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Book Review: Lessons in Censorship: How Schools and Courts Subvert Students' First Amendment Rights (Catherine J. Ross)

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Book Review

Learning Lessons

Lessons in Censorship: How Schools and Courts Subvert Students' First Amendment Rights
(Catherine J. Ross)

Review by NAOMI CAHN*

I. Introduction

Public school officials have considerable authority to regulate student expression within the school community. Although, as a constitutional matter, students do not forfeit their constitutional rights upon entering school property, it is not at all clear precisely what rights they do have or what rights school officials do—or do not—have.[1] And defining the scope of those rights has become even more complicated in the age of the Internet. Schools have claimed authority to regulate what occurs in the classroom, what is printed in student publications, what appears on students' t-shirts. In addition, they often seek to extend their sweep over classroom speech and curricular submissions, while they also struggle with how to handle cyberbullying and sexting, forms of online speech that occur both on and off-campus. *Lessons in Censorship* provides much needed clarity on all of these issues.[2]

The book is both a masterful legal history of students' rights to free speech in the public schools[3] and a powerful argument for policies that

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1. *See, e.g.*, Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 213 (2013) (addressing "the school's role as creating the next generation of citizens").

2. CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS (2015) [hereinafter LESSONS].

3. As Ross notes early in the book, the focus is on public schools because the schools, their employees, and elected school boards are *public*, so subject to specific constitutional requirements. *Id*. at 4.

respect the Constitution, public schools, children, and their parents. Although the issues explored in the book are typically not addressed in a basic family law class or practice, they are, nonetheless, issues that go to the core of parental rights and family law. Thus, the book is a signifiant contribution to the field of family law.[4]

Its comprehensive history of student free speech begins with the founding of our nation and ends with today. The book analyzes just how and why this history remains critical today for both jurisprudential and pragmatic purposes. Understanding and appreciating this history provides a framework not just for how public school officials should approach students' rights to free speech both on and off campus but also for more general concerns—beyond the schoolhouse door—about what free speech really means in contemporary America. Moreover, the book does so in a way that should be accessible to a variety of audiences, going beyond judges, lawyers, and law students, to anyone concerned about public school education and civil liberties, regardless of any preexisting background in law.

At the end, the book offers a convincing set of core principles for how to resolve issues that have troubled courts for at least a century[5] and that are arising in new ways as schools cope with the changing media for student speech. In the first section of this review, I explore the book's content and, in the second section, I address the relationship between that content and family law more generally.

II. The Book

Lessons in Censorship covers a wide territory, historically, culturally, and legally. Ross begins by explaining the three unifying stories underlying the book. The first story is about the types of disputes that are at the core of the legal battles around student free speech. The free-speech disputes range from the wearing of clothing that expresses a symbolic message (the ability of students to wear black armbands to school to protest United States involvement in war)—*Tinker v. Des Moines*,[6] to the coverage by a high-school newspaper of student drug usage, to the parameters of sexting (off-premises, online computerized messages addressing sex). Students whose free speech rights are at issue are conservative, liberal, religious, atheist,

4. It is also a contribution to the field of constitutional law, but I leave that discussion for others.

5. And, although these cases are common, they are decided with little guidance from the Supreme Court. *See, e.g.*, Frederick Schauer, *Abandoning the Guidance Function:* Morse V Frederick, 2007 Sup. Ct. Rev. 205, 208-09 (2007)("cases involving speech in the schools are overwhelmingly more common in the state and federal inferior courts than are cases dealing with obscenity, indecency, incitement to or advocacy of unlawful activity, defamation, commercial advertising, campaign finance, and any of a host of other First Amendment subjects").

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

racist, sexist, feminist—they span a range of different and competing perspectives, but all have been subject to some type of potential restriction or discipline. These disputes provide the basis for the second interwoven narrative, which is the development of the law to student free speech. The third core theme is why the other stories matter. The stories matter, Ross argues, because they show the "failure of schools to fulfill their role of fostering constitutional values."[7] So, when public schools do not respect a student's free speech, this affects not just the individuals whose rights are being challenged, but also undermines the role that public schools play—for almost ninety percent of American students—in educating students about citizenship and democracy.

The first section of the book (two chapters) is devoted to elucidating the U. S. Supreme Court's approach to student free speech. The book begins by briefly tracing the history of the speech clause, enshrined in the first few clauses of the Bill of Rights: "Congress shall make no law . . . abridging the freedom of speech." Prior to the early twentieth century, with enactment of the Espionage Act of 1917 during World War I, the federal government had enacted few laws restricting freedom of speech. Consequently, the development of the jurisprudence of free speech has occurred primarily over the last century. In one of the earliest cases involving students, in 1940, the Supreme Court rejected the claims of Jehovah's Witnesses that they were entitled to a religious exemption from reciting the Pledge of Allegiance in school.[8] Three years later, in *Barnette,*[9] the court reversed its decision, and that case provides the true starting point for the book's exploration of free speech in public schools. *Barnette* is a landmark case in First Amendment rights, and the first to establish that the Constitution protects children who are in a public school.[10]

Since *Barnette,* Ross notes, although schools, school district officials, and other courts have repeatedly dealt with student free speech rights, the Supreme Court has only directly addressed the issue in four other cases, the first of which was *Tinker v. Des Moines.*

If *Lessons in Censorship* has a star, it is *Tinker*, discussed in depth in the first chapter, and with numerous reappearances throughout the book. To justify interference with student speech, *Tinker* requires school officials to "show that the speech create[s] a reasonable apprehension of material disruption or collide[s] with the rights of others."[11] Ross labels the *Tinker*

7. Ross, Lessons, *supra* note 2, at 4.
8. Minnersville School Dist. v. Gobitis, 310 U.S. 586 (1940).
9. W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
10. Ross, Lessons, *supra* note 2, at 20.
11. *Id.* at 33.

standard "demanding,"[12] while it is somewhat lower than the strict scrutiny applied to potential infringements of adults' speech rights, it still recognizes that students have rights when they pass through the doors of the school.

In the remainder of Section I, Ross analyzes the three subsequent cases in which a more conservative Supreme Court cut back on the rights seemingly established in *Tinker*, not by overruling *Barnette* or *Tinker*, but by creating a series of exceptions. Ross again places these decisions within the larger context of the Court's approach to children's rights generally, showing how the speech cases fit into a pattern of limiting children's rights. In the 1986 case of *Bethel School District v. Fraser,*[13] the Court held that schools may censor lewd speech. Matthew Fraser had given a student-government-nominating speech on behalf of a friend that was filled with sexual double-entendre; the content of the speech was not objectionable, but the manner in which the speech was delivered subjected the student to discipline. Then, two years later, in *Hazelwood School District v. Kuhlmeier*,[14] which involved prior restraint of a student newspaper, the Court held that schools may control "school-sponsored speech." That is, speech that bears the school's imprimatur can be censored unless the school's actions do not have a legitimate educational purpose. As Ross explains, while *Tinker* protected student speech, *Hazelwood* seems to protect school administrators.[15] In its most recent opinion, the 2007 case of *Frederick v. Morse*[16] ("Bong Hits for Jesus"), the Court—through five separate opinions—allowed censorship of student speech that advocated the use of illegal drugs. Overall, these three cases set limits on *Tinker*'s protections, allowing schools to censor speech if the speech is lewd, when it is school-sponsored and the censorship is reasonably related to a legitimate pedagogical goal, or if advocating the use of an illegal substance and is not political. Otherwise it can be limited only if it would lead to a material disruption of school operations or interfere with another person's rights (*Tinker*). Ross rues this "incoherence," which "has undermined the simpler regime of a single standard that sent a clear message of respect for the speech rights of students."[17]

In its middle section, *Lessons in Censorship* focuses on how schools and lower courts apply these standards to contemporary controversies. As she describes the cases, Ross argues that while the Court does indeed recognize schools' increased authority to censor and punish student expression, school authorities have exceeded even this more permissive standard. She

12. *Id.*
13. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
14. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
15. Ross, Lessons, *supra* note 2 at 52.
16. Morse v. Frederick, 551 U.S. 393 (2007).
17. Ross, Lessons, *supra* note 2, at 65–66.

suggests that school officials have pushed *Fraser* beyond its generally understood application to lewd expression and innuendo to cover what she labels "sans-gêne" speech, that is, speech that is not necessarily lewd, but is made by someone who "either does not understand what is expected in civil society or disregards it entirely without embarrassment," a situation that Ross tartly suggests is "commonly seen in adolescents."[18] She distinguishes between sans-gêne speech in public at a school-sponsored gathering, which might be regulated under *Fraser* or *Hazelwood*, and speech used to express insubordination, which can only be legitimately regulated under *Tinker*, and private forms of speech (muttering an expletive to oneself after missing a school bus home) or potentially offensive language used in the classroom, which schools have punished, although such incidents are much less likely to satisfy the *Tinker* standard of material disruption.

In addition to using *Fraser* to expand their authority, school officials also have used *Hazelwood's* "school-sponsored" speech standard to restrict student speech in ways that Ross argues are inappropriate. For example, she argues that "Bong Hits 4 Jesus" could not legitimately be deemed to be a sentiment that carried the school's imprimatur, so a school principal could not use *Hazelwood* as a basis for prohibiting it. Moreover, schools have censored performances, school publications, and classroom speech that could in no way be associated with the school. While Ross notes that school officials might legitimately be confused because of the vagueness of the Supreme Court's guidance,[19] she also suggests that schools have not even complied with the guidance that is clear in the Court's opinions.

In the third section of the book (roughly half of the volume), Ross returns to *Tinker*, probing its contemporary meaning and its continued utility in protecting students' First Amendment rights. Each of the four chapters in this section analyzes particular types of speech that have been restricted, using *Tinker* as grounding for evaluating the validity of the school officials' actions. She argues that schools have overreacted to the potential for "material disruption," by, for example, silencing political speech that may pose little risk of any type of disruption. Although many courts then prove to be overly deferential to the decisions of school officials, applying more permissive standards that inappropriately curtail students' free speech rights, some courts do appropriately protect students' expression. She suggests that, in evaluating potential risk, it is useful to consider the imminence of the risk, its severity, and the proportionality of the imposed punishment.[20]

18. *Id.* at 72.
19. *Id.* at 98.
20. *Id.* at 143.

Aside from the risk of material disruption, *Tinker* contemplates that schools may regulate speech that conflicts with the "rights of others." Into this category falls speech based on group attributes, such as race or sexual orientation, as well as verbal bullying directed to individuals. The potential damage to rights of others occurs in two contexts (explored in two separate chapters): speech that occurs at school and the comparatively new forum of online speech that occurs outside of school, such as electronic bullying and sexting. The speech at the core of this form of regulation typically takes the form of hateful expressions, testing the First Amendment's requirement of tolerance of different forms of speech. Indeed, Ross argues that schools repeatedly err in their effort to protect "others" from hurtful words and ideas that would otherwise be protected by the First Amendment. Listeners can be protected from speech that violates civil or criminal laws, but schools go well beyond that, she claims. For example, schools may have codes that bar hate speech or loosely defined harassment; while harassment can be penalized, hate speech and verbal bullying may actually be subject to protection.

Looking outside of the school speech context, Ross explores regulation of hate speech more generally and suggests ways that school officials might constitutionally draw distinctions to silence harassing speech while respecting students' rights. Rather than censor speech, for example, she suggests that schools might offer sensitivity courses and implement proactive efforts that encourage student tolerance.[21] She proposes that schools and the courts use an "infringement matrix" to evaluate whether speech has interfered substantially with a student's access to education; the matrix would include a variety of factors, such as the level of aggressiveness, whether it was pervasive, and whether it was targeted.[22]

At the end, the book turns to the relationship between the First Amendment's religion clauses and the speech clause, focusing on the rights of students seeking to express religious viewpoints. As is true throughout this area of law, the doctrines are confusing. Indeed, some schools have imposed undue restrictions on students' religious speech, while others have promoted religious speech.[23] The test that Ross proposes summarizes her approach more generally: "Unwelcome religious exhortations are no different analytically from group disparagement and other unwelcome ideas discussed in this book. They are protected unless the school can permissibly regulate them under school speech doctrine."[24]

21. *Id*. at 204.

22. *Id*. at 195.

23. As shown by the book's discussion of cases arising under the federal Equal Access Act—statutory protection that covers certain student groups, ranging from Bible study gatherings to LGBT advocacy clubs—this covers a variety of forms of student speech.

24. *Id*. at 277.

In the concluding chapter, Ross steps back from the "morass of student speech rights,"[25] and offers her vision of how schools can engage in "living liberty" by serving as models for respecting constitutional rights. Accordingly, she provides concrete suggestions for how to improve schools' responses to student speech. These range from recommendations that education schools offer at least one overview of the legal aspects of student speech rights to the posting in each principal's office of a diagram setting out appropriate responses to student exercise of free speech (she gives an example of such a poster).[26] Indeed, school administrators, parents, and students—and courts—should, after reading the book, have the guidance they need to find the appropriate balance between maintaining order and respecting speech. Moreover, so should students have a better understanding of just what they can—and cannot do during school as well as off-campus.

In pulling together the three different narratives of how culture wars play out in student speech, of the history and contemporary status of legal jurisprudence on students' First Amendment rights, and of how schools should be fulfilling their democratic role, the book is a magnificent legal history of the lack of respect for student free speech rights by overzealous school officials, and the confusing court decisions that have attempted to balance child and state. Indeed, because her focus is on public schools, Ross devotes most of the book to children and the state, and less to parents (that may be because the book is 300 pages already!).[27]

Thus, controversies in which parents have sought to censor which books are read in the classroom receive short shrift,[28] but she does discuss teacher speech in the classroom and related issues. Indeed, she notes that free speech rights emphatically belong to children and, in her extensive research, found only one case that considered a parent's right to consent to a child's claimed speech right.[29]

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25. *Id*. at 287.

26. *Id*. at 294.

27. Thus, Ross does not fully address the scope and location[s] of parents' rights and their relationship to the state. *See, e.g*., Laura Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833 (2007). Ross does briefly discusses the allocation of authority between parents and state in the context of off-campus speech, ROSS, LESSONS, *supra* note 2, at 210. The related question of whether school officials stand *in loco parentis* was the basis of two concurrences in *Frederick*. Alito, 127 S. Ct. at 2637; Thomas, 127 S. Ct. at 2630.

28. Ross notes that these have been well covered elsewhere. For one recent exploration, *see* DAVID K. SHIPLER, FREEDOM OF SPEECH: MIGHTIER THAN THE SWORD (2015). While these issues do not involve students' rights to speak, they do involve the role of the schools in exposing students to numerous viewpoints as well as the autonomy of schools to make their own decisions about what is appropriate for students.

29. Frazier v. Winn, 535 F. 1279, 1285 (8th Cir. 2008), discussed at p. 290. The case involved a Florida statute that allowed parental control over a child's recitation of the Pledge of Allegiance.

Ross does not hide her perspective on students' rights or the appropriate duties of public schools. Throughout the book is strong support for the ongoing vitality of *Tinker*'s promise for the rights of student free speech and respect for the role of public schools in creating thoughtful citizens of democracy. The number of cases involving restrictions on student speech is overwhelming, but Ross admirably sorts through them and develops a useful—and, for many readers (including this one), a compelling—taxonomy. Reasonable minds—and courts—might differ on the extent to which *Tinker* protects this speech, and Ross does acknowledge the perspectives of those who disagree with her. (They might, however, believe that her approach is too dismissive of their legitimate efforts to prevent disruption and maintain order in the schools and to teach students proper standards of decency and citizenship, although they will still learn much.) The stories she tells, however, persuasively make the case that students' free speech rights are not being adequately respected, and that schools, as well as the legal system, should do more to protect student speech.

III. The Book in the Family Law Context

At a number of law schools, the family law curriculum includes two core courses: one focused on adult relationships, such as marriage, divorce and its consequences (alimony, property distribution, custody, and child support), as well as nomarital partnerships, and a second focused on the family, child, and state triad, typically including the child abuse and neglect system, adoption, and children's rights.[30] *Lessons in Censorship* clearly fits within that second course, and it also has resonance for the adult-relationship-focused course.

First, for the children-focused course, the narrative that Ross provides place students' free speech rights in the larger context of children's rights vis-à-vis the state generally. Of course, the relationship between education, parents, and children has been at the core of family law jurisprudence since *Meyer*[31] and *Pierce*,[32] and *Lessons in Censorship* provides another perspective on those issues. Moreover, Ross integrates other juvenile rights

30. There are also distinct casebooks for each. *See, e.g.*, DOUGLAS ABRAMS, SARAH RAMSEY, & SUSAN MANGOLD, CHILDREN AND THE LAW (5th ed. 2014); ABRAMS, CAHN ET AL., CONTEMPORARY FAMILY LAW (4th ed. 2015). Of course, some schools combine the two courses, and some family law casebooks attempt to cover both topics. Family law practice more typically involves the private law issues, such as contracts between cohabitants or married couples, building families, etc. Particularly during child custody disputes, however, children's rights become more significant. Ross's perspective is informed by the fact that she teaches both courses, and has written on custody issues in both the private and public contexts.

31. Meyer v. Nebraska, 262 U.S. 390 (1923).

32. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); *see* Carmen Green, *Note, Educational Empowerment: A Child's Right to Attend Public School*, 103 GEO. L.J. 1089, 1133 (2015).

cases into her analysis of the Court's zigs and zags in free speech. Thus, in tracing the Supreme Court's route from *Barnette* to *Tinker*, she takes account of developments in the juvenile court context,[33] showing how student free speech rights have expanded and contracted in concert with other child-centered rights. Indeed, she is the first scholar to relate Justice Fortas's contribution in cases like *In re Gault* to his authorship of the *Tinker* decision.

The tension between parental rights over children and the considerable power the state asserts over minors plays out throughout Ross's book. The expression that gets children into trouble at school often reflects controversial or unpopular views they learned at home (like showing the Confederate flag or proclaiming LGBT persons are "sinners" or, alternatively, that they have rights), but parents who chose public school lose control over why and how schools discipline their offspring. This tension, Ross shows, is at its most pronounced when schools discipline students for off-campus expression, as they increasingly try to do.

Second, there are lessons for the adult-focused course. Children's rights issues, while often less explicitly discussed, recur throughout the family law course in cases ranging from *Michael H*[34] (did Victoria have any rights to a relationship with her father?) to *Newdow*[35] (did the father have any right to make constitutional claims on behalf of his child?). Moreover, the role of the child's voice is particularly important in custody proceedings; understanding the rights of children provides support for respecting their role and choices. *Lessons in Censorship* reminds parents not to discount children's autonomy and supports courts' considerations of the children's preferences and needs. Moreover, any discusssion of family policy—in either course—should address the role of public education.

IV. Conclusion

Lessons in Censorship celebrates freedom of speech in the public schools, highlighting that what students learn about censorship, through and at their schools, is at the core of learning to be a citizen. She documents the difficulties of public schools as they grapple with what to do not only about speech in the classroom but also about off-campus speech, such as

33. Ross, Lessons, *supra* note 2, at 22–23.

34. Michael H. v. Gerald D., 491 U.S. 110 (1989).

35. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004). The father claimed a right to inculcate his daughter with his religious beliefs as part of his challenge to the recitation of the Pledge in public schools, *id*. at 15, but the Court held that he lacked standing to bring the lawsuit because his daughter's mother had "a form of veto power." *Id*. at 24 (Rehnquist, C.J., concurring). To see how *Newdow* is used in a basic family law course, *see* Abrams et al., *supra* note 30, at ch. 13.

texting and sexting. Although strongly defending the importance of student speech, Ross also highlights the dangers of "material disruption" that such speech can sometimes pose. Her thorough exploration of our past and of how to move forward, of how school officials should fulfill their role of promoting democracy—and of how they have failed—can help guide schools, courts, and the rest of us.