LIMITS TO PARENTAL CONTROL:
Student Speech Rights and the Collision of Values in Public Schools

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AALS Workshop on Shifting Foundations in Family Law
June 22-24, 2015

Introduction

My paper further develops a theme that runs through my forthcoming book – LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURT SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS (Harvard University Press, available Oct. 19, 2015). When schools censor and punish student expression, officials are often inhibiting viewpoints that students learned from and share with their parents. The silencing of student speech not only violates the students' own First Amendment rights, but squarely challenges parents' constitutional right to inculcate their offspring with their own values, a right that is central to an understanding of family law in the United States.

Educators who seek to cultivate intolerance for intolerance in elementary and secondary schools confront another inherent tension. In order for schools to "reproduc[e] the regime of toleration," political theorist Michael Walzer has observed, the state must foster behavior that conflicts with the illiberal messages some children receive in their homes and religious and cultural communities. Moreover, young people of every age commonly campaign at school on behalf of less inclusive values often learned at home. This "competition" between viewpoints, Walzer argues, provides valuable lessons: "The children presumably learn

something about how toleration works in practice and . . . something also about its inevitable strains."[1]

The character of liberal democracy in the United States limits how we carry out such civic education. The Constitution reins in educators' powers to inculcate mutual respect because the state must also accept the divergent voices, even illiberal ones, reflecting the beliefs of students, their families, and their communities. Schools can expose students to cultural preferences, but they may no more insist that every student or family subscribe to the same viewpoints than they can insist that everyone worship the same God. Above all, schools are limited by the countervailing constitutional value of respecting the expressive rights of young people and the First Amendment. Schools may also run up against constitutionally protected parental liberty interests inherent in childrearing.

This paper explores the conflict between parental rights to inculcate children with familial values and the state's efforts to impose boundaries around what student expression is deemed acceptable. No ideological or philosophical camp has been immune from censorship. Schools have stripped conservatives and progressives, secularists and the pious, of their right to speak.

Do parents or educators get to decide when hate speech, vulgarity or purely verbal bullying protected by the Speech Clause goes too far? And even if parents and school officials agree that protected speech has crossed a behavioral line, should the coercive power of the state be brought to bear, or is authority reserved to parental discretion?

I focus on battles that unfold in legal and social skirmishes over constitutionally protected student speech involving war and peace; civil rights; rights for LGBT students; the Confederate flag; abortion; evangelical proselytizing; immigration; teasing and verbal bullying; sexting; personal prayer in public spaces; courses in tolerance that sometimes verge on thought reform; and the increasingly expansive efforts of school officials to control student speech that takes place off campus, online, and outside school hours. This last development, endorsed by federal agencies and state legislatures in violation of the Speech Clause, brings jurisdictional disputes over the ultimate responsibility for acculturating the young to a head.

NEEDS ROAD MAP

I. Unique First Amendment Doctrine Arising from The Role of Schools in Our Pluralist Democracy

The role of the schools as incubators of civic virtue has deep and varied roots in American history. The United States has long assigned schools a central role in preparing children for the rights and responsibilities of adulthood, including both the ability to be self-supporting and the skills needed for active citizenship. Nearly ninety percent of children in the United States attend public schools; no other government domain offers such an expansive and regular face-to-face interaction between citizens and the state. Schools have a unique opportunity and obligation to demonstrate the importance of fundamental constitutional values as an integral part of preparing students to participate in a robust, pluralist democracy. And the best way of transmitting values is by modeling them—showing how the principles that govern us work in action.

First Amendment scholars have observed that the school years are "the primary time and place" for developing "the moral, civic, and intellectual virtues, virtues essential to the functioning of a democratic society." A host of diverse political theorists—including Amy Gutmann, Steven Macedo, Eamonn Callon, Rob Reich, and James Fleming and Linda C. McClain—have fleshed out the various tasks that make up that mission: transmitting foundational values that prepare students for work and citizenship, including commitments to liberty, equality, and freedom of speech; preparing students to exercise the rights and responsibilities of citizenship by teaching them how to think critically; and encouraging them to subscribe to fundamental ideals, such as respect for diversity.[2] Although the Constitution bars schools from promoting standardized beliefs at the expense of individual liberty, whatever social cohesion we aspire to achieve has its best chance of taking hold in public school.

Schools can expose students to cultural norms and preferences, but the First Amendment doesn't permit schools to silence or punish students for what they say merely because their opinions differ from the school's preferred values. Whether the principal instructs a student about empathy for others or imposes a penalty that remains on the student's permanent record makes a great deal of difference as a matter of constitutional law. Exhortation is generally permissible, but penalties may infringe on constitutional rights.

Schools operate under a unique constitutional regime when it comes to speech rights. Tinker v. Des Moines provides the governing law for all of the cases relevant to this paper, though later Supreme Court cases have provided exceptions

to its domain. In *Tinker*, antiwar protesters challenged their suspension from school for wearing black armbands in support of a Christmas truce in Vietnam. It brought the collision between the First Amendment rights of students and "the rules of school authorities" squarely before the Court. The seven Justices who signed Justice Fortas's majority opinion held that students are "persons under our Constitution," who are possessed of fundamental rights that the State must respect. . . . Students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate."

Because it evaluated restrictions on student speech in light of the "special characteristics of the school environment," including the school's "uniquely important role in training young people to assume the mantle of citizenship," the Court concluded that student speech in the nation's primary, middle, and secondary schools required a unique constitutional standard. The Court announced that schools could neither inhibit nor discipline student expression unless it "materially and substantially interfere[s] with the requirements of appropriate education in the operation of the school" or collides "with the rights of other students to be secure and left alone."

The Court underscored that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." The school must have solid grounds for anticipating that speech will lead to material disruption before it can censor expression. In *Tinker's* words: "Any variation from the majority's opinion may inspire fear. Any word spoken . . . that deviates from

the views of another person may start an argument, or cause a disturbance." "But," Fortas stated starkly, "our Constitution says we must take this risk."

Justice Black dissented vehemently, defending the social order. Part of his objection stemmed from a different perception of whose speech was really at stake. He emphasized that the youngest Tinker was only eight years old and in the second grade. The children, he charged, were pawns for their parents' beliefs. The students' families had participated in civil rights demonstrations, and the Tinkers and Christopher Eckhardt's parents were peace activists.

But the majority was right to treat the armbands as the students' own expression. Christopher testified that his family discussed the war at home, but his parents had neither encouraged nor discouraged his decision to wear the armband to school after the district directed students that they risked suspension if they wore armbands. The families' lawyers explained, the young people's decision to protest "reflected the religious, ethical, and moral environment in which they were raised." As it should, under the precepts of Meyer and Pierce and their progeny, which are central building blocks of family law jurisprudence, and to which I shall return below.

II. "You can't talk to people like that": Moral Disparagement Directed At Individuals

Rachel Zimmer told two of her classmates: "You're going to hell."

Ensconced in a school bus during a daily commute, the eighth-grader rendered her judgment to a fellow passenger because his brother was a homosexual. She also proclaimed in the hearing of one of the school's few Jewish students, "if you do not

believe in Jesus Christ, you are going to burn in hell." In 2012 a federal judge construed these statements as fighting words – unprotected by the First Amendment -- when Zimmer's parents sued the Carmel Clay school system in suburban Indianapolis after the school bus driver chastised Rachel for her comments.[3]

M.E., the boy with the gay brother, sought driver Betty Campbell's help after about five conversations in which Zimmer told him he was going to hell. He was proud of his brother, he said, and he felt Zimmer was harassing him.

To avoid singling Zimmer out, Campbell addressed all of the students on her bus collectively. The students had been arguing about the 2008 election with particular emphasis on Obama's support for gay rights -- a subject on which citizens disagreed mightily. As the bus pulled up at school, Campbell flashed the lights to get everyone's attention. She began by noting, "This week we had a very historic election." She then launched into a colloquy on pluralism: "'It's called diversity in this country . . . we've got kids on this bus who are Jewish, Catholic, I've had Muslims, I've had Buddhists, Sikhs, fine. . . . . I don't care if you're gay. . . . . All those diverse things are what make this country what it is. I don't care if you are evangelical. What I will not tolerate is your own personal views being espoused on this bus that you are going to hell if you don't do it the way I do it.'"[4]

Campbell concluded, "'I don't want to hear one more word about anybody going to hell if they are gay or if they're Buddhist or whatever, 'cause it is none of your damn business.'"[5]

Campbell's heartfelt words in some ways represent the best of grass roots American pluralism: all groups, all religions, all kinds of people deserve respect.

Personally offended by what she saw as Zimmer's intolerance and incivility, Campbell demanded that students on her bus behave respectfully toward each other. She wanted to prevent aggressive students from hectoring others, wounding them, or disparaging their values. She did not demand that Zimmer change her views, nor could she have without violating *Barnette's* precepts.

That afternoon, after dropping everyone off, Campbell parked her bus in front of the Zimmer house. She asked Zimmer and her older sister, who she knew, to join her on the bus (which was equipped with recording devices) for a conversation. Campbell first confronted Zimmer for keeping her headphones on while Campbell addressed the students that morning and then turned to Zimmer's statements. "She is throwing religion in people's faces. You can't do that. This is a public school. . . . You can't go off and tell other people you are going to hell, or you gotta do it my way. They don't have to do it your way." But Campbell's tolerance had limits. She suggested that if Zimmer couldn't act more in keeping with the civic ethos, the family might consider sending her to a parochial school, a recurrent theme in cases where religious parents fight with schools about their children's personal expression.[6]

When Rachel's mother Sherri arrived home and joined the conversation, Campbell explained, "I didn't want to take it to the office." But Rachel's mother shot back. "Rachel told them 'they might go to hell'? I don't think there's anything wrong with that." Sherri added, let's take it to the school.[7]

The Zimmers pulled Rachel from the bus for the rest of the school year and demanded the district fire Campbell. The school district did not fire Campbell, and it didn't punish Rachel. That didn't stop the Zimmers from filing a lawsuit in which they

asserted that Campbell had violated Rachel's rights to free speech and religious exercise. A federal judge treated Rachel's utterances as fighting words, outside the protection of the Speech Clause, and granted summary judgment to the school.

The judge went on to explore whether the school could permissibly have silenced Rachel's expression if he had not treated her statements as fighting words. He determined that the school could still have restricted her speech under *Tinker*.

The *Zimmer* court saw a risk to order in Rachel's provocative words. The judge agreed with Campbell that there is a crucial difference between "Be Happy, Not Gay" (a famous phrase from a t-shirt at the heart of a student speech case) and the finger-pointing inherent in the declaration that you personally "are going to burn in hell" because of your relatives, your religion, or your sexual orientation. The former arguably, but minimally, intrudes on the feelings of others, while the latter is literally in their faces—assaulting, invading, colliding with other students and their core identities. This more aggressive verbal stance, directed at identifiable peers, seems closest to what the *Tinker* court meant by its alternative test.

No reasonable jury would conclude, the judge in *Zimmer* reasoned, that Campbell had dissuaded students from exercising First Amendment rights when she articulated the school's policy "that one may not 'throw' or 'push' her views in another's face." Betty Campbell summed it up better than many judges: "you can't talk to people like that," at least not while they are confined on a school bus.[8]

This works as a matter of etiquette, but it is not obvious that such an approach will stand up as a matter of law because the it seems to rest on Tinker's second prong—violations of the rights of others. But as I demonstrate, the rights of others does not

stand alone as a permissible ground for silencing speech. In 2013 a judge in a different part of the country aptly summarized the relationship between *Tinker's* two prongs: "*Tinker* implies that some sort of threat or direct confrontation is a necessary predicate" to a finding that speech invaded the rights of others.[9]

If the "rights of others" only means the right to pursue their education without interruption or distraction, the standard would be redundant and totally subsidiary to the material disruption test. The first prong of *Tinker* relieves school officials of any obligation to allow student speech that disrupts the school's essential educational function.

Returning to the Fifth Circuit cases from which the *Tinker* court drew its solution once again clarifies *Tinker's* meaning. In Blackwell v. Issaquena County, the court ruled the school's suspension of demonstrators was justified because they accosted fellow students, pinned buttons on them "*whether they wanted them or not*," and caused a younger student to break down in tears.[10] This sounds like a violation of personal space, of the right not to speak, and the right to be protected in a controlled environment. It is also, however, inseparable from disruption, the first prong of the *Tinker* test.

To be legally enforceable, the "rights of others" must mean more than a conflict with the sensibilities or preferences of those who hear the offensive speech – whether racist, hate speech or other insults to groups or individuals. In the world at large (outside the schoolhouse gates), there is no right to be sheltered from the content of speech that the Constitution protects.[11]

III. Crossing the Line From Teaching Tolerance To Homogeneity

The seeming paradox of enforcing tolerance perfectly symbolizes an array of ironies stemming from the tension between free expression and the rights of others that has run through this chapter. Never was that tension more sharply joined than in a Michigan high school on Anti-Bullying Day in 2010. The day is also known as "Spirit Day," in recognition of LGBT teenagers who have committed suicide. The Gay/Straight Alliance of Howell High School had received permission to post flyers about the event, but the school did not officially sponsor it. Teacher Jay McDowell donned a purple t-shirt with anti-bullying slogans on the designated day and devoted his economics class to a discussion of bullying. He showed a video about a student who had committed suicide after being bullied about his sexual orientation. McDowell asked a girl who was wearing a Confederate flag on her belt buckle to remove it. She did.[12]

Daniel Glowacki, a student in the class, voiced his concern that McDowell's shirt and message discriminated against him and other Roman Catholics. Glowacki announced, "I don't accept gays."[13]

McDowell called Glowacki's comment inappropriate. When Glowacki refused to modify his stance, McDowell told him to leave the classroom. Another student said he agreed with Glowacki, asked to be excused, and left.

When Glowacki complained, the school exonerated him and reprimanded his teacher. The school concluded that Glowacki had not caused any disruption, and that McDowell had "'modeled oppression and intolerance of student opinion.'" Students, the district correctly reminded McDowell, could not be disciplined for their beliefs. It gave McDowell "First Amendment training."[14]

Despite this resolution of the dispute, the Glowacki family sued, alleging that Daniel's rights had been violated and that his younger brother's potential speech had been chilled. Applying *Tinker*, the court found that McDowell had discriminated against Glowacki's viewpoint, interfering with the "'robust political debate'" to which the nation is committed. It rejected the school's argument that Glowacki's statement interfered with the rights of a gay student in the class because "it was not a bullying remark" addressed to a specific individual. There was, the court explained, "no indication" that Glowacki "threatened, named or targeted a particular individual."[15]

Teaching tolerance, the court directed, is best achieved in an atmosphere that shows how divergent views can be expressed "'in a civilized and respectful manner'" and "'includes the tolerance of even the most intolerant or disagreeable viewpoints.'"[16] Tolerance can – and should – be taught, but those who teach it must personify their own lesson, staying within the limits the First Amendment imposes.

Ultimately, the students who remained in the classroom after Glowacki left may have framed the issue most eloquently: against the teacher's insistence that "'a student cannot voice an opinion that creates an uncomfortable learning environment for another student,'" the class pressed: "Why didn't" the two students who left the room "have free speech?'"[17]

IV. Extending school authority into the parental domain

In 2011 the Third Circuit, sitting en banc, pointedly commented: "It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach in to a child's home and control his/her actions there to the same extent it can control the child when he/she participates in school-sponsored activities."[18]

But that is exactly what schools around the country are trying to do, often at the behest of state legislatures, some parents and even agencies of the federal government, Those groups increasingly look to school disciplinarians to rein in student speech that takes place off-campus, outside of school hours, and online. The assertion of authority over off-campus speech is a breach of remarkable proportions, amounting to an abuse of power. The federal government has encouraged this invasion of liberty by requiring schools to control bullying wherever it occurs and threatening to strip districts of federal funds if they don't meet this demand. These radical departures conflict with longstanding jurisprudence and *Tinker's* vision of one regime inside the schoolhouse gate and another outside.

I now turn to expressly to an analysis of the respective zones of power over children that the Constitution accords to educators and parents.

A. The Division Of Authority Between Parents And Schools

The Supreme Court has only once allowed a limitation on speech rights outside of school based on age—when it upheld a separate definition of material that is obscene for minors but not for adults in Ginsberg v. New York (a case I discussed in Chapter 1). Outside obscenity, from West Virginia v. Barnette in 194_ to its 2011 ruling that California could not restrict minors' access to violent video games, the Supreme Court has repeatedly emphasized that minors too have speech rights.[19] The statute the Court upheld in *Ginsberg*, however, left it to parents to determine whether their offspring could access these titillating materials. The Court considered it significant that the state did "not bar parents who so desire from purchasing the magazines for their children" and

implied that a similar statute that overrode parental decisions might not prove constitutional.[20]

The state generally points to two interests in regulating the flow of speech and entertainment to children outside of school. First, the state relies on its *parens patriae* interest in the well-being of children, which the Supreme Court has long treated as self evident: "The well-being of its children is of course a subject within the State's constitutional power to regulate."[21] Second, the state proclaims that it limits children's access to potentially harmful communications in order to help parents exert their own authority.

The second rationale denies the wide range of values and childrearing choices found among American parents. Presumably parents don't want the government to substitute its judgment for their own. In the United States, parental decisions about how to raise their own children have constitutional dimensions. As *Ginsberg* summarized it: "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'" The Supreme Court reiterated this principle in Troxel v. Granville in 2000: the "liberty interest … of parents in the care, custody and control of their children . . . [is] the oldest of the fundamental liberty interests."[22]

Applied to the balance of power between public school officials and parents, these doctrines mean that the state may require parents to educate their children by choosing

among public or independent schools or home schooling.[23] Once parents choose public schools, however, they generally have no constitutional right to micromanage curricular requirements or to control the values the state communicates to their children (although some states provide opt out rights). With few exceptions, courts have ruled in the state's favor when parents challenged curricular choices, campus discipline, or searches.

Similarly, as the recurrent lawsuits parents file alleging that a school has overstepped its powers in silencing or punishing their child's speech make clear, on campus the school's powers trump the parents' unless and until a court decides a school has violated the law. The state isn't required to consult parents about discipline during the school's custodial shift, whether the offense involves weapons, headphones or words.[24]

The state has long challenged parents for dominance over children in the context of schooling. The judges who are called on to resolve the resulting conflicts bring to the bench their own views of how to parent, and of whether children are best served by the sure and steady exercise of adult authority that protects them from bad influences (including speech that reveals there is no Santa Claus) or by nurturing children as "civic learners," who must practice and perfect the habits of citizenship.[25]

In public schools and elsewhere, an implicit agreement underlies the enormous power citizens cede to government: citizens give the state's agents day-to-day powers in exchange for constitutional assurances that the government will respect individual rights. When school officials extend their disciplinary reach to punish off-campus speech that uses bad language or pokes fun at school officials (no matter how tastelessly), they breach that social compact. As the Chief Judge of the Second Circuit explained in 1979:

"Our willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate."[26]

Substantial deference to school authority rests on the premise that officials only rule over children during the school day.[27] When schools claim jurisdiction over children in public spaces and even at home, officials undermine the very basis for the discretion they have to control children during school.

As early as 1859, long before our modern understanding of privacy rights developed, Vermont's highest court held that a student's off-campus contemptuous language to a teacher could only be punished at school if it had "a direct and immediate tendency to injure the school, to subvert the master's authority, and to beget disorder and insubordination." Otherwise, after children return home, the court ruled, "the parents, and they alone, have the power of punishment."[28] That remains true today.

Parents agree. Those who challenge the penalties imposed by schools often punish their child at home for the very same behavior that got the child into trouble at school. But parents bring to the task of child-rearing an incalculable variety of values and sensibilities to questions of taste and morality. They don't all punish or reward the same expression, or impose the same penalties.

Whatever behavior and language they tolerate or punish, most parents don't want school officials intruding into their homes and substituting their authority for parental control. Survey data from 2012 indicates that a decisive majority of Americans (57%) reject the proposition that "public schools should be allowed to discipline students who

use their own personal computers from home to post material that school officials say is offensive." Only 34% support public school intervention.[29]

And yet, some school officials and legal commentators blame parents for their parenting styles, for letting their children listen to rap music, or standing by helplessly as their offspring surpass them in mastering technology. A 2013 study revealed that three-quarters of parents say they "don't have the time or energy to monitor their kids' Internet use."[30] The study did not ask an even more important question: would you make time to monitor your children's Internet use if you thought it was really important to know what they were doing online?

A small number of legal commentators criticize the *Tinker* regime for ceding too much independence to the young, and they begin by criticizing permissive parenting. Bruce Hafen, a family law expert who occupies a very high leadership position in the Church of the Latter Day Saints, placed what he calls the "excesses of our flirtation with children's liberation" in the context of "a general erosion of institutional authority, the erosion of marriage, [and] the sexual revolution" in 1987. Writing just before the Supreme Court announced new legal doctrine in *Hazelwood*, he lamented what he saw as a tendency (reflected in *Tinker*) to value freedom for its own sake over the discipline that is a prerequisite to learning. Hafen called for a better balance between "too much direction and not enough."[31]

Most critically, Hafen rejected the notion that schools were simply agents of the state, bound strictly by constitutional restraints. Instead, he proposed that schools "are not merely state agents, but are mediating institutions whose authority is derived both from parents and from the delegation of state power."[32] Even if that were the correct

view of the regime under which schools operate – a proposition that has been untenable since *Barnette* was decided – it would hardly give schools authority to overrule parents in their own homes. Those very parents, in Hafen's interpretation, are a crucial source of educators' authority. The delegation of power over children is not a reciprocal proposition.

Similarly, Anne Proffitt Dupre, a former teacher turned lawyer and law professor, in 2009 condemned *Tinker*, first for ignoring the social reality that children aren't yet prepared to exercise freedom responsibly, and then because she believed that *Tinker* had "strayed from its moorings." The opinion, she charges, serves as an excuse "to support all kinds of student speech" as parents abandoned their disciplinary role and backed their children's challenges to school authority, in her view undermining teachers' confidence and authority, and forcing school districts to squander resources on litigation expenses. Dupre argued that *Hazelwood* and subsequent decisions began to restore the proper balance between freedom and authority, although she did not take a position on how far off campus the "'long arm of *Tinker*'" could permissibly reach.[33]

Schools directly challenge parental authority when they punish constitutionally protected off-campus expression. In our legal system, parents may discipline their own children according to their own values (as long as parents do not impose penalties so severe that they cross the line to child abuse). They always retain the discretion to decide whether and how to punish their children for behavior they view as uncouth or deplorable, wherever it occurs—in school, on the streets, at home or online.[34]

When schools report offensive off-campus speech to parents, the families are free to ignore the speech, or even to commend it if they choose (*e.g.*, "You always hated that

teacher, he flunked you, I am glad you gave him the finger!"). Another possibility, of course, would be for a parent to use the episode as an opportunity for a dialogue about why offensive and thoughtless outbursts are both wrong and ineffective.

B. "An unconstitutional usurpation"

Courts have long repudiated the proposition that educators' authority over children extends wherever school officials find them. When it came to freedom of speech, a clear line separated the school day and the school campus from the rest of universe, where a robust, undiminished Speech Clause protects expression.

The lower court judges who tackled the problem of off-campus speech while *Tinker* still governed the entire universe of student speech unanimously rebuffed school officials' efforts to discipline students for what they said outside of school. In Shanley v. Northeast Independent School District, one of two seminal appellate court opinions on off-campus speech, the Fifth Circuit in 1972 overturned a suspension a Texas school district imposed on students who distributed what the judges regarded as "probably one of the most vanilla-flavored" underground papers "ever to reach a federal court."[35]

Suspending the underground journalists was just one piece of a more general attack on students' expressive rights in a district where the school code told students they would be punished at school if they participated "'in a boycott, sit-in, stand-in, walk-out or other related activity,"' wherever it occurred and whatever its goals.[36] The court condemned that rule, and held the off-campus newspaper lay outside the school's reach.[37]

The *Shanley* court lambasted school authorities for failing "to recognize even the bare existence of the First Amendment," and for a "quaint approach" to freedom that had been laid to rest in *Barnette*. It excoriated the school district for claiming that it could

impose "whatever conditions the state wished" on students as if they were prisoners, and for intruding on parental rights: "It should have come as a shock to the parents of five high school seniors . . . that their elected school board had assumed suzerainty over their children before and after school, off school grounds, and with regard to their children's rights of expressing their thoughts. We trust it will come as no shock whatsoever to the school board that their assumption of authority is an unconstitutional usurpation of the First Amendment."[38]

The judges in *Shanley* anticipated and addressed worries about lawless youth: outside of school students "are subject to the civil and criminal laws of the community, state and nation." The court pinned down some of the ways young people can be held accountable for speech related offenses: "A student acting entirely outside school property is potentially subject to the laws of disturbing the peace, inciting to riot, littering and so forth."[39] Similarly, if off-campus expression meets the legal definition of defamation or harassment, it is unprotected.

A few years later, a second seminal case – Thomas v. Granville Central School District – arose after Donna Thomas and her friends were disciplined for producing an admittedly vulgar underground newspaper modeled on the National Lampoon, known for its "sexual satire." The students prepared and sold the paper off-campus, though while working on it they had used a classroom storage closet, consulted a teacher and discussed their plans on campus. As in *Shanley* and many other cases, another student brought the paper to school. After the school punished the journalists, Thomas challenged the penalty in court. The school conceded it lacked authority over off-campus speech, but argued that the students' passing engagement with the project at school and the paper's

appearance on campus had transformed the publication into school speech. The trial court agreed with the school and denied the students the relief they sought. But when Thomas appealed, the Second Circuit reversed in 1979.

Thomas announced a simple rule: "school authorities are powerless to impose sanctions for expression beyond school property." It reasoned that the school could not obtain jurisdiction over the speech where "all but an insignificant amount" of the activity "was deliberately designed" to take place outside of school. Chief Judge Kaufman, writing for the court, continued: where "school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith" the students' "actions must be evaluated by the principles that bind government officials in the public arena."[40]

Parents "still have their role to play in bringing up their children," Judge Kaufman underscored in *Thomas*, "and school officials, in such instances, are not empowered to assume the role of *parens patriae*." If the underground newspaper was vulgar, he continued, that -- along with acts like watching an X-rated film on the family television -- would be "proper subjects of parental discipline," but it was none of the government's business.[41]

Both *Shanley* and *Thomas* involved press freedoms at the First Amendment's core, but the barriers they erected to encroachments on student expression outside of school extend to speech that lacks the higher calling of a paper — even an underground paper. When Jason Klein, a student, drove across the parking lot of a Maine restaurant in 1986 outside of school hours and gave "the finger" to the driver of another car who was a teacher at his school, he probably had no elevated social message in mind. The

school suspended Klein for ten days because he had violated a school rule barring "vulgar . . . conduct toward a staff member." Klein sued. A federal judge overturned the suspension because any connection between the off-campus incident and the school was "far too attenuated to support discipline" of this "ruffian" for whom "parental discipline [was] roundly deserved" (and had in fact been administered).[42]

The opinion is notable for the judge's cogent analysis in the face of behavior some might think unworthy of a court's attention. He succinctly disposed of the school's disingenuous arguments. He rejected the specious claim that the gesture was not "speech": the "finger" was "commonly understood to mean 'fuck you.'" If not for that common understanding, the finger would not be a vulgarity. Because no one else witnessed the interaction, the judge also rejected the argument that if disrespect went unpunished it would spill over onto the campus. Finally, he scoffed at the claim that the disrespectful act could have prompted imminent violence. "'The finger,' at least when used against a universe of teachers," the judge observed with a verbal wink, "is not likely to provoke a violent response."[43]

Taking rights seriously, he observed that schools may "'seek to inculcate'" taste, but may not "'in the effort to do so, transgress upon'" what he termed "political freedom." In the same vein as the concerns explored in the last chapter about securing freedom of thought and expression while teaching tolerance, the judge observed: a student's "freedom of expression may not be made a casualty of the effort to force-feed good manners to the ruffians among us."[44]

When students use traditional means of communication, from armbands to pamphlets to vulgar gestures, it's usually easy to draw lines between the school day and

the rest of the week. We can ask where the speech was created, where it was distributed, and whether the speech occurred on the school's watch, that is, during the school day, or on the school bus, or during extracurricular activities and school trips. In the world of *Thomas's* underground paper, which looks so simple in retrospect, an unambiguous geographical boundary separated school from the rest of the world.

While online communication presents new complexities involving speed, scope and permanence, fundamental questions about who is responsible when off-campus speech spreads are not unprecedented. The first generation of off-campus speech cases epitomized by *Shanley* and *Thomas* told the schools off-campus expression was none of their business. These cases contemplated at most a very narrow exception that turns the general principle that off-campus expression is beyond the school's power into a rebuttable presumption. Framed in the way most favorable to claims of authority by school officials the rule would read: off-campus speech is immune to school discipline unless the school can show that the speaker intends to substantially disrupt the campus, and his or her words are likely to have the impact the student hopes for.

Most of the lower court judges who have considered the issue agree that *Tinker,* the most protective school speech standard, should govern. This means that after school officials demonstrate a nexus between off-campus speech and the school, they must at minimum still demonstrate that *Tinker* would have allowed them to restrict or punish the speech had it occurred on campus.

Some courts require more. They would impose a stricter version of the material disruption test where off-campus speech is concerned that a school could only satisfy by

showing an apprehension of a specific, identifiable threat to the campus population such as brining a gun or bomb to school.

Strikingly, school authorities resist these requirements, seeking yet another unprecedented expansion of power. They assert discretion to discipline student speakers *without* showing disruption, and for off-campus speech at that. In *J.S. v. Blue Mountain*, the school argued it could "punish any speech by a student that takes place anywhere, at any time, as long as it is about the school or a school official, is brought to the attention of a school official, and is deemed 'offensive' by the prevailing authority." The en banc Third Circuit scoffed at this claim: "Under this standard, two students can be punished for using a vulgar remark to speak about their teacher at a private party, if another student overhears the remark, reports it . . . and the school authorities find the remark 'offensive'."[45]

Even some of the judges most attentive to the mandates of the school speech quintet seem to have lost sight of the warning in *Thomas* that First Amendment protections are "at their zenith" outside of school. In the Third Circuit, the *Layshock* majority entertained the possibility that under some future facts *Tinker* might allow a school to punish off-campus speech that threatened to materially disrupt the school.

Decades after *Shanley* raised the specter of a school district acting as if it had the powers of a feudal lord over its subjects (the students over whom it wanted to exercise "suzerainty"), the Third Circuit was compelled to restate a fundamental proposition: "It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent it can control the child when he/she participates in school sponsored activities."[46]

Remarkably, some school go so far as to assert authority over online speech by *parents*. Perhaps the most bizarre exaggeration of school authority occurred when a California school district chastised a father who used a parent email chain to ask whether other people thought the kids had too much math homework. Many did, but a parent who disagreed with him forwarded the chain to the math teacher. So far this sounds just like what happens with student Facebook postings. The pattern continues. The vice principal summoned the father to his office, where he accused the grown man of "cyber-bullying." The teacher felt threatened, the official reported, and the school expected parents to live up to demands of the school code.[47]

"Reaching into a child's home" may be more than a metaphor used by the Third Circuit. Some schools have begun to surreptitiously monitor students' use of social media, allegedly to uncover threats against other students in time to intervene, even hiring private contractors to engage in surveillance. This development presents a host of legal questions about privacy and Fourth Amendment rights in addition to concerns about the chilling impact on speech once students realize they are being watched. Parents objected so strenuously to one principal who monitored their children's Facebook accounts under a false identity that she had to resign.[48]

Other responses by the school would not intrude on First Amendment rights: lessons in empathy and on appropriate use of networking sites, and conferences with the offending students and their parents. Such measures, reliant on compliance by families and students, won't always succeed. The Fourth Circuit noted that a girl who created a "particularly mean-spirited and hateful" site alleging a classmate had herpes later resisted "the school's efforts to bring order and provide a lesson following the incident." There

was nothing the school could do about her resistance.[49] As the judge said in *Klein*, the case about the student who made an obscene gesture at his teacher in a parking lot, the Constitution limits our ability to force feed the "ruffians among us."

Schools have even intruded on private talks conducted online by willing participants. In one case, school officials intervened after two young people had an online conversation from their homes that had something to with sex. In their zeal to suppress speech they regarded as disreputable, school officials harangued and abused a girl for protected speech in a private dialogue.

When school officials in rural Minnesota learned that 12-year-old R.S. and a male schoolmate had engaged in a "sex-related conversation" on "the internet, off school grounds, and outside school hours," they pulled R.S. out of class. They interrogated her in the presence of police officers without calling her mother. The boy had initiated the exchange, but R.S. readily admitted she had voluntarily taken part. Despite her confession, school officials demanded her usernames and passwords. Crying, and threatened with detention, R.S. turned over the keys to her accounts, which the officials searched. They "expressed surprise" that she used profanity in private sites, read her personal correspondence, and commented negatively on her answers to what she called "'fun and funny'" Facebook sex quizzes. Although she wasn't punished, R.S. felt so humiliated that she stayed home for two days. She said she no longer felt "secure" or "safe" at school. Her mother sued, alleging that the school had violated her daughter's First and Fourth Amendment rights.[50]

In 2012 a federal court rejected the school district's argument that it hadn't violated R.S.'s rights, and allowed a suit the ACLU had filed against the district to

proceed. R.S. would win if she could prove at trial that her story was true. In March 2014 the school district settled; it agreed to pay $70,000 in damages and to revise its policies on student privacy.[51]

There was no victim in Minnewaska before the school made R.S. into one. Her exchange with her schoolmate was voluntary. If the school were concerned about the children's well being it could have told R.S.'s mother about the conversations it had learned about from the boy's family, and left the matter to her judgment. The court correctly considered R.S.'s private postings "a far cry" from student statements that have led courts to approve intervention after off-campus threats of violence or tangible disruption.[52]

R.S. demonstrates that the erosion of boundaries between home and school is not entirely attributable to the state. Some parents who discover troubling material on their children's devices or learn that their child has been bullied rush straight to school officials seeking help, demanding that administrators intervene in other parents' child-rearing. The guardian of the boy who initiated online discussions about "naughty things" asked the school to intervene without even attempting to talk to R.S.'s mother. The school could have explained the limits of its authority and suggested that the families work together to solve the problem before (or instead of) illegally invading R.S.'s privacy and usurping her mother's role in discussing sensitive matters of values and judgment.[53]

V. Whose Speech Right Is It?

Although many young people demonstrate that they have sufficient capacity to exercise rights (and many adults may not) one important question remains: does the right to expression in school belong to the child or the parents? This issue almost never arises

in courts for practical reasons: minors generally cannot access the courts without an accompanying adult, who is usually a parent, and there are virtually no school speech cases in which a judge has appointed another adult as a guardian ad litem to pursue the constitutional claim. In the overwhelming majority of cases, parents and child are aligned against the school. And as we have seen, in most of the disputes that turn on deeply held political, cultural or religious beliefs, the young are expressing perspectives they picked up at home. I am only aware of one school speech case in which the student appeared in court through a guardian who was not her parent (a case involving a girl whose principal outed her to her family as a lesbian, whose aunt was allowed to file a complaint on her behalf).

Yet parents and children don't always agree. Rebelling against family belief systems is a normal part of adolescent development. Teenagers, in particular, may find a different God, or a different way of practicing religion, than their parents, or may oppose a war their parents support, all manifested in expression on campus. Some parents may disagree with what their children say, but nonetheless defend their children's right to speak without penalty. Others may not be willing to support expression that offends them against school authorities. LGBT students whose parents regard their identity as sinful or a breach of the natural order, for example, may be closeted at home or lack adult support to challenge illegal restrictions on clothing proclaiming gay pride or cross dressing at the prom.

Close parsing of the cases shows that although courts seldom confront controversies in which the parents defer to the school's silencing of protected speech, the

right belongs to the individual regardless of age. Not one of the many hundreds of school speech cases so much as hints to the contrary.

Only one case, decided by the Eighth Circuit in 2008, considered the issue at all as far as I am aware. The court held that the Florida legislature could choose to support parent's dominion over their children by requiring that schools honor written parental requests that children be excused from reciting the pledge – regardless of the child's preference – and that a student who did not want to recite the pledge must have written permission from a parent. The state can protect parental rights, the court reasoned, even at the cost of restricting some students' speech rights, because "a parent's right to interfere with the wishes of his child is stronger than a public school official's right to interfere on behalf of the school's own interest."[54] The court implicitly accepted the principle that the speech right belongs to the student, but permitted a legislative judgment allowing the parent to supervise or control the exercise of the right to stand. Absent such a statute, the speech right is the young person's, even if the child can't find a way to enforce that right without parental assistance.

Conclusion

TO BE ADDED

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[1] Michael Walzer, *On Toleration* (New Haven: Yale University Press, 1997), 71–72.

[2] Vincent Blasi and Seana V. Shiffrin, "The Story of *West Virginia State Board of Education v. Barnette:* The Pledge of Allegiance and the Freedom of Thought," *Constitutional Law Stories*, ed. Michael C. Dorf (New York: Foundation Press, 2004), 433, 455. See Amy Gutman, *Democratic Education* (Princeton: Princeton University Press, 1987); Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural*

Democracy (Cambridge, MA: Harvard University Press, 2000); Eamonn Callan, *Creating Citizens: Political Education and Liberal Democracy* (Oxford: Oxford University Press, 1997); Rob Reich, *Bridging Liberalism and Multiculturalism in American Education* (Chicago: University of Chicago Press, 2002); and James E. Fleming and Linda B. McClain, *Ordered Liberty: Rights, Responsibilities and Virtues* (Cambridge, MA: Harvard University Press, 2013).

[3] R.Z. v. Carmel Clay Schools, 868 F. Supp.2d 785 (S.D. Ind. 2012) (summary judgment granted to defendants on all claims).

[4] R.Z. v. Carmel Clay Schools, 868 F. Supp. 2d at 785, 788.

[5] Ibid., 789

[6] Ibid., 790.

[7] Ibid., 789; Depo. of Sherri Zimmer at 54:11-55:7, Zimmer v. Carmel Clay Schs., No. 1:10-cv-01117-WTL-DKL, Doc. 51-40 (Sup. Ct. Ind. Nov. 7, 2011).

[8] R.Z. v. Carmel Clay Schools, 868 F. Supp. 2d at 799, 790.

[9] Nuxoll v. Indian Prairie Sch. Dist., 525 F.3d at 675 (discussing the line dividing harassment and wounding speech). Glowacki v. Howell Pub. Sch. Dist., No. 2:11-cv-15481, 2013 WL 3148272, at *8 (E.D. Mich. 2013).

[10] Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d at 751, 751 n. 2 (emphasis in original).

[11] Cohen v. California, 403 U.S. 15 (1971), Bolger v. Youngs Drugs Products Corp., 463 U.S. 60 (1983).

[12] Glowacki v. Howell Public Schools, No. 2:11-cv-15481, 2013 WL 3148272 (E.D. Mich. 2013) (unpublished).

[13] Ibid, *3.

[14] Ibid., *8.

[15] Ibid.

[16] Ibid., *9.

[17] Ibid., *4.

[18] Layshock v. Hermitage School District (3d Cir. 2011) (en banc)

[19] Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729 (2011) (Scalia, J.)

[20] Ginsberg v. New York, 390 U.S. 629, 639-640 (1968).

[21] Ibid., 639 (quoting dicta in Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

[22] Ibid. Troxel v. Granville, 530 U.S. 57, 65 (2000) (O'Connor, J., plurality op.).

[23] Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).

[24] See Bell v. Itawamba Cnty. Sch. Bd., 859 F. Supp. 2d 834 (N.D. Ms. 2012) (summarizing cases and applying to penalty for a you-tube posting).

[25] Phillip Buckley, "Subjects, citizens, or civic learners? Judicial conceptions of childhood and the speech rights of American public school students," Childhood, Vol. 2 (2) 226-241 (2013).

[26] Thomas v. Bd. of Educ., 607 F.2d 1043, 1044-1045 (2d. Cir. 1979).

[27] Expressly rejected in J.S. v. Blue Mountain, 650 F.3d 915, 933, (3d Cir. 2011)(en banc), cert. denied, 132 S. Ct. 1097 (2012).
[28] Lander v. Seaver, 32 Vt. 114, 120 (1859).
[29] "The State of the First Amendment: 2012," First Amendment Center, www.firstamendmentcenter.org (accessed 1/18/14), 5.
[30] Danielle Keats Citron, Hate Crimes in Cyberspace (Cambridge: Harvard University Press, 2014) **last chapter**, citing McAfee Digital Deception Study, May 13, 2013 http://www.mcafee.com/us/resources/reports/rp-digital-deception-survey-pdf.?culture=en-us&affd=0&cid=122416.
[31] Bruce C. Hafen, "Developing Student Expression Through Institutional Authority: Public Schools As Mediating Structures, "48 Ohio State Law Journal 663, 694, 705 (1987).
[32] Ibid., 707.
[33] Anne Profitt Dupre, Speaking Up: The Unintended Costs of Free Speech in Public Schools (Cambridge MA. Harvard University Press 2009) 253. See also Kay S. Hymowitz, "Tinker and the Lessons from the Slippery Slope," 48 Drake Law Rev. 547 (2000).
[34] Klein v. Smith, 635 F. Supp. at 1441-42; Thomas v. Granville, 607 F.2d at 1051.
[35] Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960, 964 (5th Cir. 1972).
[36] Ibid., 964, 965 n. 1.
[37] Ibid., 964, 966 n. 2, 967, 964.
[38] Ibid., 964, 966 n. 2, 967.
[39] Ibid., 974.
[40] Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1050, 1050 n. 13 (2d. Cir. 1979).
[41] Thomas v. Bd. of Educ., 607 F.2d at 1051; see also Klein v. Smith, 635 F. Supp. 1440, 1441-1442, 1051, 1051 n.15 (D. Me. 1986).
[42] Klein v. Smith, 635 F. Supp. 1440, 1441, 1441 n. 4 (D. Me. 1986).
[43] Ibid., 1441-1442, 1441 n 3. *Compare* Fenton v. Stear, 423 F. Supp. 767, 769 (W.D. Pa. 1976) (not citing *Tinker* and viewing the term "a prick" as fighting words).
[44] Klein v. Smith, 635 F. Supp. at 1442.
[45] J.S. v. Blue Mountain, 650 F.3d at 933.
[46] Layshock v. Hermitage Sch. Dist., 650 F.3d at 216.
[47] Karl Taro Greenfield, "My Daughter's Homework Is Killing Me," *The Atlantic*, Sep. 18, 2013, 80, 87.
[48] Somini Sengupta, "Warily, Schools Watch Students on the Internet," New York Times, Oct. 29, 2013, A1.
[49] Ibid., 576, 577.
[50] R.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp. 2d 1128, 1133-1134 (D. Mn. 2012).
[51] Ibid. "ACLU-MN settles Facebook case with Minnewaska School District: Minnewaska agrees to strengthen privacy protections," March 25, 2014. www.aclu.org/technology-and -liberty-mn-settles-facebook-case-minnewaska-school-district. (accessed 5/20/14) The ACLU received half of the money paid in damages to cover the costs of litigation and support its work on student privacy.

[52] R.S. v. Minnewaska Area Sch. Dist., 894 F. Supp. 2d at 1140.
[53] Ibid.
[54] Frazier v. Winn, 535 F. 1279, 1285 (8th Cir. 2008).