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"BITCH," GO DIRECTLY TO JAIL: STUDENT SPEECH AND ENTRY INTO THE SCHOOL-TO-PRISON PIPELINE

Catherine J. Ross[*]

School disciplinary codes often trample upon speech that is constitutionally protected, even under the special jurisprudence that governs student speech in school. These infringements of First Amendment rights go beyond silencing and censoring speech—they lead to long-term suspensions, expulsion, referrals to alternative schools, and even to the juvenile justice system. And yet the link between the exercise of First Amendment rights and wrongful school exclusion has received virtually no attention.[1]

That omission obscures an important link between the infringement of student speech rights and the juvenile justice system: violations of school rules that restrict constitutionally protected expression are a leading cause of the initial discipline that sets children on the path from school to a delinquency label and confinement. This Article examines the nexus that connects constitutionally protected expression, violations of school speech codes, and school exclusion.

Reported cases and news coverage of incidents that never reached a courtroom reveal that the common penalty for speech teachers and administrators find offensive is exclusion from class, out-of-school suspension (sometimes for a few days, and sometimes for weeks or months), assignment to an alternative school for troubled youth, or expulsion. Sometimes the same speech event—usually a violation of the school code prohibiting speech that is constitutionally protected outside of school—leads both to exclusionary discipline and referral to the police or to juvenile court.

Because few scholars steeped in juvenile justice also write on freedom of expression, and those who write on the First Amendment rarely focus on juvenile justice, we lack a robust understanding of how punishment for school speech leads to the exclusionary penalties known to push children off track. Where the facts in any given speech case include suspension, as is common, the well-documented impact of an initial suspension helps us to fill in the blanks

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1. A rare exception is RUSSELL J. SKIBA, IND. EDUC. POLICY CTR., ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE 9 (2000), http://www.unl.edu/srs/pdfs/ztze.pdf ("These cases [four 1999 exclusion incidents] seem to have at their heart a conflict between two fundamental rights: the right of free speech, and the right of schools to protect students and staff from real or perceived harm.").

even though we do not have long-term follow up on the individual student. We know an initial suspension is likely to lead to more suspensions, school absences, and other negative outcomes that increase a young person's chances of incarceration. And in some court cases in which students successfully challenge penalties their school imposed on speech that is constitutionally protected, the student has already been referred for prosecution or confinement based on the exercise of speech rights at school.

Most of the seminal decisions on student speech rights, along with many less heralded cases, were brought by students who were suspended, expelled, or sent to alternative schools. They include the iconic Barnette sisters, who refused to say the Pledge of Allegiance in the early 1940s and were barred from school with the threat of being sent to a juvenile detention facility looming over them;[2] visual artist Sarah Boman, who faced a four-month suspension and compulsory psychological evaluation for hanging a poster of a fictional narrative, "Who killed my dog?", until a federal judge issued an injunction;[3] and, most recently, Taylor Bell, who was suspended and sent to an alternative school for six weeks in response to a rap recording he made off campus and placed on Facebook and YouTube, which school officials claimed threatened two coaches whom Bell's lyrics accused of sexually harassing female athletes.[4]

Section I sets the stage by summarizing the pertinent research on the long-term consequences of disciplinary exclusion and the reasons for the dramatic rise in school exclusion, including zero tolerance and police presence on campus. Section II introduces the special legal doctrine that protects student speech rights on campus and the tests used to assess whether schools have violated students' First Amendment rights. Section III shows that school exclusion has long been at the heart of litigation over student speech rights, even though it has never been the focus of the legal arguments or the judicial opinions. Sections IV and V turn to the close connection between cursing on campus—which is constitutionally protected if it is not lewd—and arrest and delinquency adjudication. Section VI explains the distinction between insubordinate speech, which may have constitutional protection, and insubordinate conduct, which does not. Finally, Section VII analyzes the intersection of racial disparities, speech, school discipline, arrest, and incarceration revealed in litigation challenging the treatment of students in Meridian, Mississippi.

I. SCHOOL EXCLUSION AND THE SCHOOL-TO-PRISON PIPELINE

Exclusionary discipline in the form of out-of-school suspension or expulsion is commonly understood to be a "drastic" remedy, one with enormous downsides that can change the trajectory of a child's life forever.[5] A consensus is forming

2. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

3. Boman v. Bluestem Unified Sch. Dist. No. 205, No. 00-1034-WEB, 2000 WL 297167 (D. Kan. Jan. 28, 2000).

4. Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280 (5th Cir. 2014), *aff'd*, 799 F.3d 379 (5th Cir. 2015) (en banc), *cert. denied*, No. 15-666, 2016 WL 763687 (U.S. Feb. 29, 2016).

5. Jeffrey H. Lamont, Council on Sch. Health, *Out-of-School Suspension and Expulsion*, 131

that disciplinary exclusion is overused and disproportionate to many of the offenses that trigger suspension and expulsion as well as referral to the justice system.

"[O]ut-of-school suspension," Daniel Losen and Jonathan Gillespie report, "is no longer a measure of last resort in a large number of school districts . . . . Well over three million children, K-12, are estimated to have lost instructional 'seat time' in 2009–2010 because they were suspended from school."[6] That is, they tell us, "about the number of children it would take to fill every seat in every major league baseball park and every NFL stadium in America, *combined*."[7]

The Children's Defense Fund first demonstrated in 1975 that suspension and other exclusionary disciplinary measures diminish a student's prospects for academic success and increase the risk of juvenile delinquency and incarceration.[8] Reliance on school exclusion as a disciplinary policy has persisted—indeed, it has grown—even though repeated studies have shown that it starts students "[on a] trajectory from the classroom to the justice system," known as the "school-to-prison pipeline."[9] A student who has been suspended once is more likely to be suspended again, to be left back, and to fail to graduate on time or at all.[10] Suspension or expulsion nearly triples the likelihood that a student will have contact with the juvenile justice system during the next academic year.[11]

These pathways do not prove that only "bad" children are suspended. On the contrary, the studies show that suspension itself derails children's lives.[12] The risks exist whether a student misses classes during in-school suspension, during an out-of-school suspension that lasts only a few days, or is excluded for weeks or months.[13] Students who miss class find it "harder . . . to stay on track"

PEDIATRICS e1000, e1002 (2013).

6. DANIEL J. LOSEN & JONATHAN GILLESPIE, CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 6 (2012), http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf.

7. *Id.* at 6.

8. CHILDREN'S DEF. FUND, SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN? 61–62 (1975), http://files.eric.ed.gov/fulltext/ED113797.pdf.

9. Rebecca W. Cohen, *Reframing the Problem: New Institutionalism and Exclusionary Discipline in Schools*, J. EDUC. CONTROVERSY, 2013, at 1.

10. *See, e.g.*, Marian Wright Edelman, Opinion, *Zero Tolerance Discipline Policies: A Failing Idea*, SKANNER (June 10, 2013), http://www.theskanner.com/opinion/commentary/18780-zero-tolerance-discipline-policies-a-failing-idea-2013-06-10 (arguing that Massachusetts's expulsion and suspension policies need revision). *See generally* CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM (2010).

11. EMILY MORGAN ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR., THE SCHOOL DISCIPLINE CONSENSUS REPORT: STRATEGIES FROM THE FIELD TO KEEP STUDENTS ENGAGED IN SCHOOL AND OUT OF THE JUVENILE JUSTICE SYSTEM 11 (2014) [hereinafter SCHOOL DISCIPLINE CONSENSUS REPORT], https://csgjusticecenter.org/wp-content/uploads/2014/06/The_School_Discipline_Consensus_Report.pdf.

12. KIM ET AL., *supra* note 10, at 78; Cohen, *supra* note 9, at 1.

13. *See* SCHOOL DISCIPLINE CONSENSUS REPORT, *supra* note 11, at 9 (discussing the importance

academically, which may lead to truancy and to additional suspensions.[14] This is why researchers often refer to suspension as deprivation of instructional time.[15] Missing classroom time because of disciplinary exclusion "appears to have *negative* effects on student outcomes" for individual students, measured by the likelihood of additional suspensions, delayed promotion and graduation rates, as well as for the learning environment of schools that rely heavily on exclusionary discipline.[16] Exclusions from class reinforce the notion that school is not a positive, supportive environment, resulting in alienation and increased voluntary absences following suspension.[17]

Because missing school and marginal literacy are highly correlated with subsequent incarceration, loss of instructional time can be devastating even at a young age.[18] According to child development expert James Comer, by around the third grade children begin to classify themselves as being in the mainstream or being marginalized at school. Most of those who conclude they are marginalized, he says, will never achieve their potential.[19]

Reliance on school exclusion began to surge after passage of the Gun-Free School Zones Act in 1994. That federal statute mandated a zero-tolerance policy (removing educators' discretion to consider context or mitigation) for students who brought weapons to school.[20] The American Academy of Pediatrics reported that school systems "quickly seized on zero-tolerance policies" to respond to "nonviolent offenses, such as drug and alcohol violations, verbal disrespect to teachers, and truancy."[21] Two decades later, less than two percent of the students excluded from school were charged with possessing weapons.[22] It is estimated that no more than five percent of out-of-school suspensions are attributable to "serious or dangerous" offenses, such as assaults or possessing weapons or drugs.[23]

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of remaining in the classroom).

14. *Id.*

15. *See, e.g.*, DANIEL J. LOSEN & RUSSELL J. SKIBA, SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 8 (2010), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/Suspended_Education.pdf.

16. *Id.* at 10 (citation omitted); *see also* Lamont, *supra* note 5, at e1001 (finding students who "experience out-of-school suspension and expulsion" are ten times more likely to drop out of school).

17. *See* SCHOOL DISCIPLINE CONSENSUS REPORT, *supra* note 11, at 9–11.

18. CHILDREN'S DEF. FUND, AMERICA'S CRADLE TO PRISON PIPELINE 136 (2007), http://www.childrensdefense.org/library/data/cradle-prison-pipeline-report-2007-full-lowres.pdf.

19. *Id.*

20. 20 U.S.C. § 7151 (2012); JACOB KANG-BROWN ET AL., VERA INST. OF JUSTICE, ISSUE BRIEF: A GENERATION LATER: WHAT WE'VE LEARNED ABOUT ZERO TOLERANCE IN SCHOOLS 1 (2013), http://www.vera.org/sites/default/files/resources/downloads/zero-tolerance-in-schools-policy-brief.pdf (explaining that zero tolerance policies which removed administrative discretion in fashioning appropriate responses to certain offenses began in the 1980s in response to drug offenses); Lamont, *supra* note 5, at e1001.

21. Lamont, *supra* note 5, at e1001.

22. *Id.* (citing data showing that less than two percent of suspensions and expulsions involve weapons).

23. JENNI OWEN ET AL., INSTEAD OF SUSPENSION: ALTERNATIVE STRATEGIES FOR EFFECTIVE

A comprehensive 2014 report on school discipline issued by the Council of State Governments summarized the problem: "[M]illions of students are being removed from their classrooms each year, mostly in middle and high schools, and overwhelmingly for minor misconduct. When suspended, these students are at a significantly higher risk of falling behind academically, dropping out of school, and coming into contact with the juvenile justice system."[24]

Similarly, a 2014 U.S. Department of Education report on national school discipline trends lamented, "[u]nfortunately, a significant number of students are removed from class each year—even for minor infractions of school rules,"[25] including rules governing speech. All the studies concur: most exclusionary discipline is imposed for what the Council of State Governments termed "minor misconduct."[26]

It is less clear what comprises "minor misconduct" because in most jurisdictions schools are not required to disaggregate data on school discipline. As one study explained, "[T]he overwhelming majority of disciplinary violations reported . . . appear as generic violations of the code of conduct, making it impossible to determine more precisely the behavior for which the student was disciplined."[27] Reports lump together fistfights, conduct that materially disrupts a classroom, and violations of the school's speech code including cursing.[28]

Although most states do not release information about the number of suspensions or the reasons for them,[29] data have emerged in the last few years from selected cities and states that confirm the national picture. Generic code violations by definition do *not* include violent conduct, acts, or language that violates the criminal code, or even conduct that amounts to a status offense for which a minor could be adjudicated a delinquent, such as consuming alcohol or being "incorrigible."

Ten percent of the nation's public school students are in Texas, where a comprehensive longitudinal study published in 2011 revealed that sixty percent of all students "were suspended or expelled at least once between their seventh-

SCHOOL DISCIPLINE 44 (2015), https://law.duke.edu/childedlaw/schooldiscipline/downloads/instead_of_suspension.pdf.

24. SCHOOL DISCIPLINE CONSENSUS REPORT, *supra* note 11, at ix; *see* TONY FABELO ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR., BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT (2011), https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf (longitudinal study of Texas students).

25. U.S. DEP'T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE i (2014) [hereinafter U.S. DEP'T OF EDUC., GUIDING PRINCIPLES], http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf.

26. SCHOOL DISCIPLINE CONSENSUS REPORT, *supra* note 11, at ix.

27. FABELO ET AL., *supra* note 24, at 18; *see also* Edelman, *supra* note 10 (discussing a study of discipline in Massachusetts which found that in 2009–2010 over half of the more than 60,000 reported suspensions and expulsions were for "unassigned offenses"—nonviolent infractions of the school code, including "swearing [and] talking back to a teacher").

28. *See, e.g.,* FABELO ET AL., *supra* note 24, at 18.

29. LOSEN & GILLESPIE, *supra* note 6, at 37–38.

and twelfth- grade school years."[30] Only three percent of suspensions were attributable to violent or serious offenses, a figure that tracks national averages. The children who were disciplined for "minor misbehavior" violated school codes but did not threaten material disorder or violence, and did not break any laws.[31]

Responding to these findings in 2012, Chief Justice Wallace B. Jefferson of the Supreme Court of Texas condemned the "criminalization of children for nonviolent offenses that result in a trip not to the principal's office but to a courtroom."[32] The "single greatest predictor [of involvement in the juvenile justice system]," he warned, "is a history of disciplinary referrals at school."[33]

In New York City, too, statistics show that in 2011–2012, the "overwhelming majority of suspensions . . . were for minor . . . offenses, such as insubordination," which generally refers to verbal challenges or "talking back."[34]

Minor offenses, including infractions of school speech codes, often lead to short suspensions, which require only "rudimentary precautions."[35] In *Goss* v. *Lopez*, the Supreme Court held that suspensions for no more than ten days require minimal procedural protections.[36] Suspensions of more than ten days require more robust procedural protections, including a hearing.[37] The distinction makes short suspensions efficient for school districts. Some states also relieve schools of the obligation to report statistics on suspensions that do not last more than ten days. This distinction likely results in underreporting of the total number of students suspended each year.[38]

Some students experience repeated short suspensions.[39] A student suspended for less than ten days lacks entitlement to educational services in many jurisdictions, and in that sense may be worse off than a student who receives a longer suspension. Because the student is not entitled to educational services, he or she is likely to lack adult supervision while suspended unless the

30. FABELO ET AL., *supra* note 24, at ix.

31. *Id.* at 16–18; N.Y.C. SCHOOL-JUSTICE P'SHIP TASK FORCE, KEEPING KIDS IN SCHOOL AND OUT OF COURT: REPORT AND RECOMMENDATIONS 2, 4, 10 (2013), https://www.nycourts.gov/ip/justiceforchildren/PDF/NYC-School-JusticeTaskForceReportAndRecommendations.pdf; *see* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219 (3d Cir. 2011) (holding that suspension for off-campus expressive conduct was a violation of student's First Amendment rights because actions did not substantially disrupt school); *see also* SKIBA, *supra* note 1, at 3.

32. Wallace B. Jefferson, *Recognizing and Combatting the 'School-to-Prison' Pipeline in Texas*, NAT'L CTR. FOR ST. COURTS (2012), http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Other-pages/SchoolToPrison-Pipeline-In-Texas.aspx.

33. *Id.* (citing TEXAS APPLESEED, TEXAS' SCHOOL TO PRISON PIPELINE 2 (2007)).

34. N.Y.C. SCHOOL-JUSTICE P'SHIP TASK FORCE, *supra* note 31, at 2.

35. Goss v. Lopez, 419 U.S. 565, 581 (1975).

36. *Id.* at 579–80.

37. *Id.* at 581.

38. *See* Edelman, *supra* note 10 (reporting that because Massachusetts schools do not have to report suspensions of less than ten days the "actual number of disciplinary exclusions is likely at least two or three times the 60,000 reported").

39. LOSEN & GILLESPIE, *supra* note 6, at 12, 14 (explaining that "many students are suspended two, three, or even more times in a school year but counted only once").

student has a parent who is not employed. The lack of educational services and adult supervision further exacerbates the negative impact of even a brief exclusion.

The risks are not randomly distributed. The risk of being suspended or expelled varies by state and even by school district, depending on the culture of the school and its approach to discipline.[40] Moreover, research has amply documented that dramatic disparities persist in the rate of school exclusion based on race and disability, and, to a lesser extent, gender.[41]

Those disparities are inextricably entwined with in-school arrests, which lead in a direct shortcut from school to court and prison for offenses that do not violate either the criminal code or the special status offense rules that can land a juvenile (but not an adult) in jail.[42] The enormous leeway schools have to punish students for violating internal disciplinary codes regularly blends into the state's power to charge minors as delinquents. The seriousness of the potential penalty raises the constitutional stakes.

The proliferation of armed police officers at schools has only intensified the risks of entering the fast track from school to court. These officers frequently advise principals about the law and immediately arrest offenders who might have

40. *Id.* at 20; YOUTH UNITED FOR CHANGE & ADVANCEMENT PROJECT, ZERO TOLERANCE IN PHILADELPHIA: DENYING EDUCATIONAL OPPORTUNITIES AND CREATING A PATHWAY TO PRISON 6 (2011), http://b.3cdn.net/advancement/68a6ec942d603a5d27_rim6ynnir.pdf (finding that Philadelphia's in-school "arrest rate was between three and 25 times higher than most of the other districts" in Pennsylvania, and within the city, "one single high school . . . had more arrests in 2008–09 than 17 of the other 19 largest school districts in the state" (emphasis omitted)); Lamont, *supra* note 5, at e1001.

41. *E.g.*, KRISTEN LEWIS & SARAH BURD-SHARPS, MEASURE OF AM., ZEROING IN ON PLACE AND RACE: YOUTH DISCONNECTION IN AMERICA'S CITIES 7, 9–10 (2015), http://ssrc-static.s3.amazonaws.com/wp-content/uploads/2015/06/MOA-Zeroing-In-on-Place-and-Race-Final.pdf (providing data collected since 2012 showing that "disconnection," a term describing young people who are neither in school nor employed, is highly correlated to the failure to complete high school and that rates of disconnection show that Latino girls and women are twenty percent more likely to be disconnected than their male counterparts, and that Asian American girls are also more likely than Asian American boys to be disconnected); EDWARD J. SMITH & SHAUN R. HARPER, UNIV. OF PA. CTR. FOR THE STUDY OF RACE & EQUITY IN EDUC., DISPROPORTIONATE IMPACT OF K-12 SCHOOL SUSPENSION AND EXPULSION ON BLACK STUDENTS IN SOUTHERN STATES 1 (2015), https://www.gse.upenn.edu/equity/sites/gse.upenn.edu.equity/files/publications/Smith_Harper_Report.pdf (finding that, while African American males are disproportionately suspended more than other groups, "when compared to girls from other racial/ethnic groups, Black girls were severely and most disproportionately" subjected to discipline).

42. U.S. Dep't of Educ., Guiding Principles*, supra* note 25, at i–ii; Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1, 27 (2013); Losen & Gillespie, *supra* note 6, at 28–29 (postulating that this focus may result in part from the availability of data, as well as the importance of the issue). In a recent report, the U.S. Department of Education stated that it does not collect data on why students were subjected to exclusionary discipline. SIMONE ROBERS ET AL., U.S. DEP'T OF EDUC., INDICATORS OF SCHOOL CRIME AND SAFETY: 2014, at 82 (2015), http://nces.ed.gov/pubs2015/2015072.pdf. For reasons that are unclear, the Department defines a "serious disciplinary action" differently than the Court did in *Goss v. Lopez*, as "suspensions lasting 5 days or more, removals with no services for the remainder of the school year (i.e. expulsion), and transfers to specialized schools." *Id.* See *infra* Section V for a discussion of arrests and delinquency adjudications based on protected expression.

never come to the attention of law enforcement for minor infractions in the past. The number of school resource officers increased thirty-eight percent between 1997 and 2007, with some schools having a heavy police presence that helps to push children out of school.[43] Police officers posted in schools may or may not be school resource officers. Some school districts, including New York City, Philadelphia, and Los Angeles, maintain their own independent police forces.[44] It may not make much difference whether the uniformed officers on the school campus are school employees or members of the city's police force, because school resource officers may or may not receive training, and even if trained may not be better equipped to interact with teenagers than members of the regular police force.[45]

II. First Amendment Protections for Student Speech

Many of the "minor infractions" that result in school exclusion involve speech code violations. The codes, in turn, often penalize expression that the First Amendment protects outside of school and, to a lesser but still substantial extent, on the school campus. In school or out, the government may regulate certain kinds of speech deemed as having very low value: the narrow legal category of "true threats," incitement, libel and slander, and material that fits the legal definition of obscenity, as well as speech used to commit crimes like fraud.[46] However, a social assessment of words as having low value, or being uncivil, does not remove the speech from the umbrella of First Amendment protection.

The expressive rights of students are governed by a special First Amendment jurisprudence. It protects some rude speech in school—including much cursing and verbal disrespect toward teachers—so long as the expression is not accompanied by disruptive conduct.

A string of Supreme Court cases, from *West Virginia* v. *Barnette*, decided in 1943, through *Morse v. Frederick* in 2007, established the scope of students' speech rights in school. In *Barnette*, the Court upheld the right of students who were Jehovah's Witnesses to refuse to say the Pledge of Allegiance because it violated their beliefs.[47] Instead of seeking a religious exemption, they asserted a right to resist a compulsion to speak words that the state imposed. *Barnette* stands, among other things, for the principles that civil liberties are as important in schools as they are elsewhere, and that even the youngest public school students have constitutional rights.

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43. Amanda Petteruti, Justice Policy Inst., Education Under Arrest: The Case Against Police in Schools 1 (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf.

44. *Id.* at 3.

45. *Id.*; Carla Shedd, Unequal City: Race, Schools, and Perceptions of Injustice 93–99 (2015).

46. United States v. Stevens, 559 U.S. 460, 468–69 (2010); Virginia v. Black, 538 U.S. 343, 344 (2003).

47. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

The Court subsequently established a special regime for evaluating whether school censorship violates the Speech Clause. The earliest case to carve out a special constitutional doctrine for student speech, *Tinker* v. *Des Moines*, decided in 1969, explained that in schools the conflict between individual rights and authority required some modification of normal First Amendment standards in light of the role schools play in society and in preparing youth for citizenship.[48] It set forth a new standard for student speech: student expression on campus is constitutionally protected unless the school can show a reasonable apprehension that the speech will lead to material disruption or collide with the rights of others.[49] The Court held that schools in Des Moines had violated the rights of young people by preventing them from wearing black armbands to protest the war in Vietnam because the expression did not pose a risk of material disruption.

As the Court became more conservative, subsequent decisions under each new Chief Justice cut back on *Tinker*'s protection for student speech. The Court gradually set up a taxonomy of rights and tests for whether school had violated students' expressive rights. The present regime may be understood as limiting application of the *Tinker* test to students' personal expression on campus, the type of speech that is involved in most of the cases discussed in this Article. The remaining categories of speech enjoy less protection.

Under *Bethel v. Fraser* (1986) a school has discretion to prohibit "lewd, indecent, or offensive language" in order to promote "the shared values of a civilized social order."[50] *Fraser* aims at the *manner* in which students express themselves rather than at the content or viewpoint of their speech. This lewd or vulgar manner of expression is the "profanity" barred by school codes that is often linked to "defiance" and "disrespect." All three manners of expression appear to account for a large number of school suspensions, as highlighted in Section I.

Fraser gives schools almost unlimited discretion to punish the lewd and crude, though lower courts have struggled to define the manner of speech *Fraser* governs.[51] Educators commonly push the margins of the speech *Fraser* allows them to censor—impolite speech with sexual overtones—and claim that they have authority to regulate all manner of cursing (especially when directed at authority figures) without impinging on the constricted universe of school speech rights. In many schools cursing is a zero-tolerance offense. That is bad enough from a First Amendment perspective, but the stakes are much higher when violation of a school's rule against cursing leads to a juvenile court referral.[52]

48. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969).

49. *Id.* at 513.

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

51. CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS 66, 71–73 (2015).

52. Moreover, the school loses control over the nature of the penalty once it refers a student to law enforcement, so the penalty may be even harsher than school officials intended. They will not always know whether the student will be adjudicated in juvenile court or transferred to the adult system. *See, e.g.*, N.C. v. Commonwealth, 396 S.W.3d 852, 865 (Ky. 2013) (Abramson, J., concurring) (maintaining that students are entitled to *Miranda* warnings when interrogated about school-based

No bright line divides speech governed by *Fraser*'s grant of almost unlimited authority to educators and school boards from words that lie outside their discretion to control. The Supreme Court has never elucidated exactly what manner of speech *Fraser* governs. As I have explained elsewhere, some efforts to invoke *Fraser*'s extreme deference to educators clearly go too far: reliance on vague definitions to try to bring any form of insubordinate speech within the boundaries of *Fraser*'s lewd or vulgar expression, including references to "hell" in poetry, and even using a finger and thumb to mimic a gun.[53] And the case fails to provide any test that would limit a school's discretion. As Chief Justice Roberts cryptically observed, "The mode of analysis employed in *Fraser* is not entirely clear."[54]

The rules governing speech that appears to be the school's own also give schools enormous discretion. Under *Hazelwood v. Kuhlmeier* (1988) a school may regulate school-sponsored speech (speech that takes place in any activity related to the curriculum and that appears to bear the school's imprimatur) on the basis of any legitimate pedagogical concern.[55] While *Hazelwood* significantly undermines free expression in schools—giving officials power to control most school publications and many other kinds of speech on campus—it generally leads to prior restraint of speech, not to the discipline that is the focus of this Article.

Finally, under *Morse*, schools may bar and punish all speech that appears to advocate the use of illegal substances unless the speech is political.[56] Very few controversies of the sort *Morse* governs have been reported, and speech advocating drug use (as opposed to possession or sale of illegal substances) does not appear to lead to a large number of suspensions.[57]

III. EXCLUSIONARY DISCIPLINE IN SCHOOL SPEECH LITIGATION

The risk of being suspended for expression the Constitution protects in school has always been at the heart of litigation over student speech rights. Families sue schools seeking injunctive relief so their children can return to school or seeking to expunge a disciplinary record that resulted from an unconstitutional infringement of expression. But because courts have taken a hands-off approach to assessing whether the penalty is proportionate to the offense, the legal questions before the courts are largely limited to whether the student had a First Amendment right to engage in the expression for which the

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offenses by or in front of law enforcement officers because it will not be clear whether a referral will proceed in juvenile or criminal court, and because a minor adjudicated in juvenile court may age out and complete a sentence in an adult jail).

53. ROSS, *supra* note 51, at 86–91, 156 (discussing breast cancer awareness bracelets); *id.* at 179 (discussing racially insensitive speech).

54. Morse v. Frederick, 551 U.S. 393, 404 (2007).

55. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

56. *Morse*, 551 U.S. at 408–09.

57. Frederick Schauer, *Abandoning the Guidance Function*: Morse v. Frederick, 2007 SUP. CT. REV. 205, 222–23. Of course, conduct involving illegal substances on and off campus does lead to suspensions and expulsions, but such conduct is outside the scope of my discussion here.

school imposed a penalty, and whether the school satisfied the legal standard for inhibiting the type of speech at issue without violating the Constitution.

The link between protected speech and school exclusion is at the heart of four of the five iconic student speech cases, all the way back to the first one in 1943.[58] The Barnette sisters had been suspended from school and were not allowed to return until they agreed to say the Pledge of Allegiance. Long before anyone coined the phrase "school-to-prison pipeline," the *Barnette* Court was deeply aware of the risks that accompanied school exclusion. Under state law, the Court noted, the girls risked being charged with "insubordination" and expelled from school.[59]

The peril was real. Around the country, thousands of Jehovah's Witnesses, like the Barnettes, had in fact been expelled from school because their faith prevented them from saying the Pledge. The American Bar Association put the issue to the Court in the starkest terms in its amicus brief, in language that could have been written today about the risks of school exclusion. Some of the children expelled from school for refusing to say the Pledge, the ABA stated, "get piecemeal instructions from their parents; . . . others are torn from their homes and committed for the rest of their adolescence to institutions for juvenile delinquents" either for insubordination or because they were not attending school—expulsion being no defense to truancy.[60]

Suspensions were also at issue in the remaining Supreme Court cases involving students' personal expression. Three of the Tinker siblings and their co-dissident Christopher Eckhardt were sent home and told they could not return to school until they stopped wearing black armbands.[61] Matthew Fraser, whose nominating speech for a buddy in a high school election was a string of double entendres (without profanity), was suspended for three days and his name was removed from the ballot for commencement speaker (he won by write-in ballot and received an injunction ordering the school to let him deliver the address).[62] Finally, Joseph Frederick was initially suspended for ten days for refusing the principal's order to put down his "Bong Hits 4 Jesus" banner at the Olympic torch parade the entire school was attending.[63]

In each of those cases, the students' speech was constitutionally protected when they spoke. The Supreme Court held that the Barnettes and the students in *Tinker* had been wrongfully punished because the Constitution protected their expression. And although the Court upheld the disciplinary actions against both Fraser and Frederick, the law protected their speech *at the time* they engaged in it. In order to rule for the school officials in *Fraser* and *Morse*, the Court had to

58. In the fifth case, *Hazelwood*, the school engaged in prior restraint by cutting articles from the school newspaper before it was published. 484 U.S. at 264.

59. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943).

60. Brief of the Committee on the Bill of Rights, of the American Bar Association, as Friends of the Court at 24, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (No. 591).

61. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

62. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 667–78 (1986).

63. Morse v. Frederick, 551 U.S. 393, 397–98 (2007).

abandon existing doctrine to reach the result it wanted—upholding the authority of educators to inhibit students' manner of speech or ideas that undermined a school's anti-drug message.[64]

The facts in many lower court cases show the same pattern of exclusion from education in response to constitutionally protected expression the school considers offensive or objectionable: an art poster, immediately removed, asking "Who killed my dog?", which resulted in suspension for the rest of the school year—81.5 days;[65] suspension or the risk of suspension for wearing t-shirts promoting or denouncing rights for LGBT persons, or taking a stand for or against abortion rights;[66] refusing to remove a shirt with a political message;[67] or calling a classmate a "poo-poo head" on the playground.[68] All of these incidents involved personal student expression that is protected under *Tinker*.

None of this expression involved any realistic threat to the safety of the school or its occupants, and none posed a credible risk of material disruption. Schools have wide discretion to segregate students who appear to have issued threats even when the language does not rise to the level of a true threat.[69] Where there is no real threat of either violence or material disorder (which would satisfy the *Tinker* standard), schools must reintegrate the speaker and should rescind any penalty on the student's record. But school authorities commonly dig in their heels and refuse to back off even after it is clear that the student never constituted a threat to safety or to the educational process.[70]

Schools respond disproportionately to speech for which adults could never be punished, and for which young people could not be punished outside of school, with potentially life-changing consequences. Even if a student pursues a civil lawsuit and ultimately prevails, unless the student obtains an injunction, the penalty will be applied before the lawsuit is resolved.

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64. *See* ROSS, *supra* note 51, at 39–41 (discussing *Fraser*).

65. Boman v. Bluestem Unified Sch. Dist. No. 205, No. 00-1034-WEB, 2000 WL 297167, at *1 (D. Kan. Jan. 28, 2000) (court enjoined the suspension).

66. *E.g.*, Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 670 (7th Cir. 2008); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 203 (3d Cir. 2001); Gillman *ex rel.* Gillman v. Sch. Bd. for Holmes Cty., Fla., 567 F. Supp. 2d 1359, 1362–64 (N.D. Fla. 2008); Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 967 (S.D. Ohio 2005).

67. Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 322–23 (2d Cir. 2006) (describing that the student was sent home and discipline was noted on his permanent record).

68. Deborah Wrigley, *Parents Blame Book for Son's Suspension*, ABC13 (May 19, 2011, 4:36 PM), http://abc13.com/archive/8140843/.

69. Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1070 n.7 (9th Cir. 2013); Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38 (2d Cir. 2007) (noting that *Tinker* provides "significantly broader authority" than the true threats doctrine "to discipline a student's expression reasonably understood as urging violent conduct").

70. *See, e.g.,* Ponce v. Socorro Indep. Sch. Dist, 432 F. Supp. 2d 682, 685–86 (W.D. Tex. 2006) (discussing a situation where a principal undermined his argument that a student posed a threat based on his fictional writings when he allowed the student to return to class before turning him over to the police, sending him to an alternative school, and labeling him a "terroristic threat"), *vacated*, 508 F.3d 765, 771 (5th Cir. 2007) (sustaining the school's actions in light of Columbine and other school shootings); *Boman*, 2000 WL 297167, at *2 (discussing a situation where the school board refused to reinstate a student even though the review officer found that her poster was not threatening).

So, for example, before the Fifth Circuit ruled that Adam Porter's two-year-old drawing of a violent attack on his school was protected speech, Adam had been arrested and kept in jail for four days, threatened with expulsion, sent to an alternative school, and dropped out of high school.[71] The court mentioned Adam's learning disabilities in passing because the complaint rested in part on the Individuals with Disabilities Education Act, but did not ask what role, if any, Adam's disabilities played in the discipline he received.[72] The court held that the school had violated Adam's speech rights by punishing him, but no one could turn back the clock and restore his route to a high school diploma.

IV. CURSING, ZERO TOLERANCE, AND JUVENILE COURT ADJUDICATIONS

Violating a student speech code, by itself, shouldn't turn a young person into a dropout or a delinquent. But it does, and repeatedly.[73]

The manner of speech most likely to get kids into trouble does not involve any form of true threat or any real threat of substantial disruption, just threats to hierarchy and civility. As Sections I and II show, many incidents that lead to school exclusion involve cursing or disrespectful speech, especially—though not always—addressed to an authority figure such as a teacher or administrator. In New York City, for example, the use of "profane language" is one of the top ten reasons that schools suspend students.[74] Indeed, fully eighty-one percent of suspensions were based on infractions of the school speech code such as "using profane language or lying."[75]

Rude or crude speech is unlikely to garner much sympathy from many adults. Students have called teachers a "dick," "skank," and "tramp," all of which fall within *Fraser*'s domain because they have sexual overtones.[76] While

71. Porter v. Ascension Par. Sch. Bd., 393 F.3d 608, 612, 619–21 (5th Cir. 2004) (finding the speech constitutionally protected, but granting qualified immunity to the school official because "subtle" questions and the "unsettled nature of First Amendment law" governing several aspects of the case could have led "reasonable school officials" to make "reasonable mistakes").

72. *Id.* at 612 (noting the complaint included allegations under IDEA).

73. Because neither the states nor the federal government collect information in a way that disaggregates the offenses that lead to exclusionary discipline, it is not possible to estimate with precision the number of suspensions that are based on students' rude manner of speech. Consequently, the data do not permit us to determine what proportion of those suspensions is based solely on language that lies within schools' power to punish under the broad discretion provided under *Fraser*, or what percentage is based solely on language the Constitution protects from penalty even in school.

74. SAMANTHA POWNALL, N.Y. CIVIL LIBERTIES UNION, A, B, C, D, STPP: HOW SCHOOL DISCIPLINE FEEDS THE SCHOOL-TO-PRISON PIPELINE 12 (Johanna Miller et al. eds., 2013), http://www.nyclu.org/files/publications/nyclu_STPP_1021_FINAL.pdf; *8th Grader Arrested for Throwing Skittles on School Bus*, WGNTV.COM (May 13, 2015, 8:10 AM), http://wgntv.com/2015/05/13/school-district-busts-students-for-candy-cellphones-profanity/ (noting that the Jefferson Parish, Louisiana school district arrested roughly 1,600 students for offenses like "swearing and carrying cell phones" in just one school year).

75. N.Y.C. SCHOOL-JUSTICE P'SHIP TASK FORCE, *supra* note 31, at 4.

76. *See* ROSS, *supra* note 51, at 72–73, 80–84 (discussing Smith *ex rel.* Smith v. Mount Pleasant Pub. Schs., 285 F. Supp. 2d 987, 989 (E.D. Mich. 2003) (student called principal a "skank" and a "tramp"); and Posthumus v. Bd. of Educ. of Mona Shores Pub. Schs., 380 F. Supp. 2d 891, 894–95

on the Third Circuit, Justice Alito offered this clarification: *Fraser* permits schools to "prohibit words that 'offend for the same reason that obscenity offends,'" but does not allow regulation of other manners of expression that may be "plainly offensive."[77] Schools, however, assert authority to control and punish words and attitudes far beyond *Fraser*'s reach—words that have no sexual connotations, but are merely deemed by adults to be in "bad taste."[78]

Adults have a constitutional right to curse, even using words that have a sexual meaning, as the seminal case of *Cohen* v. *California* held.[79] But it has long been accepted that students have no right to wear Cohen's infamous jacket, which gained its rhetorical power from its "crude" exclamation: "Fuck the Draft."[80]

In some states, however, such as Texas or Mississippi, cursing can lead to an arrest in school and adjudication as a delinquent even though a minor could not be arrested for cursing outside of school. Until 2013, Texas had a "ticketing" system that allowed school-based police officers to issue citations to students for misdemeanors, including truancy, chewing gum, disrupting class, "disorderly language," and talking back to teachers. The ticketed students had to appear in court, were subject to fines, and often did not know that they were entitled to attorneys. When students turned seventeen, any unpaid fines could lead to incarceration.[81]

In one apparently typical instance, a high school senior in Texas received a ticket with a $340 fine from a police officer posted in the school after she cursed at another student. When she failed to show up for a court hearing because she could not pay, the judge raised the fine to $637. Although she took a waitressing job to raise the money, she had saved only $100 when the court issued a warrant for her arrest.[82]

V. ARRESTS AND DELINQUENCY ADJUDICATIONS BASED ON PROTECTED EXPRESSION

In 1969 the *Tinker* court certainly did not envision that protesters would be arrested rather than sent home if they refused to remove their black armbands. But that is exactly what happens in contemporary America, on the ground that students refused to follow orders even when the order aims to silence political speech that the First Amendment clearly protects. In one 2013 incident, a West

(W.D. Mich. 2005) (student called assistant principal a "dick")).

77. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 213 (3d Cir. 2001) (Alito, J.) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)).

78. *E.g.*, Poling v. Murphy, 872 F.2d 757, 763 (6th Cir. 1989) (upholding penalty for making fun of the vice principal in a campaign speech).

79. Cohen v. California, 403 U.S. 15, 26 (1971).

80. *Id.* at 16, 21; Thomas v. Bd. of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring).

81. Jody Serrano, *School Officers Can No Longer Issue On-Campus Citations*, TEX. TRIB. (Aug. 29, 2013), http://www.texastribune.org/2013/08/29/class-disruption-cases-head-principals-office-not-/.

82. Jessica Hopper, *Texas High School Senior Fined $637 for Cursing at School*, ABCNEWS (Feb. 2, 2011), http://abcnews.go.com/US/texas-teen-fined-cursing-fellow-student/story?id=12821959.

Virginia eighth grader was both suspended and arrested when he refused to remove his shirt, which displayed the NRA logo, a rifle, and the phrase "Protect your right." The police removed him from the school.[83] The episode gained prominence when students all over the state showed up wearing NRA apparel to show their support for the boy's right to express his political views.[84]

Very few state appellate courts have squarely considered whether delinquency adjudication (largely governed by state law) based solely on a school speech code infraction is constitutional. Most of the cases involve rudeness to authority figures, often using profanity. The courts are divided.

Some of the states that have ruled on the question have concluded that prosecution for offensive speech in school does not violate the Constitution if the criminal statute tracks the Supreme Court's language about the standards that apply to student speech. The highest court in South Carolina, for example, upheld a statute that allowed the state to prosecute students for speech that was "disruptive" or "interfere[d]" with the educational process, which it deemed to provide fair notice that *Tinker* would not protect the speech.[85]

The opinion ignored the fact that the mode of analyzing whether the state wrongfully constricted speech set forth in *Tinker* applies only in the "special environment" of the public school.[86] In essence, the delinquency offense under the South Carolina code amounts to nothing more than breaking a school rule, a situation the studies discussed earlier in this Article indicate holds true in many parts of the country. The criticisms justly leveled at excluding a child from school for breaking a school rule apply tenfold to adjudicating a child a delinquent for the same behavior.

Other state courts have attempted to bring the school speech that led to a delinquency adjudication outside the protections of the Speech Clause, commonly by asking whether the words amounted to "fighting words" that would not be protected anywhere.[87] These courts have ruled that state penal statutes that reach knowing abuse of teachers on school grounds or while they are engaged in performance of their duties, including "insulting" a teacher, will be sustained as applied only if, in context, the insult amounts to "fighting words."

Fighting words, categorically removed from the scope of the First Amendment by *Chaplinsky* v. *New Hampshire* in 1942, are words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[88] As subsequently defined, fighting words must be directed to a

83. Victoria Taylor, *West Virginia Teen Suspended, Arrested After Wearing NRA Shirt Returns to School in the Same Shirt,* N.Y. DAILY NEWS (Apr. 23, 2013, 3:00 PM), http://www.nydailynews.com/news/national/teen-suspended-arrested-nra-t-shirt-returns-school-shirt-article-1.1325252.

84. *Id.*

85. *In re* Amir X.S., 639 S.E.2d 144, 147–50 (S.C. 2006).

86. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.").

87. *E.g., In re* Nickolas S., 245 P.3d 446, 447 (Ariz. 2011); *In re* Louise C., 3 P.3d 1004, 1006 (Ariz. Ct. App. 1999); *In re* L.E.N., 682 S.E.2d 156, 158 (Ga. Ct. App. 2009).

88. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

particular person, and must be "inherently likely to provoke a violent reaction" from the person at whom the insult is directed.[89]

Courts applying this analysis to student speech are likely to conclude that teachers, as a group, are not going to respond to insults from students by engaging in a fistfight. Therefore state courts have ruled that a student's muttered "bitch,"[90] "I'd better get my 'fucking' [confiscated marker] back after school,"[91] and "fuck this, I don't have to take this shit," addressed to a teacher do not constitute fighting words and fall within the speech the First Amendment protects.[92]

Even repeated insults (in class and in the suspension room), including "fucking bitch," "stupid bitch," and more, shouted within ten feet of the teacher, are protected by the First Amendment against prosecution by the state.[93] Discussing these facts, an appellate court in Arizona instructed that school discipline is called for, but went on to say that penalties imposed by the school are the only permissible responses when students insult teachers:

> We do not believe that the natural reaction of the average teacher to a student's profane and insulting outburst, unaccompanied by any threats, would be to beat the student. . . . [Such] conduct, although reprehensible, is properly punished through school discipline . . . rather than by characterizing it as fighting words likely to provoke a violent reaction by his teacher.[94]

Where the insult does not amount to fighting words, because a teacher is unlikely to take the bait, the First Amendment prohibits delinquency charges or criminal prosecution. Courts taking this approach regularly underscore that the rude student remains vulnerable to school discipline—including suspensions.[95]

The Supreme Court of Arkansas took a starker position when it held that a student could never be adjudicated a delinquent just for lobbing a curse word at a teacher. An eighth-grade girl had been suspended and adjudicated a delinquent for referring to her science teacher as a "bitch" during class. The court reversed and overturned the state statute which made it a misdemeanor to "abuse or insult a public school teacher while that teacher is performing" his or her job. The court held that the law violated the First Amendment by criminalizing speech that did not amount to fighting words and therefore fell within the First Amendment's protection.[96]

89. Cohen v. California, 403 U.S. 15, 20 (1971); *see also* Texas v. Johnson, 491 U.S. 397, 409 (1989) (characterizing fighting words as an "invitation to exchange fisticuffs").

90. Shoemaker v. State, 38 S.W.3d 350, 355–56 (Ark. 2001).

91. *L.E.N.*, 682 S.E.2d at 157.

92. *Louise C.*, 3 P.3d at 1004.

93. *In re* Nickolas S., 245 P.3d 446, 447 (Ariz. 2011).

94. *Id.* at 452–53 (reversing delinquency adjudication and noting that Nickolas was not charged under other statutes targeting assault, intimidation, or disruption of education).

95. *Id.* at 453 (reversing delinquency adjudications below); *L.E.N.*, 682 S.E.2d at 157 (same); *Louise C.*, 3 P.3d at 1007 (same).

96. Shoemaker v. State, 38 S.W.3d 350, 355–56 (Ark. 2001) (discussing cases from other states and overturning the statute as overbroad and vague).

Adjudication as a delinquent (the equivalent of prosecution and conviction) based on a school infraction, the Arkansas court made clear, pushes far beyond the considerable discretion educators have to impose penalties for rude speech. Like several other state courts that had reached similar conclusions, it agreed that the term "bitch," addressed to a teacher, was "derogatory and insulting" and "should be the subject of discipline and control by the school administration."[97] The Arkansas statute, however, elided what should be a clear divide between school speech code violations subject to educational discipline and conduct subject to prosecution. That elision resembles the watering down of Fourth Amendment protections against unreasonable search and seizure in the special environment of the school, which permits campus searches that would be unconstitutional outside of school to yield evidence introduced against juveniles in drug cases.[98]

Even if it were constitutional to criminalize calling an authority figure a "bitch," which the highest court in Arkansas correctly held it is not, sound social policy should discourage schools and juvenile prosecutors from turning a student into a juvenile offender based on a moment of thoughtless or even intended offensive expression. A delicate balance exists in school between the need to educate students, which requires a certain level of order and decorum, and the natural inclination of adolescents to resist authority and test limits. Beyond that, in a democracy, individuals have a right to criticize those in authority, including teachers, even if doing so appears impolite or insensitive, as long as the student or citizen does not refuse to follow lawful directives—in the case of students, sitting and listening in class, taking exams, and so forth.

VI. SPEECH ENTWINED WITH CONDUCT

Readers may justifiably wonder whether it makes any sense to allow insubordinate speech addressed to teachers. Isn't that part of what is wrong with kids today? Doesn't disrespect stand in the way of a secure school environment and improved learning?

The Speech Clause does not protect insubordinate conduct, it protects only words. When speech merges with conduct, the analysis becomes more complex. It is often a challenge to separate insubordinate conduct from the words that are part of the behavior. Dissenting from Justice Harlan's masterful explanation in *Cohen* of why the First Amendment protects even the most offensive speech, Justice Blackmun regarded the slogan "Fuck the Draft" as a form of acting out, not a protected utterance.[99] Small wonder that students and school officials may be confused about how far student speech rights extend, particularly when the student is behaving disrespectfully to school authorities.

Judges instruct that "under contemporary constitutional concepts" the

97. *Id.* at 356.

98. *See, e.g.*, FLA. STATE CONFERENCE NAACP ET AL., ARRESTING DEVELOPMENT: ADDRESSING THE SCHOOL DISCIPLINE CRISIS IN FLORIDA 31, 39, 43 (2006), http://b.3cdn.net/advancement/e36d17097615e7c612_bbm6vub0w.pdf (describing arrests of students at school).

99. Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting).

question of whether "admittedly 'discourteous' and 'rude' remarks" have constitutional protection in school is "a serious one."[100] The question of where the boundary falls is part of the larger puzzle of how to distinguish between what Justice Stevens called the enforceable "permissible rule" impinging on speech and an impermissible rule whose enforcement always violates the Speech Clause.[101] Even permissible rules may be administered in a way that infringes constitutional rights—for example, when enforced only against disfavored viewpoints.

Assigning the label "insubordinate" to speech often reflects subjective judgments. As the New York Civil Liberties Union observes, "While some misbehavior is clear by any objective standard—smoking at school, for example—other behaviors are more subjectively assessed. Studies repeatedly confirm that subjective infractions, like talking back or disrespect for authority, may be interpreted differently depending on the teacher's and student's race."[102] They may also be influenced by the teacher's perceptions of the student as fundamentally "good" and on track, or problematic.

The boundaries between conduct, verbal insubordination, and protected speech can be difficult to discern, especially in the heat of the moment. Common sense sometimes seems to evaporate.

Crystal Kicklighter, a white eleventh grader in Georgia, pregnant by her black boyfriend, responded to her classmate's "sit [your] pregnant ass down," with a retort the school thought even ruder: "You just mad because you ain't got nobody pregnant."[103] The principal suspended Kicklighter for five days and told her she could not return until she apologized to the class. Two weeks later, when she returned to school but refused to apologize, she was arrested and removed from the building. Kicklighter spent the rest of the academic year on suspension. She formally withdrew from school the next year.[104]

Kicklighter sued, alleging among other things that the school district had violated her speech rights by conditioning her return to school on compelled expression (an apology) in violation of *Barnette*'s holding that the First Amendment bars compelled speech. It is inconceivable, Justice Jackson wrote in *Barnette*, that "a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."[105]

The court upheld the original suspension as well as the conditions attached to Kicklighter's return to school, even though those conditions cut Kicklighter's education short. Perhaps Kicklighter's initial conduct—standing as class started—would have been a sounder basis for school discipline, but even that conduct would not have justified the severity of the penalty that resulted from

100. Poling v. Murphy, 872 F.2d 757, 758 (6th Cir. 1989).

101. Morse v. Frederick, 551 U.S. 393, 434–35 (2007) (Stevens, J., dissenting).

102. POWNALL, *supra* note 74, at 13.

103. Kicklighter v. Evans Cty. Sch. Dist., 968 F. Supp. 712, 714 n.2 (S.D. Ga. 1997).

104. *Id.* at 715.

105. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943).

mutual intransigence as events unfolded.

While the Constitution does not require it, a sounder social policy would have led the school to help Kicklighter find a face-saving way to continue her education instead of pushing her out. Why not reduce the penalty to "time served"?

VII. THE INTERSECTION OF RACE, SPEECH, DISCIPLINE, ARREST, AND INCARCERATION IN MERIDIAN, MISSISSIPPI

In 2014, the U.S. Department of Education corroborated a string of studies that reported shocking disparities in the use of exclusionary discipline based on race and disability: "Nationwide . . . youths of color and youths with disabilities" are far more likely than other students to be expelled or suspended.[106] Members of both groups are also much more likely than other young people to be "referred to law enforcement" by school authorities.[107] Study after study underscores that children of color and children with disabilities are greatly overrepresented among students who are suspended, expelled, sent to alternative schools, and referred to the juvenile justice system.[108]

Events in Meridian, Mississippi illustrate this conjunction of racial discrimination, speech offenses, school exclusion, and in-school arrests. These conditions led the U.S. Department of Justice to charge that the Meridian School District was one of the worst school-to-prison pipelines in the country.[109]

Meridian had been the subject of a school desegregation lawsuit that began in 1965, in which the United States had intervened on behalf of the plaintiffs. That litigation did not end until 2013, when the district court entered a consent decree.

The consent decree in the desegregation case specifically addressed disparities in disciplinary policies and referrals to law enforcement as they affected children of color and those with disabilities. Among other things, the decree barred the school from referring students to law enforcement except where state law required schools to do so, or when "necessary to protect the physical safety of students or school personnel."[110] It further required the school district to treat "public order offenses," including "profanity [and] dress code violations" as matters for school discipline, "rather than criminal law issues warranting [school resource officer] involvement," language suggesting that the school system had been inappropriately referring students to law enforcement

106. U.S. DEP'T OF EDUC., GUIDING PRINCIPLES, *supra* note 25, at i.

107. LOSEN & GILLESPIE, *supra* note 6, at 6–7; U.S. DEP'T OF EDUC., GUIDING PRINCIPLES, *supra* note 25, at i; Nance, *supra* note 42, at 41.

108. *E.g.,* SMITH & HARPER, *supra* note 41, at 1.

109. Elisabeth Kauffman, *The Worst "School-to-Prison" Pipeline: Was it in Mississippi?*, TIME (Dec. 11, 2012), http://nation.time.com/2012/12/11/the-worst-school-to-prison-pipeline-was-it-in-mississippi/.

110. Consent Order ¶ 83, No. 4:65-CV-1300 HTW-LRA, 2012 WL 1067105 (S.D. Miss. Mar. 28, 2012).

for exactly these kinds of speech code violations.[111]

In 2012, as the school desegregation case was winding down, the U.S. Department of Justice filed another lawsuit against Meridian and the State of Mississippi following an investigation into the juvenile justice system in Lauderdale County where Meridian is located. The complaint alleged, among other things, that schools regularly asked the police to arrest students for "conduct that would traditionally be considered to constitute only a school disciplinary infraction, including disrespect, refusal to follow the directions of a teacher, and profanity."[112] It further alleged that police officers always arrested students when the school asked them to, making the arrests in school, and often handcuffing minors while escorting them from the building.[113]

In addition, students placed on probation by the juvenile court frequently had their probation revoked for minor violations of the school code that resembled those leading to the initial arrest, including "dress code violations, profanity, 'talking back' or disrespect to teachers."[114] Revocation of probation resulted in confinement. A study by several public interest groups including the ACLU and the Advancement Project revealed that students who had been placed on probation by a juvenile court (often for low-level school code violations) were "routinely suspend[ed]" afterwards for "such low-level behaviors as use of *vulgar language*, flatulence in class, and dress code infractions like having a shirt untucked," leading to "automatic incarceration" for violating the terms of their probation.[115]

The parties agreed to wide-ranging procedural reforms in a consent decree entered in 2015.[116] Focused on substantive and procedural issues under the Fourteenth Amendment, neither the complaint nor the consent decree expressly addressed violations of students' speech rights that are implicated when young people are not only disciplined in school for cursing and other expression, but are also arrested and incarcerated for words that have constitutional protection. But the Meridian litigation and the evidence it generated help us to flesh out the

111. *Id.* ¶ 89.

112. Complaint ¶ 48, United States v. City of Meridian, No. 4:12CV168HTW-LRA, (S.D. Miss. Oct. 24, 2012), 2012 WL 5240820.

113. *Id.* ¶ 62–68.

114. *Id.* ¶ 53; *see also* Memorandum from Thomas E. Perez, Assistant Att'y Gen., to Phil Bryant, Governor of Miss., et al. 3 (Aug. 10, 2012), http://www.justice.gov/iso/opa/resources/264201281012173367479l.pdf (noting that the Meridian police department "automatically arrests" all students referred by the school system, the juvenile justice system denies the children due process rights, and children on probation must serve any subsequent school suspensions in "the juvenile detention center").

115. ADVANCEMENT PROJECT ET AL., HANDCUFFS ON SUCCESS: THE EXTREME SCHOOL DISCIPLINE CRISIS IN MISSISSIPPI SCHOOLS 3 (2013) (emphasis added), http://b.3cdn.net/advancement/bd691fe41faa4ff809_u9m6bfb3v.pdf.

116. Press Release, Dep't of Justice, Justice Department Reaches Settlement Agreements to Address Unconstitutional Youth Arrest and Probation Practices in Meridian, Mississippi (June 19, 2015), http://www.justice.gov/opa/pr/justice-department-reaches-settlement-agreements-address-uncon stitutional-youth-arrest-and (discussing that the agreement reached between the Justice Department and the city of Meridian, which builds on the decree in *Barnhardt v. Meridian*).

pervasive injustice that can accompany unchecked disregard for speech rights that leads to in-school arrests and juvenile court referrals.

The cases discussed above all involved expression at school. The most recent and dramatic expansion of schools' proclaimed authority, discipline imposed for off-campus speech, involves even more dramatic overreach—tied once again to the risk of being adjudicated a delinquent and confined in a detention facility.

VIII. EXCLUSIONARY DISCIPLINE AND JUVENILE COURT REFERRALS FOR OFF-CAMPUS SPEECH

Over the last decade, schools have increasingly asserted jurisdiction to punish students for what they say in their free time, from their homes, and especially for what they say online.[117] Schools have referred students for prosecution based on communications from off-campus that did not violate any civil or criminal laws.

Remarkably, while this trend is seen nationwide, I can illustrate the point entirely with cases from the Third Circuit, the locus of Juvenile Law Center, which this Symposium honors on its fortieth anniversary, and of Temple University.

In one instance, a school turned in a group of girls who were threatened with prosecution for transmitting "provocative"—though not indecent—pictures of themselves from an off-campus gathering until the ACLU intervened and courts ordered the overly eager prosecutor to cease and desist.[118]

Three other cases involved virtually identical fact patterns: adolescent humor in the form of fictitious, satirical postings that disrespected faculty members, and turned out not to be so funny after all. Each involved a posting on MySpace that purported to be the page of a school administrator. All showed their target in a bad light, but none amounted to libel because they were so over the top as not to be credible. The targets of the "jokes" were variously depicted as swastika-wearing Satan lovers, "big," focusing on physical bulk, and as a bisexual "sex addict and pedophile." Some of the postings were prominently labeled as works of humor. The first, *In re J.V.R.*, litigated by Marsha Levick of Juvenile Law Center, did not gain national prominence as a speech rights case, or even as a school-to-prison case, but rather because efforts to gain the release

117. The emerging doctrine governing off-campus speech is beyond the scope of this Article, but is discussed in *Lessons in Censorship*. ROSS, *supra* note 51, ch. 7. Since the book went to press, the Court of Appeals for the Fifth Circuit issued an en banc decision, on which a petition for certiorari was denied. *See* Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280 (5th Cir. 2014), *aff'd*, 799 F.3d 379 (5th Cir. 2015) (en banc) (ruling for the school that sent Taylor Bell to an alternative school for six weeks in response to an online rap recording it regarded as containing a true threat), *cert. denied*, No. 15-666, 2016 WL 763687 (U.S. Feb. 29, 2016).

118. Miller *ex rel.* Miller v. Skumanick, 605 F. Supp. 2d 634, 647 (M.D. Pa. 2009), *aff'd sub nom.* Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010); ROSS, *supra* note 51, at 239–40 (discussing incident involving thirteen-year-olds in Tunkhannock, Pennsylvania, where the school turned over the girls' phones to the county district attorney even though the girls had not violated any law or even any school rule).

of the fictional page's creator, who was confined to a for-profit facility, revealed a massive criminal kickback scheme involving two judges.[119]

The two remaining cases—*J.S. ex rel Snyder v. Blue Mountain School District* and *Layshock* v. *Hermitage School District*—reached the Third Circuit en banc in 2011. The question before the court in each case squarely focused on whether public schools could discipline students for what they said off-campus when school was not in session. Neither the arguments nor the opinions went beyond noting that school authorities had referred both students to the juvenile justice system in addition to imposing exclusionary discipline on them at school.

J.S., a middle school honors student, had a virtually unblemished record except for two dress code violations when she posted the crude fictional page that portrayed her assistant principal, James McGonigle, in what the court characterized as "vulgar" and "disturbing," but not illegal, terms.[120] McGonigle, who was the school disciplinarian, imposed a ten-day out-of-school suspension on J.S., and "threatened legal action" against J.S. and her parents.

He went further. McGonigle "contacted the local police and asked about the possibility of pressing criminal charges."[121] They referred him to the state police, who told him he could press charges for harassment, but the charges were likely to be dropped. The state police summoned J.S., a girl who had collaborated with her on the site, and their parents to the police station for an interview, but McGongile ultimately did not pursue any charges. McGonigle wanted to have it both ways: to punish off-campus speech at school and to treat it as an offense in the world at large amenable to civil and criminal remedies. The appeals court held that the school violated J.S.'s First Amendment rights by punishing her for off-campus speech that had not posed any risk of disrupting the campus.[122]

In the third case, also before the Third Circuit en banc, high school senior Justin Layshock was sent to an alternative facility for disturbed, disruptive students from January until the end of the academic year.[123] He was also barred from extracurricular activities and his high school graduation ceremony. The district court denied injunctive relief, in part on the basis that Justin would not experience "irreparable harm."[124] In a familiar pattern, the en banc court

119. Order In Re: Expungement of Juvenile Records and Vacatur of Luzerne County Juvenile Court Consent Decrees or Adjudications from 2003–2008, No. 81 MM 2008 (Pa. Oct. 29, 2009) (per curiam); Ian Urbina & Sean D. Hamill, *Judges Plead Guilty in Scheme to Jail Youths for Profit*, N.Y. TIMES, Feb. 13, 2009, at A22; In re *J.V.R.*, JUV. L. CTR. (Apr. 18, 2008), http://jlc.org/legal-docket/re-jvr; *Kids for Cash* (SenArt Films 2013).

120. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920–21 (3d Cir. 2011).

121. *Id.*

122. *Id.* at 931.

123. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 412 F. Supp. 2d 502, 505 (W.D. Pa. 2006) (noting Layshock first completed a ten-day suspension), *aff'd in part on rehearing en banc*, 650 F.3d 205 (3d Cir. 2011).

124. *Id.* at 509 (denying a temporary restraining order); *see also Layshock*, 650 F.3d at 210 (noting that Justin's parents later withdrew their motion for a preliminary injunction while the court was attempting to promote a settlement).

vindicated Justin's First Amendment rights, but that victory did not come until five years after he completed high school at the alternative school to which he had been wrongfully relegated.[125]

Some educators claim even more discretion to punish off-campus speech than they are allowed to exert at school. They seek unlimited discretion to upend students' lives by punishing them for off-campus expression that, in the words of the Blue Mountain School District: "takes place anywhere, at any time, as long as it is about the school or a school official, . . . and is deemed 'offensive.'"[126] The en banc court scoffed, "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 [it] offensive."[127]

Another federal judge, overturning the suspension of a girl who commented on her website that "Ms. Phelps" was the "worst teacher I've ever met," took the analysis one step further.[128] He called the idea that "students everywhere would be prohibited from the slightest criticism of their teachers, whether inside or outside of the classroom," an authoritarian and constitutionally repugnant prospect.[129] This brings us full circle to the life risks that accompany calling a teacher a "bitch" when that leads to school exclusion and adjudication as a delinquent.

CONCLUSION

The potential repercussions of violating school rules have not changed much since the Barnette sisters risked being sent to a reformatory for refusing to say the Pledge of Allegiance. The issue is not whether schools can teach or even compel a modicum of civility on campus, but whether a lack of civility should lead to disproportionate penalties that can set a child on the path from school to prison. Just as we should distinguish between the punishment Justin Layshock's parents imposed at home and the penalties his school levied, it is critical to separate positive efforts by educators to encourage polite discourse from exercising the state's coercive powers to punish children. No constitutional doctrine bars schools from teaching civility, empathy, and norms of civilized behavior, and many resources are available to help educators master alternative strategies premised on respect for students.[130]

Events of the last few years offer encouragement that the worst abuses of discipline and arrest for student expression may be mitigated in the future. Efforts to reduce the number of school suspensions for minor offenses are beginning in states with as different politics as California and Texas.

125. *Layshock*, 650 F.3d at 219.

126. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 933 (3d Cir. 2011).

127. *Id.*

128. Evans v. Bayer, 684 F. Supp. 2d 1365, 1367 (S.D. Fla. 2010).

129. *Id.* at 1373.

130. *See*, *e.g.*, OWEN ET AL., *supra* note 23, at 6–49.

In California, where "willful defiance" accounts for nearly half of the state's 700,000 yearly suspensions and one-third of its expulsions, Los Angeles in 2013 became the first California school district to bar suspension of students for willful defiance.[131]

At around the same time, in 2013, the Texas legislature responded to widespread criticism of the "ticketing" system described in Section IV. Under the revised state code the police can no longer issue citations in school except for traffic violations and truancy.[132]

The reforms are no panacea, however, as Texas Appleseed, a public interest organization, warns students: schools "can still send you to adult criminal court for minor misbehavior, like disorderly conduct," including "cursing, making offensive gestures, [and] being too loud."[133] It just takes more effort. The school has "to file a criminal complaint now" rather than asking in-school police to issue a ticket on campus.[134]

At the federal level, the U.S. Department of Education (DOE) has voiced concerns about overreliance on suspensions as a means of discipline for minor code-based offenses. In 2013, the DOE advised that law enforcement should never be asked to handle "non-violent conduct, such as . . . use of profanity, dress code violations [including controversial slogans on t-shirts], and disruptive or disrespectful behaviors."[135] Responding to a growing body of research on school exclusion, in 2014 the DOE expressly urged schools to reserve exclusionary discipline for the "most serious infractions" and as a "last resort," a view echoed at the White House Conference on school discipline the next year.[136] It remains to be seen whether such reforms will take root, and whether they will be honored at the level of school districts and individual schools.

Educators need to understand the legal doctrines that protect student expression. If that happens, we may at long last witness greater respect for expressive rights. Such renewed respect should result in a bright line between in-school discipline for violations of constitutionally permissible school speech codes and exclusionary discipline or arrest and referral to juvenile court in response to constitutionally protected expression a school rule prohibits. It violates the First Amendment to label a teenager a delinquent because he or she called a teacher a bitch. And while depriving that student of educational opportunity may or may not be unconstitutional depending on the facts, it surely is unwise and counterproductive as a matter of social policy.

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131. Jane Meredith Adams, *Student Discipline Must Move Beyond 'Willful Defiance,' Educators Say*, EDSOURCE (July 1, 2013), http://edsource.org/2013/willful-defiance/34515.

132. TEX. EDUC. CODE. ANN. § 37.143 (West 2015); Serrano, *supra* note 81.

133. TEX. APPLESEED, STUDENT GUIDE TO CHANGES IN TEXAS SCHOOL DISCIPLINE LAWS (2013), https://www.texasappleseed.org/sites/default/files/154-STPP-StudentGuidetoSB393and1114.pdf.

134. *Id.*; *see also* Serrano, *supra* note 81 ("Officers can still submit complaints about students, but it will be up to a local prosecutor whether to charge the student with a Class C misdemeanor.").

135. U.S. DEP'T OF EDUC., GUIDING PRINCIPLES, *supra* note 25, at 11.

136. *Id.* at 14.