming that the School District promoted religion throughout the school, the Schultzes pointed out that prayer was delivered at the onset of every Board of Trustees meeting; a superintendent delivered a prayer at the annual faculty convocation and employee-appreciation ceremonies; and coaches participated in prayer circles. The School District pointed out that most, if not all, of these items were in personal spaces belonging to the schools' teachers and administrators. The School District argued these individuals do not lose their free exercise or free speech rights when they become government employees, citing, for example, *Warnock v. Archer*, 380 F.3d 1076, 1082 (8<sup>th</sup> Cir. 2004).

All of these issues were put to rest in the marathon-mediation about which little

has been revealed other than the executed lengthy Settlement Agreement. The parties agreed that school officials will not initiate, solicit, or direct prayer, join students in prayer, proselytize, or invite a third party to engage in these practices. School personnel may not display crosses or religious icons or items unless the items are used for non-religious purposes, such as teaching a history of world religions course. Students may pray at graduations and other events at which students are expected to speak to the extent permitted under the Model Policy Governing Voluntary Religious Expression in Public Schools, which was passed in Texas as part of the Religious Viewpoints Act, and school officials may not require prayer or endorse it. The agreement calls for very specific language to be included in student handbooks, and in oral and written disclaimers. The Settlement Agreement sets forth terms that attorney Wood described as protecting the students' freedom of expression.

Judge Biery, in an order approving the parties' settlement agreement on remand, hinted at the effect of this case in a rare "Personal Statement" at the end of the order:

During the course of this litigation, many have played a part:

To the United States Marshal Service and local police who have provided heightened security: Thank you.

To those Christians who have venomously and vomitously cursed the Court family and threatened bodily harm and assassination: In His name, I forgive you.

To those who have prayed for my death: Your prayers will someday be answered, as inevitability trumps probability.

To those in the executive and legislative branches of government who have demagogued this case for their own political goals: You should be ashamed of yourselves.

The court approved the settlement agreement, retaining jurisdiction for ten years to ensure its enforcement. Newt Gingrich's office refused to comment on the order. The court also included an Appendix

to the order approving the agreement, "An Ironic Venue for Separation of Church and State Litigation," taking great care to give a brief but pertinent history of the Medina Valley area, and a lengthier discourse about the history of religious tensions amongst *Homo sapiens* and the United States' attempt to prevent the danger of "majoritarian government joining hands with religion." Castroville was founded by Alsatians immigrating to the area from a "small geographic region with its own language and religious diversity" long fought over by Germany and France. The irony here was that the Alsatians, Judge Biery wrote, "chose freedom from the majority by coming to America."

The parties' settlement included an agreement that the School District would not disparage the Schultzes. Shortly thereafter, however, the district's superintendent stated in a televised interview that this matter had been "a witch hunt." Another school official called the plaintiff a liar on Facebook, and "liked" a comment from a poster that stated, "There should be a disclaimer after a prayer that says, 'No atheists or anti-religious activities were harmed in the recitation of this prayer.'" The court entered yet another order, this time requiring school district officials to make a written apology to the Schultzes, and the Schultzes to sign a written acceptance of the apology.

Judge Biery titled his latest action the "Non-Kumbaya Order, The *Homo Sapien* Saga Continues," and it gave him the last word against all those who took potshots at him during the entire ordeal. After ordering the parties to sign the apologies in lieu of "hold[ing] hands and sing[ing] 'Kumbaya' around a campfire beside the Medina River," the judge wrote: "While [the Fifth Amendment protection against self-incrimination] is invoked for criminal prosecutions, its underlying premise is instructive for *Homo sapien* relationships in general: Trouble does not come from words unspoken...." In other words, as Judge Biery stated: "Silence is golden."



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