Exercising Rights Beneath the Virtual Schoolhouse Gate

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DRAFT of 10 April 2018 — PLEASE DO NOT QUOTE OR CITE

Students do not shed their constitutional rights "at the schoolhouse gate." The Supreme Court announced this principle in 1969 and it remains good law.[1] The Court did not doubt that governments can compel children to go to school. But the state cannot strip students of their rights once they get there.[2]

Nevertheless, the Court also tells us, schools have to be able to educate effectively. This makes it necessary and legitimate for schools to *limit* students' rights. Schools must find a balance between rights and authority.

In an important and fairly obvious way, these two principles are in conflict. A line must be drawn at their boundary, and it is often unclear how the balance should be struck. In the area of freedom of student expression, the particular issue upon which this paper focuses, one must determine where legitimate constraint upon student speech in school blurs into illegitimate suppression. American lawyers and educators continue to struggle mightily to define that line.

In another way, and perhaps less obvious way, these two principles are of a single piece. They define a geographic principle: students' rights *in school* can be limited, but cannot be eliminated. "In school" is a geographic concept. Some places are "in school" and others are not. Between them lies a geographic barrier, the proverbial "schoolhouse gate." As a pupil traverses that gate, she enters one domain of rights-regulation and exits another.

The contemporary rise of virtual educational spaces, however, endangers the geographic paradigm for conceptualizing student rights. Soon technology will make that paradigm unworkable.

Information technology is now ubiquitous in the K–12 sector. For a long time now, computers have been in the classroom, used first to teach computer-related skills, like word processing or coding, and then to teach other subjects, as when students play mathematics "games" or use language flashcards on the computer. More recently, American schools have become sites for the deployment of data analytics, tracking student and teacher performance under the paradigm of big data. And, crucially, the use of

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[1] Tinker v. Des Moines Community School Board, 393 U.S. 503, 506 (1969).

[2] This paper focuses upon traditional "public" schools, which, in the American context, means schools that are both funded are managed by governments. It makes brief references to "charter" schools, which is what Americans call (a certain type of) schools that are publicly funded but privately run. It also refers to "private" schools, which in the American context are privately funded and privately run. Private schools are still regulated, with regards to matters like minimum curriculum, employment standards for teachers, and health and safety, but the extent of regulation is much less than faced by charter schools, which in turn are less regulated that "public" schools. These terms ("public," "charter," and "private") have idiosyncratic meanings in the United States. Other regimes, even in the Anglophone world, use the terms differently.

computers as substitutes for in-person instruction has accelerated quickly. Online courses proliferate.[3] They are touted for the flexibility and variety they give to students; they appeal to governments with their piecework, potentially union-free, and (aspirationally) low costs. It is unsurprising, therefore, that (as of August 2014, the last data I have available) high school students in Alabama, Arkansas, Florida, Michigan, and Virginia were required by law to take at least one online course to be graduated.[4] Other states have passed legislation that makes it easier for online institutions to offer courses and creates incentives for students to enroll in them.[5] Local school districts also create incentives for their students to move their educations online. In the 2009–10 school year, there were more than 1.8 million enrollments in online courses (some students may have taken more than one course).[6] By the 2007–08 school year, seventy percent of school districts that offered online learning were reporting that at least one of their students was taking an online course.[7] Most, but not all, online learning that supplanted in-person learning was at the high-school level.[8]

Most discontinuously, for a surprising number of students, school itself has moved online. In a 2010 survey of public school districts, twenty-two percent reported that high school students "could take a full course load in an academic term using only distance education courses," and another twelve percent reported that students "could fulfill all high school graduation requirements using only distance education courses."[9] By simply combining online courses, students can turn themselves into online students, even as they are matriculants of traditional schools. More radically, specific legislation in the states has also

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[3] *See* Barbara Queen et al., Distance Education Courses for Public Elementary and Secondary School Students: 2009-10, at 3 (National Center for Education Statistics Nov. 2011) (Sixty-four percent of public school districts and the elementary and secondary levels reported that providing courses not otherwise available at the school was a very important reason for offering distance education courses); *see also* Margaret Clements et al., Online Course Use in Iowa and Wisconsin Public High Schools: The Results of Two Statewide Surveys 9 (National Center for Education Evaluation and Regional Assistance Jan. 2015) (In Iowa and Wisconsin, more than fifty percent of public high schools that reported using online learning during the 2012-13 school year cited providing a course not otherwise available as a very important reason for enrolling students in online courses); Avi Wolfman-Arent, *The MOOC Heads Back to High School in Delaware*, Newsworks, May 19, 2015 http://www.newsworks.org/index.php/local/delaware/82067-mooc-meets-high-school-in-delaware-classrooms (Delaware relies on educational services firm Amplify to offer AP Computer Science in its high schools because most schools in the state would reportedly not have enough interested students to justify the cost of administering the technical course otherwise).

[4] John Watson et al., Keeping Pace With K-12 Digital Learning 64 (Evergreen Education Group 2014).

[5] Id.; Lyndsey Layton & Emma Brown, *Virtual Schools are Multiplying, But Some Question Their Educational Value*, The Washington Post, Nov. 26, 2011 http://www.washingtonpost.com/local/education/virtual-schools-are-multiplying-but-some-question-their-educational-value/2011/11/22/gIQANUzkzN_story.html.

[6] Barbara Queen et al., Distance Education Courses for Public Elementary and Secondary School Students: 2009-10, at 3 (National Center for Education Statistics Nov. 2011).

[7] A.G. Picciano & J. Seaman, K-12 Online Learning: A 2008 Follow-Up of the Survey of U.S. School District Administrators 1 (2009), retrieved from http://www.onlinelearningsurvey.com/reports/k-12-online-learning-2008.pdf.

[8] During the 2009-10 school year, "[s]eventy-four percent of the distance education enrollments were in high schools, [nine] percent were in middle or junior high schools, and [four] percent were in elementary schools." Barbara Queen et al., Distance Education Courses for Public Elementary and Secondary School Students: 2009-10, at 3 (National Center for Education Statistics Nov. 2011).

[9] Barbara Queen, Laurie Lewis & Jared Coopersmith, Distance Education Courses for Public Elementary and Secondary School Students: 2009-10 at 3 (National Center for Education Statistics Nov. 2011).

enabled the creation of fully online schools, designed in advance to operate exclusively online. Several American states have established, by statute, online "virtual school districts."[10] Several states have also adapted their regulatory regimes to permit charter schools to operate exclusively online.[11] Cyber charters operate at every educational level, from kindergarten through high school.

What becomes of a geographic paradigm of rights when education happens in virtual spaces? The legal doctrines associated with the exercise of student rights, and of rights to expression in particular, are tied to physical place. They focus upon *where in space* particular kinds of exercise occur and are met with sanction, limitation, or censorship. Virtual education lacks a *where.* Virtual educational spaces are characterized by aterritoriality, asynchronicity, unbundling, and forms of community that do not require proximity.

How, then, should the law regulate student expression in virtual educational spaces? The response to this question so far from the legal educational establishment — some cases have already hit the courts, with many more sure to come — has been simultaneously deeply lawyerly, deeply flawed, and deeply alarming. *Lawyerly* because educators and courts have reacted to the problems associated with virtual expression as common-law lawyers are trained to do: by analogy. They search for ways to determine which kinds of virtual speech are "in" or "out" of school. They do this based upon coincidental connections to physical space in particular cases, or by deploying the unfortunate (in this context) analogy of "space" commonly associated with social interaction on the internet ("cyberspace").

Flawed for the same reason: the reactions proceed by analogy. This, I argue in this paper, is a bad mistake. The metaphor of the schoolhouse gate was not meant to be a constitutional principle, and should not be understood as such. Instead, the geographical paradigm is an *instantiation* of the actual constitutional principle, which is in fact a constitutionalized theory of civic pedagogy. That theory requires publicly run schools to teach students about their rights by using a particular pedagogical method, associated with Dewey and his progressive school: learning by doing. It is this principle, and not the spatial analogies that followed it, that should guide a new law of student expression for the information age. In this way, the critical case is not *Tinker v. Des Moines* — the 1969 case that introduced the concept of the "schoolhouse gate."[12] Rather, it is *West Virginia State Board of Education v. Barnette*, the 1943 cases that invalidated school rules requiring objecting public-school students to salute the American flag in their classrooms.[13] *Barnette* constitutionalizes the principle that public schools must teach rights experientially.

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[10] These districts, which exist in at least 17 states, including Florida, Massachusetts, and Virginia, are distinct from any of the state's brick-and-mortar public school districts. Students anywhere in the state may enroll in these schools; they are not students in any other school, as are many students who take online classes. Such students do their coursework entirely in the cloud. Ariz. Rev. Stat. Ann. § 15-808; Fla. Stat. Ann. § 1002.37; Ga. Code Ann. § 20-2-319.1; Idaho Code Ann. § 33-5504A; Iowa Code. Ann. § 256.42; Me. Rev. Stat. Tit. 20-A, § 19152; Mass. Gen. Laws Ann. Ch. 71, § 94; Miss. Code. Ann. § 37-161-3; Mo. Ann. Stat. § 161.670; Mont. Code Ann. § 20-7-1201; N.M. Stat. Ann. § 22-30-3; S.C. Code Ann. § 59-16-15; S.D. Codified Laws § 13-33-24; Tex. Educ. Code Ann. § 30A; Utah Code Ann. § 53A-15-1002.5; Va. Code Ann. § 22.1-212.24; W. Va. Code Ann. § 18-2E-9.

[11] Thomas Clark, Virtual Schooling and Basic Education, in Economics of Distance and Online Learning: Theory, Practice and Research 52, 57 (William J. Bramble & Santosh Panda eds., Routledge 2008).

[12] 393 U.S. 503, 506 (1969).

[13] 319 U.S. 624.

Finally, *alarming.* We often think of information technology as a phenomenon that promotes speech and galvanizes expression. But there is a great deal of reason to fear that American society (and other societies) will seize upon the movement of schooling from real to virtual spaces as an occasion for the increased surveillance, regulation, and punishment of student expression. *Tinker* sought to cabin a frankly authoritarian tendency among some school administrators, and an authoritarian streak with respect to children in the culture more generally, with respect to students' speech. Since that time, the legal trend has rebounded in an authoritarian direction, repeatedly narrowing the sphere in which student expression is protected. The rise of virtual expression invites that trend to accelerate. Unless new doctrine is developed on a different basis, schools seem likely to develop rules and practices which entitle them to monitor, regulate, and restrict of virtually all speech by students, any time and in any place. Schools, with the support of the courts, are already moving in this direction.

As new technologies develop, it is vital that this trend be stopped and reversed. For one thing, it is jurisdictionally incoherent. A school has authority only to discipline its own students. Students in other public school, in private schools, or in-home schools are immune from its authority. So are persons who are not students at all. School-based regulation is therefore necessarily a patchwork. This worked well when nearly all speech about a school was confined to that school. But is untenable in today's world of social media, and entirely incoherent in a world of unbundled, aterritorial educational providers.

This issue of jurisdiction, moreover, is less important than foreclosing a pedagogy that is associated with pervasive surveillance and regulation of student speech. The First Amendment is a core right that defines the liberty of Americans. It is also the core of the education of free citizens. Schools play a pivotal role in molding citizens who are able to speak well and effectively, and even more important, who have something to say. That goal cannot be made subservient to the desire for order, quiet, or discipline. Speech regulation must respond to the pedagogical imperative to teach students how to exercise their rights to expression *well*. This cannot be done if students have no room to engage in expression. Nor can it be done if student expression is driven entirely into venues other than schools, where educators have no sway and little influence.

The legal free-speech doctrines that we have were developed for physical school buildings and classrooms. They will not adequately either protect or teach First Amendment values as schooling moves towards the cloud. Instead we must look to the pedagogical reasoning behind current rules to develop new rules, constitutional but also statutory, that insist that virtual schools make adequate room for students to speak freely. While acknowledging that schools legitimately need to operate, schools must give students space in which they can practice exercising their freedom of expression. In physical schools, that space was the space within the "schoolhouse gate." Identifying and developing a virtual, nongeographic idea of that space, and resisting the forces that seek to use geographical thinking to erode that space away to nothing, will be the critical challenges related to free expression in the coming age of new educational technology.

SPEAKING IN PUBLIC SCHOOL

In December 1965, a small group of public high school students in Des Moines, Iowa, decided to give voice to their objections to American military action in Vietnam. They would wear black armbands to school in protest. School officials got wind of their plan. Before the students could act, the school announced a policy prohibiting armbands. Any student refusing to remove an armband would be suspended from school. The students wore their armbands nonetheless. They refused to remove them

upon request. They were duly suspended. The students then objected to their suspensions as inconsistent with their constitutional rights to free expression.

The students' case, *Tinker v. Des Moines School District,* was ultimately decided by the Supreme Court. It remains the signal case regarding the rights of students to express themselves freely in school. The Court held that the school could not constitutionally prohibit the students' armbands or punish them for wearing them. Constitutional rights to free expression, the Court decided, are not "shed ... at the schoolhouse gate."[14]

Tinker does not, however, declare student speech rights to be absolute. *Tinker* permits school officials to restrict, ban, or even punish student speech, but only when those officials reasonably forecast[15] that the speech being regulated would "materially or substantially interfer[e] with the requirements of appropriate discipline in the operation of the school or collide with the rights of others."[16] The Court was aware of the wiggle room this rule creates. It therefore insisted that the predicted interference or collision must be substantial. Mere fear of disorder cannot be a pretext for school officials' desire to "avoid ... controversy which might result" from the speech.[17] The Court held for the students in *Tinker* because, in its judgment, under the particular circumstances of that case such a reasonable forecast could not be made.

In reaching that conclusion, the Court emphasized that the students' protest was peaceful, silent, and nondisruptive. Its conclusion rested in large part on the realization that the views the armbands expressed were communicated in "hallways and cafeterias" as well as, silently, in the classroom. The school's informal spaces played an important role in the Court's reasoning. A school accommodates "students during prescribed hours … for the purpose of certain types of activities." A student enjoys constitutionally protected rights "[w]hen he is in the cafeteria, or on the playing field, or on the campus during the authorized hours."[18]

By emphasizing the difference between the classroom and other aspects of school, *Tinker* created a geography of public schools that consists of three zones. In the first zone, speech consists of what *Tinker* calls "the supervised and ordained discussion which takes place in the classroom."[19] In the classroom, the purpose of speech is instruction. A child in class is therefore a near-total subject of the school, which can regulate her speech nearly at will. A student may be entitled to say "I disapprove of the Vietnam War" in school, but she is not entitled to do so in the middle of her mathematics class. Doing so makes her susceptible to discipline.

School discretion to regulate speech in the classroom is not absolute. Passive, nondisruptive speech, like the armbands in *Tinker* or an antiwar slogan on a t-shirt, cannot be banned. Nor could a school discriminate based upon *viewpoint* in class. It could not permit students to pass pro-war notes in math class while punishing anti-war ones. But schools can, in the classroom, exercise virtually unlimited

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[14] Tinker v. Des Moines Community School Board, 393 U.S. 503, 506 (1969).

[15] The requirement that school officials must be able to make a "reasonable forecast" that speech will result in material disruption or rights violations is at Tinker v. Des Moines Community School Board, 393 U.S. 503, 514 (1969).

[16] Id. at 513.

[17] Id. at 510

[18] Id. at 512–13.

[19] Id. at 512.

discretion in defining the range of permitted modalities of speech, up to and including rules that prohibit talking entirely. They have similarly wide discretion in regulating the subject matter of in-class speech: talk can be only about the course's subject, or the day's lesson, or the question being asked at the time.

This rule has to be correct. Even Justice Brennan, who wrote in a different case that the "classroom is peculiarly the marketplace of ideas"[20] would agree that teachers may forbid discussion of Vietnam during calculus class.

The second *Tinker* category is places entirely outside of school. Although *Tinker* does not say so explicitly, it implies that when students communicate entirely outside of the schoolhouse gate, they are like any other member of society.[21] The gate is a spatial metaphor. It defines a space inside and another space outside. The metaphor implies that extramural student speech can be regulated only like everyone else's. Students outside of school still unprotected if they say obscene things, or speak "fighting words"; and they are liable for tortious remarks. But that makes them no different than anyone else with First Amendment rights.

This second category serves as a check upon the first. The coercion exerted upon students in school — which includes the fact that students are forced by the state to *be* in school — is mitigated by their freedom out of school. It creates what Deborah Ahrens calls a "protected ... private sphere for public school students."[22] As the Second Circuit put it in the pre-Internet era, in a case dealing with an underground student newspaper whose printing and distribution was conducted off-campus:

> When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption.[23]

The signal contribution of *Tinker* is to identify a third category of speech, speech that is in school but outside of class.[24] The case establishes the "schoolhouse gate," in addition to the classroom door, as a legally important boundary.[25] School "is not confined to the supervised and ordained discussion which takes place in the classroom."[26] Instead, "[t]he principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities."[27] *Tinker* seeks to assure that a student enjoys constitutionally protected rights during those hours, and while conducting those activities, exclusive of formal instruction. It defines a regime to guarantee free speech rights when students are not in class but "in the cafeteria, or on the playing field, or on the campus during the authorized hours."[28]

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[20] Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (internal citations omitted) (cited in Chemerinsky 545).

[21] Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 Fla. L. Rev. 1027, 1089 (2008).

[22] Deborah Ahrens, *Schools, Cyberbullies, and the Surveillance State*, 49 Am. Crim. L. Rev. 1669, 1704 (2012).

[23] Thomas v. Board of Education, 607 F.2d 1043, 1052 (2nd Cir. 1979).

[24] Tinker v. Des Moines Community School Board, 393 U.S. 503, 512-13 (1969).

[25] Id. at 504.

[26] Id. at 512.

[27] Id. at 512–13.

[28] Id.

In this third zone, *Tinker* says, student free-speech rights are real but limited. A student may speak freely, up to the point of interference with the school's operations or the rights of others. A student cannot answer a teacher's question "What were the results of Irish potato famine?" with "US Out of Vietnam!," but she can issue her anti-war call in the corridor. The former comment causes "interference with [school]work"[29]; the latter does not.

The third zone has two purposes. One is to protect students from state efforts to capitalize upon the institution of compulsory schooling as a way to create entirely captive audiences for indoctrination. The Court makes this point beautifully. "In our system, state-operated schools may not be enclaves of totalitarianism. … In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."[30]

Second, *Tinker* intends for the third zone of partial protection, a zone of hallways, cafeterias, and ballfields, to be an educational environment where students exercise speech rights as a way of learning by doing. These places are part of the school; what happens in them is part of the schools' mission. But *Tinker* requires that schools include some places where rights are taught experientially, by allowing students to exercise them. The state's role in this zone, no less than in the classroom, is to educate. When speech is disruptive, the state can regulate or even prohibit it, because education should not be disrupted. Therefore schools have substantial power to constrain student speech in the third zone. But much speech must be tolerated in that zone. Civic learning must include learning by doing. Nondisruptive expression cannot be penalized.

EXPRESSION AND AUTHORITY AFTER *TINKER*

Since 1967, the Supreme Court issued three major decisions that limited the scope of *Tinker*. Each frames itself as an exception to the *Tinker* rule. *Tinker* survives as the law of the land, and has real, not just *pro forma*, force. Nevertheless, these cases, taken together, unquestionably signal a trend towards allowing school authorities more latitude to control student speech.

The first of these cases was decided in 1986. *Bethel School District v. Fraser* involved a student who, at a school assembly about student government, delivered a speech urging the election of a classmate. The speech dripped with sophomoric sexual innuendo.[31] But under *Tinker*, it was hard to prohibit. In reviewing *Fraser*, the Supreme Court found that no "material disruption" resulted or could have been forecast to result from the speech; it was too preposterous. Nevertheless, the Court held that the school was entitled to censor and punish lewd expression. Not to do so, the Court thought, was inconsistent with a school's educational responsibilities. "The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy."[32]

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[29] Id. at 511.

[30] Id.

[31] Bethel School District v. Fraser, 478 U.S. 675 (1986).

[32] Id. at 683.

Fraser was understood in the legal and educational communities as creating an exception to *Tinker* for lewd, sexual speech. Speech of that kind, even if it was not likely to disrupt school operations, could be prohibited.

Two years after *Fraser*, the Court announced another exception to *Tinker* when it approved of censorship by a public school of a student newspaper published by its journalism students.[33] This exception, articulated in *Hazelwood School District*, rested not upon the content of the speech but upon the way that it was communicated. The newspaper was sponsored by the school, the product of one of its classrooms, and printed with school funds. The Court held that school-sponsored speech, whether curricular or cocurricular in nature, can be censored by the sponsor without trampling the constitutional rights of the students participating. All that is required to legitimize official regulation of such school-sponsored speech is that censorship be "reasonably related to legitimate pedagogical concerns."[34]

The Court's most recent foray into student speech came in the 2007 case of *Morse v. Frederick*.[35] The facts of *Morse* are bizarre. A school in Alaska excused its students from class so that they could watch the Olympic Torch pass by the school building.[36] Although students were not on school property and not part of a formal school program, the students remained under school supervision. During the event, several students hoisted a banner that read "BONG HiTS 4 JESUS."[37] The rest of the scenario follows the *Tinker* script. School officials told the students to remove the banner. The students refused and the school suspended them. Then the students sued.

Morse is notable because of how distant the interaction between students and school administrators was from any high-minded goal associated with schooling or with the First Amendment. As to the banner itself, its meaning was contested. School officials insisted it bore a pro-drug message; a majority of Supreme Court justices thought that was a reasonable interpretation. The students (and the dissenters in the Supreme Court) insisted that the banner had semantic content barely at all. Instead, they argued, it was a "nonsense message" designed to get its authors on television.[38] Post-litigation accounts lend credence to the suggestion that the students who raised the banner were seeking attention, and perhaps poking a stick at the predictably overreacting adults in their midst, more than they were saying anything in particular.[39]

In any event, all parties and all the Justices who heard the case agreed that the message did not address an academic or political issue or controversy.[40] Nevertheless the Supreme Court allowed the school to punish students for refusing to remove the banner. It had no trouble concluding that the students were at school, so that *Tinker*'s third zone applied.[41] It again cited the need for good order in school, the

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[33] Hazelwood School District et al. v. Kuhlmeier et al., 484 U.S. 260 (1988).

[34] Id. at 273.

[35] Morse v. Frederick, 551 U.S. 393 (2007).

[36] Id. at 397.

[37] Id.

[38] *See* James C. Foster, Bong Hits 4 Jesus: A Perfect Constitutional Storm in Alaska's Capital (University of Alaska Press 2010).

[39] See id.

[40] Morse v. Frederick, 551 U.S. 393, 401–02 (2007) ("The message on Frederick's banner is cryptic.").

[41] Id. at 400.

responsibility of school staff to maintain such order, and the paramount need for schools to educate students to avoid the scourge of illegal drugs. (The Court did not mention the pedagogical goal of discouraging unconventional orthography.)

The most straightforward reading of *Morse* is that it parallels *Fraser* in creating a topic-based exception to *Tinker*. Just as *Fraser* holds that lewd or sexual speech that would be protected if uttered by adults on a public street can be barred by schools in light of their particular educational mission, *Morse* holds the same for speech advocating the use of illegal drugs. This is very explicitly the position of two Justices (Alito and Kennedy) and also appears to be the position of two more (Roberts and Scalia). (*Hazelwood*, by contrast, distinguishes between speech not based upon its content but upon whether the school is affirmatively promoting, rather than simply tolerating, the speech.)[42]

One reason that *Morse* is important is that Justice Clarence Thomas, writing only for himself, took the opportunity it offered to make a full-throated case for overruling *Tinker*. Thomas writes that the law should treat students in custody of the "state as schoolmaster" as having abandoned their free-speech (and other) rights at the schoolhouse gate. Thomas urges a return to the pre-*Tinker* common-law doctrine of *loco parentis*, which grants to schools, during school hours, the same powers as parents.[43] This position echoes that of Justice Hugo Black, dissenting in *Tinker*, who would have allowed public schools to regulate student speech at their discretion. "School discipline," wrote Black, "like parental discipline, is an integral and important
part of training our children to be good citizens-to be better citizens."[44] Thomas and Black are frank in their view that public schools, *qua* educators, are entitled to be fully authoritarian.

In the contemporary period, no other Justice signed Thomas's opinion. But the Black/Thomas position finds many sympathetic ears today.

Another claim that Justice Thomas makes in *Morse* is descriptive: he sets out the evidence for the proposition that *Tinker* is being steadily eroded.[45] Every one of the school-speech cases heard by the Supreme Court since *Tinker*, he writes, has approved of school officials' limitations on student speech.[46] The exceptions are accreting. Moreover, the explanations for those exceptions consistently emphasize that the educative mission of the schools requires that schools have substantial range for their ability to restrict what students may say and hear.[47]

It is hard to disagree with the descriptive part of Thomas's argument. It is buttressed by the Supreme Court's cases concerning the constitutionality of random urine tests of public school students, designed to

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[42] Hazelwood School District et al. v. Kuhlmeier et al., 484 U.S. 260, 270–71 (1988).

[43] Morse v. Frederick, 551 U.S. 393, 413–17 (2007) (Thomas, J., concurring).

[44] Tinker v. Des Moines Community School Board, 393 U.S. 503, 524 (1969)(Black, J., dissenting).

[45] Morse v. Frederick, 551 U.S. 393, 418 (2007) (Thomas, J., concurring) ("[W]e continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not.").

[46] Id. at 419 (2007) (Thomas, J., concurring)

[47] *See* Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 Drake L. Rev. 527, 541–42 (2000).

detect illegal drug use.[48] There have been two such cases, *Vernonia School District 47J v. Acton*,[49] decided in 1995, and *Board of Education v. Earls*,[50] decided in 2002. These drug-test cases, like the speech cases, address the question whether public school officials can deprive their students of rights that in ordinary life all persons enjoy. But these cases, instead of arising in the context of the First Amendment, arise in the context of the Fourth Amendment prohibition of unreasonable search and seizure by the government.

Both *Acton* and *Earls* cite with approval *Tinker*'s rule that students do not shed their rights "when they enter the schoolhouse."[51] But both then go on to conclude that urine testing for drugs presents special circumstances that justify warrantless, suspicionless searches of students' persons. *Vernonia* holds that students participating in extracurricular athletics may be subjected to random drug tests, in light of the dangers of combining sports and drug use and athletes' voluntary diminishment of their own expectations of privacy. In *Earls,* over a wry dissent by Justice Ruth Bader Ginsburg,[52] the Court extended schools' power randomly to search students wishing to participate in any extracurricular activity. It again cited danger to students, students' diminished privacy expectations, and the schools' custodial responsibilities.

There are obvious echoes in this line of cases' increasing deference to school authority to the trajectory of the student speech cases. They clearly lend credence to Justice Thomas's claim in *Morse* that his authoritarian conception of schools as institutions *in loco parentis* is in fact carrying the day.[53]

Nevertheless, Thomas is not being simply descriptive in *Morse.* The best characterization of current law is that *Tinker* is being progressively narrowed, in ways that permit substantial, authoritarian controls by school officials who want to control student speech.[54] The Court's reasons for allowing expansive regulation of lewd and pro-drug speech could easily be applied to speech about other kinds of topics. There are quite a few kinds of student speech whose regulation, to use *Fraser*'s terms, seems necessary to a school's ability to teach "the essential lessons of civil, mature conduct."[55] The clearest candidates in the current political atmosphere of American education are speech acts that denigrate women, gays, racial or ethnic minorities, and various religious faiths.[56]

But *Tinker* is no dead letter, the kind of opinion that courts ritually cite before proceeding to ignore it. Notwithstanding *Vernonia* and *Earls,* the baseline student-search rule, which applies to students who confine their in-school participation to the school's required activities, is that searches (whether urinalysis or physical searches of students' persons and effects) cannot be conducted without particularized

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[48] *See* id. at 539 James C. Foster, Bong Hits 4 Jesus: A Perfect Constitutional Storm in Alaska's Capital (University of Alaska Press 2010).

[49] Vernonia School District 47J v. Acton, 515 U.S. 646 (1995).

[50] Board of Education v. Earls, 536 U.S. 822 (2002).

[51] Id. at 829 ; *accord Vernonia*, 515 U.S. at 655–56.

[52] Board of Education v. Earls, 536 U.S. 822, 842 (2002).

[53] Morse v. Frederick, 551 U.S. 393, 418 (2007) (Thomas, J., concurring) ("[W]e continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not.").

[54] *See* Erwin Chemerinsky, Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker? 48 Drake L. Rev. 527, 541 (2000).

[55] Bethel School District v. Fraser, 478 U.S. 675, 683 (1986).

[56] Kevin W. Saunders, Saving Our Children from the First Amendment 247 (NYU Press 2003).

suspicion or other special circumstances.[57] So too *Tinker* retains substantial vitality, and continues to govern the mine run of cases even as exceptions proliferate. The baseline speech rule remains *Tinker's* rights-protective one, especially in cases involving political speech.

In a celebrated 2013 case, for example, two Pennsylvania youngsters initiated a breast-cancer awareness campaign in their middle school. They distributed bracelets emblazoned with the slogan "I ♥ boobies" to their classmates.[58] The school suspended the students when they refused to remove the bracelets under a school policy forbidding lewd speech. The Third Circuit Court of Appeals, hearing the case, decided that the rule of *Tinker*, and not the sexual-speech exception of *Fraser*, applied. The speech was not "plainly lewd," said the appeals court, and moreover could "plausibly be interpreted as commenting on political or social issues."[59] Without a reasonable expectation that the bracelets would lead to disruption, the court concluded, such speech could not be banned.

In short, robust protections for student speech still pervade American public school law. School officials cannot restrict student speech that is in school but not in class unless they reasonably anticipate disruption or the abrogation of the rights of others. It is true that courts seem ever more inclined to defer to school authorities in deciding what constitutes a reasonable expectation of substantial disruption. But it remains the law that they must show such a reasonable expectation in order to limit student speech.

SPEAKING IN PRIVATE SCHOOL

[*To the reader: I provide only this short note in the interest of space.]* Unlike those for public schools, the rules governing interference by private schools in student expression are straightforward: Private schools restrict speech as they like. The First Amendment applies only to government institutions. Private schools, being private, are not subject to it. Private schools may therefore condition a student's enrollment on her agreement to all manner of restrictions on expression. They can restrict speech based on its contact, forbidding, for example, speech critical of the school, of teachers, or of American policy in Vietnam. And they can restrict speech in whatever locations they choose, whether in classrooms, in school corridors, at home, or on the street. These restrictions are matters of the enrollment contract between the school and its students. Students who don't like the terms need not enroll.

This principle is unaffected by the fact that enrollment in private school discharges a compulsory school obligation imposed by the state. Private schools do indeed provide a governmentally-mandated service. But that mandate does not change the private character of the provider.[60]

Private schools, like all private institutions, are bound by civil rights laws and employment laws, some of which affect speech. Private schools cannot allow speech that creates a hostile environment for women, for example, nor may they impose or enforce speech restrictions differently upon students of different races. These principles come up sometimes in litigation private schools' reactions to students' sexist,

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[57] Safford Unified School District v. Redding, 557 U.S. 364 (2009); New Jersey v. T.L.O., 469 U.S. 325, 384 (1985).

[58] B.H. v. Easton Area School Dist., 725 F.3d 293, 297 (3rd Cir. 2013).

[59] Id. at 298.

[60] Rendell-Baker v. Kahn, 457 U.S. 830, 842 (1982).

racist, religious, pro-gay, or anti-gay speech.[61] But, civil rights aside, a private school can impose whatever speech restrictions on students it likes, so long as students and families to are willing to accept them by agreeing to enroll.

American courts confronted with rights claims treat charter schools — those privately managed but publicly funded —as public schools. This might be a mistake;[62] but that is not my topic here.

TINKER AND TECHNOLOGY

The regulation of students' expression "in the cloud" is, on one dimension, a straightforward instance of a now-familiar problem: the old rules assumed the old technology; new technology makes them unworkable. In the case of speech, the structural features of information technology vitiate *Tinker* by collapsing its geographical categories.

Consider first the most regulated zone in *Tinker*, the student in class. *Tinker* says that speech inside of class can be regulated intensely. But what happens when "class" is aterritorial, and perhaps also asynchronous and unbundled? In the context, it is not even clear what it *means* to be "in class."

To see this, imagine two students, Dennys and Sandy. Dennys is sitting in a physical-world public-school history class. Sandy is sitting in her living room or backyard in the real world with her history lesson open in a window on the computer before her.

Dennys, the bricks-and-mortar student, is distracted and bored. He passes a note to a classmate. It is obvious that the school may forbid such speech and punish its expression. This is true whether the note says "Meet me after school" or "US Out of Afghanistan." The capacity of the school to discipline Dennys stems not from the note's content but from the fact that Dennys is *in class*. If the history class is talking about the Irish potato famine, the teacher can demand that nobody talk about Afghanistan. The teacher likewise can demand that no one pass notes at all, or speak without raising their hands — even if the unrequested speech or passed notes *are* about the potato famine.

Compare this to Sandy's situation as she sits at home participating in a virtual history class about the Irish potato famine. Distracted like Dennys, she opens a new non-class window and sends an email or instant message to a classmate: "US Out of Afghanistan!"

It is very hard to imagine where a school could find authority to punish Sandy for this. If the class is asynchronous, Sandy is entitled to stop being in class at any time of her choosing. At the moment she opens the second window, she "leaves" class. She is messaging her friends just as she would have if she had not been logged onto, or even thinking about, history class. Likewise the recipient of Sandy's message, even if also a student in the class, and even if she were working on the class at the moment the message arrived, would at the moment she opens that message "leave" class. A multitasking student can flit from "in class" to "out of class" repeatedly.

Even if the virtual history class were synchronous, it is not clear that a student's IM-ing could be regulated by the virtual class provider. Software that locks students out of their hard drives and only

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[61] Adam J. Kretz, *The Right to Sexual Orientation Privacy: Strengthening Protections for Minors Who are "Outed" in Schools*, 42 Journal of Law and Education 382, 389 (Summer 2013).

[62] See Steve Sugarman, *Is it Unconstitutional to Prohibit Faith-Based Schools from Becoming Charter Schools?*, 32 Journal of Law and Religion (2017); Aaron Saiger, *Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education*, 34 Cardozo L. Rev. 1163 (2012).

allows them to access a single, school-related exam window is already commercially available. Standardized exams are increasingly moving toward using this software in lieu of paper exams. Virtual schools could adapt this software to block students from multi-tasking on their computers. But it is hard to imagine that this would be a popular innovation. Indeed, it might perversely make unavailable some of the advantages of on-line instruction: a student might want, for example, to refer to online materials or to pause or replay parts of a video. Moreover, a student at home likely has other devices she could use to IM or play games during class.

Unless the school or platform requires otherwise, there is no principle that a virtual class can or does demand a student's full attention. Depending on the format of the class, but including both synchronous and asynchronous contexts, what would be distraction in a physical classroom seems better described as "multitasking" in a virtual context.[63] One of the things Sandy is doing when she messages about Afghanistan is being in history class. Separately albeit simultaneously, she is also politicking about American foreign policy. She is "in class" only when, and to the extent, she decides to be.

The student who passes a note across the aisle in a traditional bricks-and-mortar classroom, on the other hand, is undoubtedly in school and in class. Dennys is "in class" because he is in the classroom while class is being conducted. It does not matter that his mind — or even the active window on his computer — is elsewhere. An in-person student who starts doing something else in class is distracted. A virtual student who starts doing something else has left class.

Tinker, therefore, seems to leave almost no room for a virtual school to regulate in-class speech not conducive to classroom work based on whether it is in class. A student speaker can, more or less at will, recategorize any speech act as private. A virtual student moves at her own pleasure from *Tinker*'s most-protected zone to its least-protected.

Virtuality poses a second challenge to the geography of *Tinker:* When a virtual student is not "in class," whatever that may come to mean, it is hard to say that she is "in school." If she speaks to her schoolmates not "in class," she does so on the same terms and in the same way she might speak to anyone else at any other time. There is no space called "school" into which students are placed by and remain under the supervision of the state during moments at the interstices between periods of formal education. Virtual schools have no physical buildings or grounds, no "corridors," "ballfields," or "campus." There is no "schoolhouse gate." Without the "gate," without the analogous "playing field," or "campus," the tripartite categorization of *Tinker* falls apart. (The closest virtual analogue to *Tinker*'s third zone would be a social media site or blog where students participate in discussion. Such sites are discussed at the end of this paper.)

Consider what happens, in an old-technology school, if Meg stands up the cafeteria and declaims, "Principal Jenkins is a tinpot dictator." Charles then, in support, stands up and goes further: "And he's none too bright, either." *Tinker* gives schools some substantial room, though not absolute discretion, to shut down and punish this sort of mindless *ad hominem* criticism in those situations where cafeteria mayhem is likely to ensue. Even if no disruption is likely to or does occur, school officials can use incidents like these as teaching moments, perhaps showing students how this sort of speech is rude and unproductive, encouraging them to channel it into more productive forms, and showing students how that

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[63] Multitasking appears to be distracting in fact for online as well as for in-person learners. See *Digital Nation*, Frontline, Rachel Dretzin and Douglas Rushkoff, (Feb 2 2010) (Interview with Clifford Nash, 7:59). That multitasking may be inadvisable for online students, however, does not mean that it is unexpected.

might be done. That kind of teaching is effective in part because teachers and staff are authority figures in the school's third zone.

But had Meg gone over to Charles's house that night after school, told him the same thing, and elicited the same response — or had they had the conversation on the telephone before going to sleep — the school could not censor or punish. Meg and Charles can say whatever unkind, irresponsible, unfounded things about the principal that they want to on their home phones in the evening. This is true notwithstanding that Meg and Charles are encouraging one another to resist school authority in their nighttime colloquy as much as by they are by their cafeteria declamations. It is also true regardless of what disruption might result. It would be true no matter whether the statements were made at a large a get-together at Meg's house, or via a series of telephone calls. In our example, Meg and Charles are speaking neither tortiously nor criminally; at home, they are entirely protected.

This outcome also illustrates a virtue of *Tinker*: students at home ought to be free to speak their mind, even thoughtlessly or mindlessly, about issues of public policy, which Principal Jenkins' alleged dictatorial tendencies no doubt are. Many readers, like this writer, will remember in their own student days making ill-considered, unfair, but private and therefore protected, criticisms of their teachers. Such criticism is like a first kiss: it may not be done well, but clumsy early attempts may be necessary precursors if more successful endeavors are to follow.

As the Second Circuit argued, different treatment of these two scenarios is justified by the difference between being in school and not being in school. *In* school, students cannot interfere with good order in the school. Moreover they are in school to be taught. Out of school, they are private citizens complaining about the quality of their government services, and they have no teachers looking over their shoulders. The freedom at home is a corrective for the regulation at school; the regulation at school is educative, one hopes, about how one might exercise one's freedoms at home.

What outcome, then, if Meg posts "Principal Jenkins is a tinpot dictator" to some online forum, and starts to harvest "likes" from her schoolmates, some of whom chime in to malign the principal's intelligence along with his metallurgical characteristics? This is different from the telephonic or in-person gripe session. The evening's screed is available in the morning, available in its original form to the speaker, the original hearers, the subject of the speech, and everybody else. The virtual forum makes that speech, which would have been ephemeral on the telephone or in person, permanent. In particular, it was said not-in-school but can be heard, and heard again, in-school-but-not-in-class. The Internet remembers, and internet speech reverberates for a long period of time.

If we treat such speech as protected because of it was *said* out of school, we risk material disruption and lose the opportunity for democratic education at the location where it is heard. But if we treat it as regulable because it can be *heard* in school, we deprive Meg and Charles of *any* space in which to communicate without government oversight about the quality of the principal, at least in the social media that has become a "critical too[l] for [students'] social life."[64] (They could, of course, resort to telephones or in-person meetings; but this is hardly a remedy for a generation that communicates by text online.)

Giving schools control over all speech that can be heard in school transforms student speech rules from rules based upon context to rules based upon status. Students cannot freely speak anywhere, because they are students. Where what would otherwise be students' constitutional rights had been restricted while

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[64] Robin M. Kowalski, Sue Limber, & Patricia W. Agatston, Cyber Bullying: Bullying in the Digital Age 2 (2008).

they were *in school,* now they are restricted because students are *enrolled in school,* 24/7. The public-school student is left nowhere "free to speak his mind."[65]

Status-based regulation is a close cousin of the authoritarian vision championed by Justice Black in his *Tinker* dissent and later by Justice Thomas in his *Morse* dissent. It is clearly incompatible with *Tinker*. Justices Black and Thomas, who might welcome status-based regulation of student speech, would agree that it is not the policy of *Tinker.*

Without a category of in-school-but-not-in-class, and arguably also without a relevant category of speech "in class," the law seems to be left with two polar choices. One is to extend to schoolchildren the full constitutional protections enjoyed by everyone else. As a practical matter, those protections would be enjoyed always: even though they might not formally apply when students are "in class," "in class" is a state that students can enter and exit more or less at will.

In the alternative, the law could take a position even stronger than that advocated by Justice Thomas: not just the school is in *loco parentis*, but that children, *qua* minors, do not *ever* have the right to expression unfettered by state paternalistic regulation.[66] The school could be *in loco parentis* not only at school, but at home, on the street. Students would be subject to a 24/7 regime of speech regulation. Their status as schoolchildren would subject them to an inescapable regime of constant control over their expression, not just at some places and times but always. And, in public schools, that control would be government control. It is defined and carried out by public servants: school boards, principals, administrators, and teachers.

Is a virtual school reduced, as *Tinker* insisted that school should not be, only to the classroom? Or does it expand, as *Tinker* did not imagine that school could be, to encompass every child's total experience, both academic and social?

VIRTUAL BULLIES

Statements that are evanescent when uttered in person or on the telephone leave a permanent record when made online. As we have seen, that means that virtual words spoken at a particular place and time can be heard in other places and at other times. These features of online expression are related to an additional vexing issue associated with virtual speech: It seems to carry fewer social constraints than other kinds of speech. Internet speech is often frank, but also tends to be gratuitously nasty. Some online speech surpasses nastiness and becomes truly toxic, a piling of monstrous insult and invective — with sometimes tragic results.

Commentators have noted several ways in which online communication seems to encourage such bad behavior.[67] Online speakers are often physically isolated from their audience. They get no immediate feedback or reaction from hearers or subjects. Speakers can thus feel untethered from any particular community of listeners[68]; they direct their comments to the everyone in the whole world, and therefore to no one in particular. They speak to the ether, mediated by the screen. The social distance between speaker and listener that results seems to encourage people to shed ordinary social inhibitions and

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[65] Thomas v. Board of Education, 607 F.2d 1043, 1052 (2d Cir. 1979).

[66] This view was advocated by Justices Stewart and Black in *Tinker*.

[67] Danielle Keats Citron, Hate Crimes in Cyberspace 64 (Harvard University Press 2014).

[68] Id. at 59.

constraints regarding what should and should not be said. Likewise, the ubiquity of anonymity on the internet makes speakers feel immune from the social consequences of their speech.[69]

Anonymity, social distancing, and permanence can catalyze a shift from what might begin as isolated remarks into a pattern of speech by a group, in which speakers pile on and further lower the level of discourse. Danielle Citron calls these "cyber mobs"[70]; Brian Leiter calls the mobs' gathering places "cyber-cesspools."[71] Mobs can be spontaneous, arising even without anyone seeking to create them and certainly without the group ever formally organizing itself. The development of a mob in turn catalyzes even more extreme speech by its members. Speakers feel confirmed in their views and behaviors by other like-minded participants, and also imagine that they are safe from detection or consequences when they are but one participant in a large group.[72] (Mobbing also makes it much harder for the subjects of negative speech to avoid learning about it, and to prevent third parties from hearing the speech as a result of internet searches.[73])

When these factors combine with the juvenile bad judgment and immaturity of schoolchildren, the results can be deeply disturbing. Destructive online speech by pupils has become a major problem in schools today. Unlike most of the issues described in this paper, it is already a feature of the present, rather than an anticipated problem of the future. In today's ordinary, physical schools, the same students who interact in person with classmates and teachers in buildings and classrooms live simultaneously in virtual spaces defined by asynchronous, aterritorial, social media platforms. They use these platforms — email, websites, instant messaging, and social media — to talk to one another, about their schoolwork, about their classmates and teachers, about politics, and about nothing at all.

Some student speech is merely puerile. But its worst examples are very bad indeed. A student posts online a cartoon that a teacher should be shot and killed.[74] Another solicits funds to hire a "hitman" to dispatch a teacher.[75] A third accuses a principal of sexual encounters with students and unleashes a stream of deeply vulgar insults to the principal and his family.[76] A fourth group of children create an online discussion group that shares text and photographs characterizing a classmate as a "whore" who suffers from herpes.[77]

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[69] Id. at 59–60

[70] Danielle Keats Citron, *Civil Rights in Our Information Age*, in Levmore & Nussbaum, The Offensive Internet 33 (Harvard University Press 2010).

[71] Brian Leiter, *Cleaning Cyber-Cesspools: Google and Free Speech*, in Levmore & Nussbaum, The Offensive Internet 155 (Harvard University Press 2010).

[72] Danielle Keats Citron, *Civil Rights in Our Information Age*, in Levmore & Nussbaum, The Offensive Internet 33, 37 (Harvard University Press 2010).

[73] Danielle Keats Citron, Hate Crimes in Cyberspace 67 (Harvard University Press 2014).

[74] Wisniewski v. Board of Education, 494 F.3d 34, 35 (2007).

[75] J.S. v. Bethlehem Area School District, 757 A.2d 412, 416 (Commonwealth Court of PA 2000).

[76] J.S. v. Blue Mountain School District, 650 F.3d 915, 920 (Commonwealth Court of PA 2011).

[77] Kowalski v. Berkeley County Schools, 652 F.3d 565, 568 (4th Cir. 2011).

In some cases like these, the targets of online speech have felt compelled to withdraw from school, lapsed into depression, suffered from deteriorating physical and mental health, and even taken their own lives.[78] Many other victims of hostile internet speech have experienced upheavals less dramatic but still intense.[79]

More generalized consequences are felt in school. The events triggered by the online cartoon urging the death of the teacher led the school, in its principal's words, to "a low point … worse than anything he had encountered in his forty (40) years of education." The school district analogized it to a death in the community, describing a general "feeling of helplessness and a plummeting morale."[80]

Can such speech be regulated by the state because it is offensive or destructive to others? One begins with the principle that the First Amendment is not absolute. First Amendment law has always acknowledged that some destructive speech is unprotected.[81] The state has power to regulate speech that does substantial damage and brings little value.[82] There are several classic examples. It is criminal to plan, for example, to assault someone physically, or to arrange to surveil them.[83] Laws against criminal conspiracy are constitutional even though they involve speech.[84] Similarly, it is criminal to threaten someone with violence, whether online or off.[85] And defamation and libel can incur liability for those who intentionally inflict substantial emotional distress on another through their speech.[86]

Both criminal sanctions and civil liability for speech must be justified relative to the limits that they impose upon freedom of expression otherwise protected by the First Amendment. The benefits of imposing sanctions or liability must be weighed against the damage to expressive rights that such imposition implies. In the case of defamation and libel, for example, the courts make it nearly impossible to hold speakers liable when the object of the speech is a public figure or the speech is about a matter of political or public concern.[87] But when speech is about private people and private matters, the value of

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[78] Vidovic v. Mentor City School District, 921 F.Supp.2d 775 (N.D.Ohio 2013); J.S. v. Bethlehem Area School District, 757 A.2d 412, 416-17 (Commonwealth Court of PA 2000)

[79] Ari Ezra Waldman, *Hostile Educational Environments*, 71 Maryland Law Review 705, 710 (2012).

[80] J.S. v. Bethlehem Area School District, 757 A.2d 412, 417 (Commonwealth Court of PA 2000).

[81] Danielle Keats Citron, Hate Crimes in Cyberspace 199–205 (Harvard University Press 2014).

[82] *See, e.g.*, Thomas v. Board of Ed., Granville Central School Dist., 607 F.2d 1043, 1047-48 (2d Cir. 1979) ("[W]hen experience has clearly revealed that the value of a species of expression is thoroughly exiguous, but its potential for harm is great, courts have defined narrow categories of words that the state may punish.").

[83] Danielle Keats Citron, Hate Crimes in Cyberspace 123 (Harvard University Press 2014) (citing CA code provision); Marc G. Perlin & Davalene Cooper, 2 Massachusetts Proof of Cases Criminal § 66:1.

[84] Frederick Shauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 1768 MPC §503

[85] Cassie Cox, *Protecting Victims of Cyberstalking, Cyberharassment, and Online Impersonation Through Prosecutions and Effective Laws*, 54 Jurimetrics, 277, 282-83 (Spring 2014)

[86] Cf. Catherine Armspacher, *Humor, Defamation and Intentional Infliction of Emotional Distress: The Potential Predicament for Private Figure Plaintiffs*, 31 Wm. & Mary L. Rev. 701, 705-10 (1990); Diane L. Borden, *Invisible Plaintiffs: A Feminist Critique on the Rights of Private Individuals in the Wake of* Hustler Magazine v. Falwell, 35 Gonz. L. Rev. 291, 295-301; 305-07 (1999-2000).

[87] Snyder v. Phelps, 562 U.S. 443, 451 (2011)

the speech is lessened, and the willingness of courts to impose liability for false and damaging speech therefore increases.[88]

Whether criminal or civil sanctions can lawfully be imposed for damaging speech is determined on a case by case basis. Through a constant, ongoing process of legislation and litigation, legislatures, courts, private parties work to define the lines are where free expression ends and impermissible harm to others begins.

That process has been challenged by technology, an area where technical innovation far outpaces the speed of legislatures and courts. Danielle Citron has also pointed out that many existing laws clearly reach online threats and other kinds of destructive online conduct, but often are not applied to such conduct. Many local police forces do not understand the law, the technology or both.[89] Civil litigation is inaccessible to many victims because the cost of investigation is high, many perpetrators do not have the money to pay damages if the victim prevails, and most lawyers are unfamiliar with the law.[90]

Nevertheless, as internet speech proliferates, recent years have seen a strong trend in the direction of placing bullying[91] and other nasty online speech directed at others on side of the line where speech can be regulated. Such attempts have been made in both the criminal and civil contexts. The regulations proposed would apply across the board, applicable not just to students, but to all persons.

Today, therefore, "bullying" can be, under certain circumstances that depend upon the jurisdiction, tortious.[92] Some states have also criminalized bullying and "cyber-bullying." Both are defined as a pattern of speech and behavior that takes advantage of a power differential to harm someone.[93] It is, in some states, also criminal to engage in "cyber-stalking"; various criminal codes define this crime as a "course of conduct" involving virtual communication that is intended to cause its target substantial emotional distress.[94] The constitutionality of these efforts is not yet finally determined, but there have been convictions and damage awards associated with these crimes and torts.[95]

Public school officials, along with the legislatures, prosecutors, and courts, are participants in the process of balancing the right to free expression and the desire to reduce the harms that it can create. When government officials who work in schools punish speech because they view it as harmful, they push in

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[88] Id. at 451 (para beginning "Whether the First Amendment prohibits holding Westboro liable for its speech in this case…")

[89] Danielle Keats Citron, Hate Crimes in Cyberspace 84 (Harvard University Press 2014); see also https://www.youtube.com/watch?v=PuNIwYsz7PI.

[90] Danielle Keats Citron, Hate Crimes in Cyberspace 122–23 (Harvard University Press 2014).

[91] I use "bullying" in this paper only to describe speech; I exclude from my analysis all bullying that involves conduct other than speech, especially that involving physical contact. This is straightforwardly regulable by schools and by the state; neither students nor anyone else has the right to engage in it, in or out of school.

[92] Danielle Keats Citron, Hate Crimes in Cyberspace 121–22 (Harvard University Press 2014).

[93] Sameer Hinduja & Justin Patchin, State Cyberbullying Laws (July 2012), available at http://www.cyberbullying.us/Bullying-and-Cyberbullying-Laws.pdf. *See also* Ruth Broster, *Cyber-Bullying of Educators by Students: Evolving Legal and Policy Developments*, 20.1 Educ. & L.J. 35, 36 (2010) ("Bullying is always unwanted, deliberate, and persistent -- there is an element of repetition. There is also a power imbalance between the victim and the perpetrator.").

[94] Danielle Keats Citron, Hate Crimes in Cyberspace 86 (Harvard University Press 2014).

[95] Id. at 133–41.

one direction of the First Amendment. Sometimes students push back, arguing in court that the punishments meted out restrain their expression impermissibly.

In addition to schools' role in the general process by which First Amendment law comes to terms with online speech, the school context raises two particular questions. One is whether schools can punish or prohibit online speech by its students that other organs of the state are also allowed to punish or prohibit, but without the processes we associate with civil sanctions, arrest, or criminal conviction. If a person is criminally charged with cyberstalking, or civilly sued over alleged libel, they enjoy procedural protections. These include things like the presumption of innocence, the right to confront accusers, and the right to counsel on the criminal side, and the right to trial and sometimes to a jury on the civil side. School discipline has none of these features. Can public schools punish their students for this kind of conduct anyway?

The answer to that question appears to be *yes.* The Fifth and Fourteenth Amendments to the Constitution require that persons be afforded "due process of law." Public schools, as government agencies, are bound by that requirement. But, the courts have held, the nature of the process that is "due" in school depends upon the severity of the potential sanction. For sanctions less severe than a lengthy suspension, more or less all that is required is that school officials informally hear a student's side of a story before imposing discipline. Only if suspensions are long (greater than ten days) are relatively full-blown hearings required.[96]

Schools have not found it problematic, therefore, to punish speech that is otherwise criminal or tortious — when they feel that it is appropriate. Consider a 1976 case in which a student called a teacher a "prick," not in school or during school hours, but in a mall parking lot on a Sunday. A reviewing court approved the school's decision to suspend the student for three days and exclude him from a class trip. Once the court had determined that the insult was "fighting words" unprotected by the First Amendment and prohibited by local law, it had no trouble sustaining the school's discipline even though the conduct was out of school.[97] Presumably the same reasoning would apply if the speech were online.

The harder question is to what extent school officials may regulate online speech that otherwise is *not* prohibited by law. This is speech that would rate First Amendment protection if uttered by an adult on the street her own social media account. Can schools still regulate and punish such speech? *Tinker* suggests the possibility that the answer again could be *yes*. *Tinker* entitles schools to regulate speech in their cafeterias or ballfields that the state could not regulate on a street or public park. It holds that schools are different. Perhaps schools may also regulate online speech that the state could not otherwise regulate.

Today's schools often claim the power to do so. Occasionally the targeted speech is not bullying but straightforwardly political, like the case of the Pennsylvania "I ♥ boobies" bracelets or like *Tinker* itself. More often, cases are about politics writ small, in which students use online fora to object to various school policies. In a town in Connecticut, for example, a student objected to the rescheduling of a school concert. She took to a blog to criticize the school administrators involved and to urge others to protest.

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[96] Goss v. Lopez, 419 U.S. 565, 584 (1975) .

[97] Fenton v. Stear, 423 F.Supp. 767, 771 (W.D. P.A. 1976).

The blog used some coarse language. School officials then excluded the blogger from continuing to hold office in student government.[98]

Very commonly, however, the online speech that results in school discipline is abusive towards others. When such speech falls under "cyberbullying" or "cyberstalking" statutes, schools, as we have noted, are able to impose discipline. But in other cases the speech falls short of the applicable criminal-law standard relevant to the school jurisdiction. And, one must emphasize, many states and localities have no statute or a narrow one. A good catch-all term for such speech is "cyberinsult." "Cyberinsult" may or may not break generally applicable laws, but it is distressing and arguably harmful to others. Schools therefore often want to police, control, or punish it.

Even absent catastrophic results like suicide or health crises among the targets cyberinsult, it is easy to empathize with schools' desire to regulate it. And it is more than empathy. Cyberinsult is antisocial, nasty, and hateful, and has little value. Adult educators' duty, their *job*, arguably includes coping with the kind of immaturity, bad judgment, and sometimes monstrous behavior that the online character of speech seems to encourage. To do otherwise is to abdicate a school's basic responsibilities. Schools *should* teach children to speak in ways that are kind, productive, and respectful. That seems a fundamental part of civic and values education. Schools, after all, include benchmarks for social and emotional development in curricula, on school report cards, and in Individual Education Programs (IEPs) required under the Individuals with Disabilities Education Act (IDEA). Even if the speech at issue is merely disrespectful rather than toxic, it also is hard to object to the fact that schools should teach children to treat adults in authority with respect.

There are strong parallels between cyberinsult and the "BONG HiTS 4 JESUS" banner in *Morse.* Like the *Morse* banner, insulting speech neither has academic content nor occurs in an academic context. But, also like the banner, both its content and form make it very relevant to children's education. The expression is part of the social life of the school community, and, when directed at authority, its political life. As we have noted, teaching students how to live in a social and political community, and to do so well and responsibly, is a key goal of education.

In *Fraser,* the case involving the sexually suggestive speech in an assembly, the Supreme Court said that it is ''a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.''[99] However true that is of vulgarity, it is even more true of this kind of expression. If schools seek to train future citizens and persons of character, they can hardly ignore vicious bullying, venal lies, and grotesque insults, online or off.

It is true that cyberinsult directed at teachers, coaches and principals is in a very real sense political speech. These individuals are public employees who provide a public service. A student who complains about his aggressive basketball coach or his under-demanding English teacher is very similar to a citizen who objects to the behavior of an aggressive police officer or a dirty public park. Sometimes schools appear to overregulate or overpunish such speech out of ego, defensiveness, or self-protection. Schools have penalized players for complaining about abusive coaches, or circulating written petitions requesting their removal.[100] A group of students was suspended for three days after posting on social media a

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[98] Doninger v Niehoff, 527 F.3d 41, 46 (2d Cir. 2008).

[99] Bethel School District v. Fraser 478 U.S. 675. 683 (1986).

[100] Lowery v. Euverard, 497 F.3d 584, (6th Cir. 2007); Pinard v. Clatskanie School District, 467 F.3d 755, 760 (9th Cir. 2006).

teacher's mugshot after the teacher was arrested for driving with a suspended license and shared it so other students could view the image.[101] Such behavior is in the mainstream of political speech and should be protected. In the mugshot case, the school retracted the suspension after some pressure and publicity.[102]

At the same time, the online postings filled with vulgar lies about teachers and principals seem categorically different from the high-minded anti-war protest of *Tinker,* from the silly but still serious message "I ♥ boobies," or from complaints about the police force. And in both kinds of cases, teachers and principals are not "public figures" in the way that appointed and elected officials — governors, mayors, secretaries of defense — are. A composition teacher or coach have not, by accepting their jobs, agreed to become public figures.

Cyberinsult directed at peers, moreover, is not at all political. It ultimately has no redeeming social value at all. And its potential damage is great. This creates even greater justification for schools that wish to regulate or punish it. Principal Jenkins is an adult, and is or ought to be equipped to react without ego if he is insulted online. His only with respect to being the target of cyberinsult goal should be to preserve order in his school and teach Meg, Charles, and his other pupils how to act, and speak, well. In the case of student-on-student bullying, however, school authorities also have to protect the targets of bullying. Those children also must be able to learn and to function in the social group. That's nearly impossible when you are the target of a snarling cyber-mob.

And yet. The argument that schoolchildren should enjoy some zone of free speech where their rights are coextensive with the rights of all citizens remain strong ones. There cannot be a requirement the only protected speech is high-minded speech. As the previous section suggests, nasty speech about those in authority is perhaps not admirable, but it does have its place in a democracy. Plenty of people make unreasoned, *ad hominem,* and gratuitously nasty comments about their presidents, governors, or congressmen. They do it in person and they do it online. We do not stop them either way. We tolerate such speech in part to avoid defining a line between reasoned and unreasoned, or productive and baseless, speech. But that is not the only reason. We also permit emotional and unreasoned criticisms of authority because it is the right of a free person to make such comments. If a student tells a friend off campus that school officials are "douchebags," schools should have no power to punish (although they could, and should, articulate their disapproval). I would say that when the Connecticut student blogger upset over her concert was suspended in 2007 for saying the same thing online, that was a school overreaching.[103]

It is harder to argue for a zone in which students should be able to freely attack their classmates online up to the point of libel or harassment. But if Meg, on the phone with Charles in evening, offers him a litany of their classmate Sandy's failings, real and imagined, the school cannot retaliate. It seems reasonable that an educator who learned about such speech might try to *explain* why it is unbecoming and inappropriate, but unreasonable for that educator to *punish* the speech. As text and email replace the telephone and the streetcorner as the site of expression, does all such speech fall under the educator's rules? Are students free to engage in nastiness, short of criminality, somewhere?

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[101] Sasha Jones, Students suspended after sharing teacher's mugshot on social media, WMC Action News 5, Memphis, TN available at: http://www.wmcactionnews5.com/story/28654573/students-suspended-after-sharing-teachers-mugshot-on-social-media

[102] Id.

[103] Doninger v Niehoff, 527 F.3d 41 (2d Cir. 2008).

The tendency to say *no* is an expression of the desire to look out for victims. But the elevation of that desire over the liberty of expression is a manifestation of troubling developments in the contemporary public culture of the United States. That culture is relatively thin-skinned, sensitive to insult, and anxious to police it. This has become especially prevalent on college campuses setting out to protect members of groups that have not historically have a strong present on college campuses.[104] It is sensitive to feelings and to "safety." Universities buzz with talk of microaggressions, individualization and comfort.[105] The dominant campus ethic is to avoid giving offense.[106]

With respect to children younger than college age, the public culture of the United States seems over time to have become over time even more interventionist and sensitive to psychic comfort. This sector of public culture, to be sure, is largely about middle-class and upper-middle-class children; and for them, supervised Little League has replaced the pickup game. In what Deborah Ahrens calls "intensive parenting" and many others call "overparenting," parents monitor children's development, police children's extracurriculars, arrange their playdates, schedule their time, and worry that, when unsupervised, they might be aimless and/or unsafe. Children are allowed less independence. And parents and society worry vociferously about their emotional well-being .[107]

Adults who routinely insert themselves as organizers and supervisors into dependent children's time, not just in school but out, are ideologically primed to widen the sphere of adult regulation of children's expression. They are particularly anxious to do so with regard to online speech, which is hard to monitor, and moreover occurs in fora and in styles that are unfamiliar to many adults.

No one of these factors alone determines how we understand the problem of objectionable student speech on social media. But the combination of genuine pedagogical concerns, increasing sensitivity to the emotional ramifications of hostile speech, the shrinkage of spheres of activity for children that are free of adult supervision, and a general authoritarian trend among adults' attitude to children, have led both schools to seek quite wide latitude to prohibit and to punish bullying or insulting speech, notwithstanding its character as speech.

VIRTUAL SPEECH AND THE SCHOOLHOUSE GATE

When courts review schools' decisions to regulate or punish cybernastiness, or when schools seek on their own to determine the legality of such policies, they turn to *Tinker*, the case that defines the extent to which student expression is protected. When the case was decided, it was clear that its intention was to restrict the authoritarian impulse: students do not "shed" their rights at the "schoolhouse gate."

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[104] Eric Hoover, *The Comfortable Kid*, The Chronicle of Higher Education, July 28, 2014.

[105] Id.

[106]Peter Schmidt, *Pleas for Civility Meet Cynicism*, The Chronicle of Higher Education, September 10, 2014, Eric Hoover, *The Comfortable Kid*, The Chronicle of Higher Education, July 28, 2014. A prominent example is the recent directive issued by the University of California to faculty to avoid "microaggressions" ranging from, "where are you from or where were you born?" to "everyone can succeed in this society, if they work hard enough." Eugene Volokh laments that this is a "serious blow to academic freedom and to freedom of discourse more generally."

[107] Madeline Levine, The Price of Privilege 28–32 (HarperCollins 2006); Madeline Levine, Teach Your Children Well 25–26, 83–84 (HarperCollins 2012); Deborah Ahrens, *Schools, Cyberbullies, and the Surveillance State*, 49 American Criminal Law Review 1669, 1715 (2012); Carl Honoré, Under Pressure: Rescuing our Children from the Culture of Hyper-Parenting 162–73 (HarperCollins 2008); Gaia Bernstein & Zvi Triger, *Over-Parenting*, UC Davis L. Rev. 44 (2010).

But when it comes to online speech, *Tinker* and its successor cases lend themselves to readings that contract the domain in which students may speak freely. This leads to the ironic and worrying result that, although the internet is often associated with expanding opportunities for expression, student speech becomes *less* protected as it moves online.[108] School officials who seek to expand their jurisdiction over school buildings and grounds into the virtual spaces where their students speak — regardless of students' physical location at the time of expression — can justify themselves with the *Tinker* test.

Tinker defines two legitimate reasons for schools to restrict speech. First, it permits the regulation of speech in school when it reasonably can be predicted to "materially or substantially interfer[e] with the requirements of appropriate discipline in the operation of the school."[109] Cybernastiness often can be expected so to interfere. It can be expected that it will be heard in school. Hearers might find themselves distracted from their schoolwork or unable function effectively within the school community. Moreover, if the speech in question mocks teachers or administrators, such challenges to authority can disrupt school environments.

Tinker also states that student free speech rights do not extend to speech that "collide[s] with the rights of others."[110] Schools, courts, and commentators have embraced the idea that, especially with respect to speech that targets other students, victims' rights to real and perceived "safety," and victims' own rights to be educated, are eroded by the victimizing speech of their peers.[111] One advocate explains that speech collides with the rights of others "if the victim demonstrates effects such as insecurity at the school, fearfulness, or depression."[112]

Consider again the middle-school student who, while off-campus, sent an instant-message containing a "small drawing crudely, but clearly, suggesting that a named teacher should be shot and killed."[113] The student who sent the message went to school in upstate New York. The drawing showed a "pistol firing a bullet at a person's head, above which were dots representing splattered blood." The student accompanied the cartoon with the caption "Kill Mr. VanderMolen," the author's English teacher at the time. The school suspended the student for a semester. An evaluating psychologist found that the student "had no violent intent, posed no actual threat, and made the icon as a joke."[114]

One way in which the court could have validated the student's suspension was to hold that the cartoon was a "true threat." Genuine threats are a category of speech that the courts have long help not to be protected by the First Amendment. No person who makes a true threat against another, regardless

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[108] See Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 Pepperdine L Rev 427 (2009) ("At the very moment that our economic and social lives are increasingly dominated by information technology and information flows, the First Amendment seems increasingly irrelevant to the key free speech battles of the future.").

[109] Tinker v. Des Moines Community School Board, 393 U.S. 503, 514 (1969), quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir.1966).

[110] Id.

[111] *The Myths About Bullying: Secretary Arne Duncan's Remarks at the Bullying Prevention Summit*, Aug. 11, 2010, *available at* http://www.ed.gov/news/speeches/myths-about-bullying-secretary-arne-duncans-remarks-bullying-prevention-summit.

[112] Karly Zande, *When the School Bully Attacks in the Living Room: Using* Tinker *to Regulate Off-Campus Student Cyberbullying*, 13 Barry L.Rev. 104, 134 (Fall 2009).

[113] Wisniewski v. Board of Educ. of Weedsport Cent. School Dist., 494 F.3d 34, 35 (2d Cir. 2007).

[114] Id. at 36.

whether they are that person's student or attend the school where he works, is protected.[115] The problem, however, was the possibility that the youngster's threat was not "true": that, however, crass and tasteless, it was meant entirely as a "joke."

The Court of Appeals with jurisdiction over New York therefore said that it did not need to decide if the threat was "true." *Tinker*, it said, permitted the school to suspend the child regardless whether the threat was true. There was "a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school.'"[116] That the IM was composed and transmitted "away from school property" did not, in the court's view, lessen the applicability of *Tinker*.[117] "[O]ff-campus conduct," said the court, "can create a foreseeable risk of substantial disruption within a school" and therefore fall within the ambit of *Tinker*.[118]

A somewhat similar case arose in 2006, in a high school in Hannibal, Missouri, north of St. Louis. A tenth grader, in the aftermath of a breakup, was at home exchanging instant messages with a friend. The spurned sophomore messaged that he would not kill the object of his affections: "i still like her so I would say let her live.'' His interlocutor followed up: "well who would you shoot then lol."[119] The student then listed "a particular boy along with his older brother and some individual members of groups he did not like, namely 'midget[s],' 'fags,' and 'negro bitches.'" The interlocutor later became concerned and turned transcripts of the messages over to school authorities. The school ultimately decided to suspend the student, first for ten days but ultimately for the balance of the school year.[120]

The relevant court of appeals in this case did find these messages to be "true threats," and therefore unlawful wherever and whenever they were made.[121] But, like the court in New York, the court also concluded that, independent of whether the statements were threats, they could be punished because it reasonably could be foreseen that they would reach school and materially disrupt school operations. In this case, parents and children had experienced acute anxiety when the existence of the violence-laden messages became known, and repeatedly demanded information and access from school officials who then had to deal with the situation.[122] As in New York, the disruption that was reasonably anticipated would occur in school; therefore the school could act even though the speech itself occurred outside of school.

These two cases, and cases in lower courts like them, essentially ignore *Tinker*'s tripartite geography. These cases do not read *Tinker* as being about space at all. Protecting schools from disruption and protecting other students' rights is what matters. The only reason that *Tinker*'s holding has a geographic dimension is that, in traditional schools, speech outside of school was unlikely to disrupt school or affect

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[115] D.J.M v. Hannibal Public School District, 647 F.3d 754, 762-64 (8th Cir. 2011).

[116] Wisniewski v. Board of Educ. of Weedsport Cent. School Dist., 494 F.3d 34, 38–39 (2d Cir. 2007)(quoting Tinker v. Des Moines Community School Board, 393 U.S. 503, 733 (1969).

[117] Wisniewski v. Board of Educ. of Weedsport Cent. School Dist., 494 F.3d 34, 39 (2d Cir 2007).

[118] Id.

[119] D.J.M v. Hannibal Public School District, 647 F.3d 754, 758 (8th Cir. 2011).

[120] Id. at 759.

[121] Id. at 760.

[122] Id. at 766.

the rights of others. That accident of technology falls away as anachronistic when the law is applied to social media platforms to which so much of student life has relocated.[123]

Indeed, the Missouri court cited in support of this conclusion *Tinker*'s own statement that its rule applied to speech "in class or out of it."[124] To the appeals court, this meant the same thing as "in school or out of it." Language that in *Tinker* itself is clearly meant to distinguish speech in-class from *Tinker*'s third zone of speech not in class, but still in school, was repurposed to describe student speech that occurred anywhere and everywhere.[125]

Other courts of appeal have taken *Tinker*'s geography more seriously. Nevertheless, the predominant conclusion in those courts has been the same as the ones in New York and Missouri. For example, in 2011, the federal appeals court with jurisdiction in West Virginia reviewed the case of a student who used the platform MySpace to allege that a fellow student had herpes.[126] The student posted only from home. A small cybermob of other students then piled on around that claim. They too posted from home. The school suspended the student who originated the posts for ten days and excluded her from social activities in school thereafter.

The student objected to this sanction, because "her conduct took place at home after school and … was therefore subject to the full protection of the First Amendment."[127] The reviewing court wrote that the question of "where" Internet speech occurs is a "metaphysical" one.[128] Whatever limits might exist on schools' ability to discipline virtual speech uttered off-campus, the court said, the school is well within its rights to discipline a student for online speech addressed to other students in the same school about a third student in that school. Such speech has more than a sufficient "nexus" to the school's "pedagogical interests."[129]

The only court of appeals in the United States that has addressed this "metaphysical" question directly is the Court of Appeals for the Third Circuit. The Third Circuit hears cases that originate in Delaware, New Jersey, and Pennsylvania. In 2011, it heard two (separate) Pennsylvania cases in which students used MySpace to create profiles of their school principals. In both cases, the fake profiles purported to have been created by the principal in question. Both were puerile, vulgar, and full of preposterous insults. In the more egregious of the two cases, the profile (created by a student with the initials J.S.) inundated its reader with profanity, insinuated that the principal was a pedophile, and insulted the principal's family.

Both profiles were created off of school property and out of school time. In both cases, the students argued after the fact that their intent was humorous.[130] In the *J.S.* case, the court concluded that "[t]hough

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[123] Ari Ezra Waldman, *Hostile Educational Environments*, 71 Maryland Law Review, 706, 732 (2012).

[124] Tinker v. Des Moines Community School Board, 393 U.S. 503, 513 (1969)(cited in D.J.M v. Hannibal Public School District, 647 F.3d 754, 765 (8th Cir. 2011)).

[125] Tinker v. Des Moines Community School Board, 393 U.S. 503, 513 (1969).

[126] Kowalski v. Berkeley County Schools, 652 F.3d 565, 567 (4th Cir. 2011).

[127] Id. at 573.

[128] Id.

[129] Id.

[130] Layshock v. Hermitage School Dist., 650 F.3d 205, 207 (3rd Cir. 2011) (en banc); J.S. Ex. Rel Snyder v. Blue Mountain School District 650 F.3d 915, 939 (3rd Cir. 2011) (en banc).

disturbing, the record indicates that the profile was so outrageous that no one took its content seriously."[131]

The two cases were decided using a procedure called *en banc,* whereby the entire court, rather than the usual panel of three judges, decided the cases. All the judges were able to agree that "*Tinker*'s 'schoolhouse gate' is not constructed solely of the bricks and mortar surrounding the school yard." In the BONG HiTS 4 JESUS case, they noted, the Supreme Court extended the idea of "in school" to an off-campus school event. All the judges also agreed that it "would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities." Here the judges' leading example was *Fraser*: a school can discipline a student for lewd or vulgar speech on campus, but not off.[132]

The judges could not agree, however, on which side of the line *Tinker* falls. Can its test — that schools may discipline otherwise protected speech if it can reasonably be anticipated to disrupt school operations or to affect the rights of others — be applied to speech that originates off campus? Five judges joined opinions favored the answer *no*; another five judges said *yes.*

The judges who thought *Tinker* should apply only in school emphasized that, when off-campus, a student's speech should be as protected as those of adults (or of children not enrolled in that school), unless the speaker intentionally directs his speech so that it will be heard in school.[133] *Tinker*, wrote Judge D. Brooks Smith writes, "is expressly grounded in 'the special characteristics of the school environment.'"[134] Outside of school, those characteristics are absent, so students, who do not shed their rights by going to school, have the same expressive rights as everyone else.

The judges who would apply *Tinker* to all speech emphasized that the law should protect schools from disruption. This was the point of *Tinker*, in their view, and on their reading the place where the disruption originates is not relevant, so long as the disruption is felt in school.[135] This position would effectively treat all speech on social media that leaves a permanent record as speech "in school."

Judge Kent Jordan, joined by Judge Thomas Vanaskie, offered an even stronger version of why *Tinker* should apply to all student speech:

> We cannot sidestep the central tension between good order and expressive rights by leaning on property lines. With the tools of modern technology, a student could, with malice aforethought, engineer egregiously disruptive events and, if the trouble-maker were savvy enough to tweet the organizing communications from his or her cellphone while standing one foot outside school property, the school administrators might succeed in heading off the actual disruption in the building but would be left powerless to discipline the student. Perhaps all of us participating in these *en banc* decisions would agree on that being problematic. It is, after all, a given that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," and no one supposes that the rule would be different if the man were

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[131] J.S. Ex. Rel Snyder v. Blue Mountain School District 650 F.3d 915, 921 (3rd Cir. 2011) (en banc).

[132] Id. at 932.

[133] Id. at 940 (Smith, J., concurring).

[134] Id. at 937 (3rd Cir. 2011) (quoting Tinker v. Des Moines Community School Board, 393 U.S. 503, 506 (1969)).

[135] Id. at 945–47 (Fisher, J., dissenting).

> standing outside the theater, shouting in. Thus it is hard to see how words that may cause pandemonium in a public school would be protected by the First Amendment simply because technology now allows the timing and distribution of a shout to be controlled by someone beyond the campus boundary.[136]

(The Third Circuit court itself avoiding taking an authoritative position on this issue. It concluded that the profile in one of its cases could not have been expected to disrupt school operations, so that if *Tinker* did apply to off-campus speech, its test would not be met.[137] Certainly, in my view, any effects would fall far short of "pandemonium." In the other, the court held that the district had decided not to argue its case based upon *Tinker,* so the issue did not need to be decided.)

In the end, legal rules that permit school regulation of nearly all virtual speech — because all virtual speech could plausibly, eventually, be heard on campus — are a mistake. They are unsatisfactory for three reasons.

Judge Jordan is absolutely right that social media makes it problematic to "lean on property lines." But it is absolutely wrong therefore to conclude that property lines do not matter in *Tinker*. *Tinker* drew lines in space in an effort to make sure that students both retained their rights to free expression and that schools could run well. Judge Jordan, and the courts that have endorsed similar positions to his, have concluded that because *Tinker*'s particular lines are being displaced by technology, line-drawing in general can be given up. These courts then elevate avoiding disruption above expression, always. This is not true to the First Amendment as *Tinker* understands it. The statement that constitutional rights can be limited within "the schoolhouse gate" but are not "shed" there should be understood to demand that there must be some area *outside* of those gates, however defined, where one has full rights, regardless whether one is a student.[138] Otherwise students have, because of their status as students, fewer rights than others. That the exercise of rights can upset school communities and other individuals should not be, without more, sufficient to subject them to pervasive, constant regulation.

Second, the cases are not workable on their own terms. So long as virtual speech continues to be tied to a school community defined by the old, bricks-and-mortar technology, its pervasive regulation by schools is possible. In the kinds of cases the courts have dealt with so far, where speakers, listeners, and targets share a physical school, it is plausible, even if undesirable, to extent *Tinker* to all student speech. This rule can work because speech on social media merely extends an existing physical community into a supplemental, virtual realm.[139] But if there is a fuller virtualization of student social life, so that not only the speech itself but the underlying communities of speakers and listeners are virtual, the problem is very different. What happens when virtual speech crosses school lines? What happens when virtual school lines are too blurry to discern? These can be thought of as questions of jurisdiction or authority.

The final, more basic, critique of the student cyberspeech cases is that they attend to *Tinker* as a legal regime but not at all as a pedagogical one. Judge Smith compares the school to the crowded theater. But a school is *not* a theater. *Tinker* means to create a pedagogical regime as well as a legal one. This is a

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[136] Layshock v. Hermitage School Dist., 650 F.3d 205, 221–22 (3rd Cir. 2011) (en banc) (internal citation omitted).

[137] J.S. Ex. Rel Snyder v. Blue Mountain School District, 650 F.3d 915, 931 (3rd Cir. 2011) (en banc).

[138] Tinker v. Des Moines Community School Board, 393 U.S. 503, 506 (1969)

[139] Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 BU L Rev1435, 1445 (2011).

problem of *pedagogy:* the cases do not think hard enough about the impact of virtuality on the teaching and learning of free expression.

There is more to be said about the logistical and pedagogical issues; I will treat each in turn.

SCHOOL JURISDICTION IN A VIRTUAL WORLD

Return to the case where a student was suspended for directing an obscene epithet at his teacher in a mall parking lot on a Sunday. I described this case above to show that, even without criminal due process or a civil lawsuit, a school can punish a student for unlawful speech outside of school. But it is important that the case involved a student using "fighting words" to provoke a teacher in *his own* school. In suspending the student who picked a fight at the mall, the school asserted a kind of *jurisdiction* over the incident. The claim that the school has authority to act in this matter is based upon its being a dispute between a student and a teacher in that school. But it is not so clear, nor should it be, that a school could punish a student for such an incident off school premises, and not occur during school hours, if it involved a stranger to the school.

Similar assumptions underlie the internet speech cases. The court in West Virginia that confirmed the suspension of a student who spurred a group of classmates virtually to harass another student on MySpace admitted that all the MySpace comments had all been made from students' homes. Nevertheless, the court of appeals said, *Tinker* applied. This conclusions was made much easier because the speaker, her audience, and her target were all students at the same school. That commonality gave the school quasi-jurisdiction.

Common membership in a real-world community unites every one of the virtual speech cases that have been litigated in the courts of appeals to date. The profiles of principals, the caricatures of teachers, the threats to classmates, all occurred within the context of a bricks-and-mortar school community. Meg's attacks on Sandy, or her vulgar parody of Principal Jenkins, are attacks on *her* classmates and *her* principal. Principal Jenkins, when he restricts Meg's speech on the subject of his inadequacies, is restricting the speech of one of *his* students. These people's baseline interrelationships and a major portion of their quotidian interactions are established by their common membership in the physical school.

That real-space connection won't last for long. To the extent that courts permit schools to regulate and punish student speech no matter where it is expressed, they embrace a status-based form of regulation. Students face school discipline for their speech anywhere and at any time not because of where they are or when they speak, but because they are students. But "being a student" is imprecise. What exactly is the relevant status? Is it that a child attends *some particular* public school? A public school within a larger jurisdiction? Some public school of any kind, anywhere? Any school, whether public, private, or home?

This is a practical question. Consider again our account of Meg and Charles, complaining online to one another or to the world about Principal Jenkins or their classmate Sandy. Their school, as we have seen, will often successfully be able to assert jurisdiction over that case. But we have not yet seen the case, for example, where Meg and Wallace, "savvy" students in Judge Jordan's sense, collude across school lines to disseminate their message. Meg is Wallace's friend but the two attend different public schools. Meg could, perhaps at Wallace's informal instigation, create a vulgar profile of Wallace's principal. Or she could insult one of Wallace's classmates. That speech could then be heard in, and potentially disrupt, Wallace's school. In a fully bricks-and-mortar world, it is hard to see how Meg's speech could have

nearly as much impact upon Wallace's school as Wallace's would; nobody there knows Meg. But even in our existing social-media world it is easy to see both how Wallace could help engineer such speech and, with his help, that it could spill out into Wallace's school and have impact there.

But how could Wallace's school discipline Meg? She is not under their authority. *Tinker* allows its exception to the First Amendment based upon the proposition that "school officials do not possess absolute authority over *their* students."[140] They don't have authority *at all* over students who are not "theirs." Even Justice Thomas's theory that schools are *in loco parentis* to their students would not permit to restrict speech about that school by all students, everywhere; they play the role of parents with respect only to the students under their control. They don't have jurisdiction over others. Moreover there are few "punishments" available to them. Wallace's school cannot control Meg's school's decisions about who can run for student council, or who can be valedictorian, or who can participate in interschool sports. Nor are they in a position to suspend Meg or give her detention.

Could *Meg's* school impose such sanctions? Again it is hard to see how, given that Meg has violated no generally applicable law.[141] *Tinker* is willing to restrict student speech outside of class because of its potential materially to disrupt school operations. Meg's speech has no impact in Meg's school. Nobody there cares about Wallace's principal, Wallace's classmates, or Wallace himself.

Nor does the possibility that the school district or the state board of education could be the right locus of control offer much help. The whole goal here is to allow schools to restrict student speech on a contextualized basis, even when it falls short of a general standard of illegality or tortiousness, and without the procedures demanded by the legalized and bureaucratized processes of state power. Moreover, Meg might be a student in a different school district. She might be in a private or home school. She even, as some of the judges in the Third Circuit Court of Appeals cyberbullying case noted, might be an adult.[142]

Under old technological reality, lapses in jurisdiction because of these kinds of variations in distance and circumstance might have been thought to arise only rarely, and therefore not to need much consideration. Such variations become commonplace with the rise of virtual media. When unbundled students flit from "school" to "school," and "in" and "out" of school at will, this kind of jurisdictional variation not only will be frequently unfair in application but will also be unable to address the problem that is designed to solve.

Such problems become progressively more vexing as virtuality moves past the issue of asynchronicity and begins, through unbundling, to undermine not only the meaning of "in school" but of "public school" itself. For example, students may soon often bundle multiple public and non-public providers of virtual education, each creating an idiosyncratic collage of educational activities. As noted above, private providers can limit student speech by contract, on or off-campus, more or less as they like.[143] This is one of the ways that private and public providers are distinguished. But as students' education comes increasingly to meld the two, they risk becoming subject to multiple and conflicting regimes of speech control. Private forms of regulation may come to trump public ones.

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[140] Tinker v. Des Moines Community School Board, 393 U.S. 503, 511 (1969) (emphasis added).

[141] It does seem plausible that schools could punish students for illegal acts performed anywhere.

[142] J.S. ex rel. Snyder v. Blue Mountain School District, 650 F.3d 915, 940 (2011) (Smith, J., concurring).

[143] James A. Rapp, Education Law, Ch.9 no. 3 §2(b)(Matthew Bender & Co. 2015)

Finally, public versus private aside, virtuality works havoc with the meaning of the term "school" itself. If each student's "school" is different because each has a different package of courses and classmates, if classmates rarely or never meet face to face, and if schoolmates can interact at any time and from any place, what does it mean to disrupt "school" activities? The cloud has no in-school-but-out-of-class analogue, whose population is defined by a school's catchment area, whose physical boundaries are those of the school grounds, and whose authority ends with the end of the school day. There are no school grounds and no school day. Students not taking the same classes do not obviously go to school "together."

Virtuality undermines our ability clearly to define a locus of intermediate authority over children's speech that can exert public control in the interstices between the public law and individual conscience. All of the available options seem incoherent. Can only students not enrolled in a particular virtual class complain on social media about that class, or make vulgar fun of its teacher? Can students in that class read their words? Can students who verbally gang up on a hapless victim, in ways not reachable by the criminal or tort law, be punished if and only if they are co-enrolled with that victim in some online class?

None of this will change the fact that young people, trying their rights on for size, will not always exercise them responsibly. Sometimes they will be contemptuous of authority, sometime vulgar, sometimes mean, sometimes vicious. But the alternatives for legal regulation are sorely depleted without the authority of a single, discrete "school."

THE PEDAGOGY OF SPEECH REGULATION

Most lawyers and educators understand *Tinker*, along with subsequent cases that limited its scope, as civil rights cases. They address the extent to which students' constitutional, First Amendment rights can be limited when they are present in school. *Tinker's* basic principle is that students retain their rights in school; rights do not stop at the schoolhouse gate. At most, expressive rights can be limited so as to allow schools to operate smoothly.

But *Tinker* is more than a rights case. *Tinker* reaches its conclusions about rights based on a particular pedagogical theory of civic education. The three-zone geography of *Tinker* is *not* just about balancing rights against the need for school to operate. Rather, *Tinker*'s three zones instantiate and constitutionalize the idea that school communities, both political and social, are a critical site for democratic education. Participation in these communities is itself a central experience of education. Democracy is enacted in the miniature polis of the school in order to prepare students to function in the larger polity and social world. In the context of speech, the third zone of *Tinker* offers students a way genuinely to practice the right free expression, while doing so still under school supervision.

Tinker relies for this democratic pedagogy upon an earlier case, *West Virginia State Board of Education v. Barnette*, which the Supreme Court decided in 1949.[144] *Barnette* involved a decision by the West Virginia Board of Education to require all students to salute the flag during the recital of the Pledge of Allegiance.[145] (Students were required to use a "stiff-arm salute" that was criticized at the time as too closely resembling the salute associated with the Nazi Party.[146])

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[144] West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 637 (1943); extended quotation is at Tinker v. Des Moines Community School Board, 393 U.S. 503, 507 (1969).

[145] West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 628–29 (1943).

[146] Id. at 628 & n.3.

Students who were Jehovah's Witnesses refused to salute. They felt themselves bound by their religious view that the biblical prohibition against service to any "graven image" includes saluting the flag. *Barnette* held that schools could not force students to participate in the flag salute ritual if to do so would violate the students' religious beliefs. The decision was particularly remarkable and controversial when it was delivered, because it overturned a decision the Court had issued in 1940, a scant three years earlier, in a case called *Minersville School District v. Gobitis.*[147] The *Gobitis/Barnette* cases are about religious exercise, but they are also the first Supreme Court cases to address a public school's obligations to allow student expression of which it disapproves.[148]

Both *Gobitis* and *Barnette* are explicitly pedagogical. They each rest upon the view that a central purpose of the public school is democratic education. The earlier of the two, *Gobitis,* permitted schools to compel Jehovah's Witnesses to salute the flag as a case of the principle that laws with a neutral purpose, not intended to disadvantage any particular religion, can be enforced even if they burden some particular religious beliefs. In this instance, Justice Frankfurter wrote, the neutral purpose was a vital one: "training children in patriotic impulses."[149] Just as children could be compelled to study academic subjects, they could be compelled to engage in patriotic exercise. The question of how to nurture patriotism in children "at the formative period in the development of citizenship" was a difficult one. Given the gravity of the mission, judges should defer to schools' expert judgment with respect to this issue. At stake, after all, was the welfare of the entire polity. "A society … may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty."[150]

Barnette, reversing *Gobitis* after only a short period (and the replacement of a few Justices on the Court), did not agree with *Gobitis* about much. But it agreed that it mattered that the flag-salute issue arose in school. However, the new Court's theory of education was quite different. *Gobitis* was interested in ends — the inculcation of patriotic feeling. Means were to be left to the school. *Barnette* agreed that the goal of the schools, educating good citizens, was paramount. But, in contrast to *Gobitis, Barnette* takes the view that this goal determines the means.

In 1928, arguing that evidence that the government had procured illegally should be inadmissible in criminal trials, Justice Brandeis famously wrote, "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."[151] *Barnette* recognizes that this principle reaches its apotheosis inside government schools whose purpose is to teach. "That [schools] are educating the young for citizenship," the *Barnette* Court wrote, "is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach you to discount the important principles of our government as mere platitudes."[152] The purpose of schools is to teach students what it means to have the rights and duties of a free citizen; the only way to do that is for schools to treat students as bearers of those rights. *Barnette* does view *Gobitis* as too

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[147] Minersville School District v. Gobitis, 310 U.S. 586 (1940).

[148] Josie Foehrenbach Brown, *Inside Voices: Protecting the Student-Critic in Public School,* 62 American University L. Rev.253, 269 (2012).

[149] Minersville School District v. Gobitis, 310 U.S. 586, 598 (1940).

[150] Id.

[151] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

[152] West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 637 (1943).

lackadaisical about First Amendment rights, and wrong to think that civic unity can ever truly be instilled through coercion.[153] But it identifies an additional wrongness: if schools trumpet the Bill of Rights but fail to honor it, students will spot their teachers' platitudinous hypocrisy.[154]

Tinker is a brilliant instantiation of the *Barnette* principle that schools should protect students' constitutional rights as a way of, and for the reason that, we are "educating the young for citizenship."[155] *Tinker* quotes the same passage from *Barnette,* about citizenship and platitudes, that I quote above.[156] It embraces *Barnette*'s view that a school that hopes to teach students effectively about free speech must respect their speech rights. Among the "activities" to "which the schools are dedicated is to accommodate … personal intercommunication among the students," says *Tinker.* "This is not only an inevitable part of the process of attending school; it is also an important part of the educational process."[157]

Tinker then seizes on a feature of twentieth-century school technology to make that principle a reality. Its offers its third zone, speech in-school-but-not-in-class, as the one in which the sort of civic education contemplated by *Barnette* can be accomplished. Speech in that arena cannot be barred; that would be to treat the First Amendment as a "platitude." Still, the parts of school that are not active classrooms remain a site for education. Unlike spaces in class, the right to speak is protected. Still, these are not spaces like those outside of school, where students may practice their rights without educators' oversight. In school but out of class, speech is like a laboratory or an internship, a site for learning by doing: for practicing, for improving, for succeeding, and sometimes for failing.

As students practice self-expression in cafeterias, hallways, and ballfields, they are engaged in the "educational process." Schools can and should seize upon that expression as a teaching moment.[158] If they speak in unproductive ways, school officials are in a position to say something about that. If the speech is so unproductive as to interfere with school activities or the rights of others, teachers can not only respond to speech but regulate its boundaries and punish those who violate them. But schools cannot overregulate or overpunish, lest students lose their right to learn by doing. This is an experiential, democratic pedagogy. Young people learn what it means to exercise a right of free expression in a democracy by practice. They learn their rights are protected. They also learn that speech is powerful, that it can interfere with important institutions, that it can harm the rights of others. When that interference or harm reaches a certain level, state reaction is allowed.

Indeed, this is the argument the Supreme Court relies upon for its decision in *Fraser* that public schools may regulate even nondisruptive lewd, sexual speech. "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class," said the Court. "[S]chools must teach by example the shared values of a civilized social order. Consciously or otherwise,

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[153] Id. at 639–41.

[154] Id. at 637.

[155] Id.

[156] Tinker v. Des Moines Community School Board, 393 U.S. 503, 507 (1969).

[157] Id. at 512.

[158] *See* Zamecnik v. Indian Prairie School District No. 204, 636 F.3d 874, 880 (7th Cir. 2011) (online responses to a student's plans to wear a "Be Happy, Not Gay" discuss both student and faculty reactions).

teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class."[159]

The problem with virtuality and speech, as we have seen, is that it collapses the *Tinker* geography. Because *Tinker* rests on its identification of a particular pedagogical space in which expression must be taught experientially, it is vitiated by new technology that lacks such spaces. The cyberspeech cases suggest that virtual schools may well choose to abandon *Tinker*'s description of physical schools as places not "confined to the supervised and ordained discussion which takes place in the classroom."[160]

But to do so is to abandon the pedagogical imperative developed by *Barnette* and instantiated by *Tinker.* Some commentators have recognized this and celebrate it. "[S]chools might be better off," writes R. George Wright, "without *Tinker* and the *Tinker* disruption standard, focusing instead on better fulfilling one or more of the consensually vital functions and basic purposes of public schools, even at some cost to student speech rights." Wright finds it "implausible to imagine that anything like the *Tinker* rule, modified or unmodified, is necessary for minimal civil competence or for an increase in the number of altruistic, community-minded, thoughtful, high information voters."[161] To Wright, the cultivation of civility and civic capacity outweigh any benefits that might flow from student expression.

What this analysis misses is that *constitutional* values are different from other desiderata. *Barnette* and *Tinker* privilege expression in their pedagogy because students have constitutional rights that should not be brushed aside. Respecting those rights even at substantial cost — including the costs Wright notes — teaches what it means to have such rights. For this reason, I side with those who think the *Barnette/Tinker* pedagogy remains as vital as ever.[162] To be sure, students should not have fewer rights than other persons to express themselves freely at home. But students need to be taught about their rights and how to exercise them well. This can't be taught only by talking *about* rights; educators must find a way to teach students about the importance of free expression by letting them practice it under supervision. The little polis of the school is a critical venue. It is where Meg and Sandy, objectors to the regime of Principal Jenkins, have their chance to practice criticizing authority. They do so in a community that includes those whose duty it is to teach them about how to criticize authority. Their right to speak is both honored and subject to the teaching of democracy. That right and that subject are as vital in a virtual school as in a physical one.

The challenge, then, is to identify what new arenas virtuality might offer that could function as learning-by-doing environments for free speech under pedagogical supervision. This, it seems fair to say, will be a particularly tall order.

A further problem is that virtuality does not just change where and how speech occurs; it also changes the substantive content of what schools should teach students about free expression. The developments that upsets the *Tinker*'s geography, that virtual schooling takes place in an aterritorial, asynchronous, multitasked, unbundled world, are also shaping the entirety of a new world of expression, one in which students will live for the rest of their lives. How can we teach students be citizens in that kind of a world

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[159] Bethel School District v. Fraser, 478 U.S. 675, 683 (1986).

[160] Tinker v. Des Moines Community School Board, 393 U.S. 503, 512 (1969).

[161] R. George Wright, *Post* Tinker, 10 Stanford Journal Of Civil Rights & Civil Liberties 1, 16 (2014).

[162] Josie Foehrenbach Brown, *Inside Voices: Protecting the Student-Critic in Public School*, 62 American University L. Rev.253, 263 (2012).

who use their right to free expression vigorously, productively, and fairly? How can we teach them not to bully, and protect the bullied? How can we discourage their vulgarity while still ensuring that they understand that it is protected and worth protecting? Fair, just, effective expression is a different matter in a world of networked virtual spaces than in a world of print and broadcasting.

A second, equally large concern has to do with the track record of expression in new virtual spaces that are still evolving. Distance, asynchronicity, unbundling, and anonymity all seem to have contributed to a problematic culture of expression. It is characterized, many have argued, by movement away from responsible expression and reasoned argument about ideas and towards brevity, emotionalism, irresponsibility, insult, and the *ad hominem*. Defenses of student speech rights often cast student expression in the high-minded mode of Mary Beth Tinker and her armbands; the reality is often closer to the puerile lewdness of Matthew Fraser or the raw nastiness of the student J.S. Nevertheless, making room for the latter is the only way to neutrally create space for a wide range of people to give expression to their ideas and opinions. The same might be said for the internet as a whole.

Ultimately, it is very hard to see what might replace the zone of in-school-but-not-in-class as the situs for learning-by-doing student expression in a system of virtual education — especially since the technology is still changing rapidly. When *Tinker* announced its third zone, that zone already existed in the spaces necessary to operate a bricks-and-mortar school, such as hallways and cafeterias. That is not the situation we face with virtual schooling. We know that virtual fora do create communities, often strong and vibrant ones. But there is no technological or social norm for virtual schools that lets us understand thoroughly how such communities will look or what forces will operate within them.

However, we do not have, as *Tinker* had, the luxury of waiting for technology to mature. The priorities of democratic education need to influence the development of technology. Moreover, the cyberbullying and cyberinsult cases suggest that, absent a concerted effort, educational policymakers and legal authority may be content to default to a position of broad authoritarianism in which learning by doing — coming to understand one's rights by practicing their exercise — falls by the wayside.

The key difference between the new technology and the old, it seems, is that where the old technology created educative spaces for learning about rights by doing in spaces necessary for school operations, new technology demands that we create such spaces with intentionality. When school technology meant that formal book learning required us to establish the school as a miniature community of students and adults inside of a state-owned, state-run school building, this country decided that *democratic* schooling meant enacting democracy, of a limited type, in the miniature polis so created. New technologies mean that formal learning is decreasingly a set-aside activity, corresponding to a physical location, a set schedule, and defined by geographical constraints. Instead, schooling and learning will be composed of a set of discrete activities whose tendrils enter and exit individual students' lives everywhere, at any time of day or night, with no set pattern. As technological innovation transforms learning, we need to make a new set of decisions about what democratic education means and how to achieve it.

The shape of virtual education strongly suggests that the only way possible to advance the goals of democratic education, including learning by doing, is through positive regulation.[163] The maxim that

[163] Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 Pepperdine L Rev 427 (2009) ("The most important decisions affecting the future of freedom of speech will not occur in constitutional law; they will be decisions about technological design, legislative and administrative regulations, the formation of new business models, and the collective activities of end-users.")

computer code is law has enormous application to this problem.[164] In order to be licensed to provide virtual education, providers (public and private) have to be required to make room for democratic participation and the exercise of rights, within appropriate limits. What that room would have to look like, and what kinds of limits would be appropriate, will be heavily dependent on what evolving platforms of virtual education will look like, something unknown at this writing. But the test should be *Barnette*'s. Does the design of virtual education encourage "scrupulous protection of Constitutional freedoms of the individual"? Does it "strangle the free mind at its source" or "teach youth to discount important principles of our government as mere platitudes"?[165] Schools' code must make sure not to do this. Rules designed to guarantee that code does not do this will be the analogues to *Tinker* in the virtual era.

Ultimately, it is possible that a *Tinker* rule for the future may be able to describe and make normative the *Barnette* principles. Ironically, the likelihood that unbundled virtual education will follow a consumer model may, in the medium term, assist in this regard. Government contracts can insist that fora for community speech be created and that they function, more or less, like a *Tinker* third zone. Moreover, if families choose unbundled educational providers, and combine them one with the other, systems for supervised but free interstudent communication have to be acceptable to the market as well as to society. This imposes a constraint upon regulators and providers alike: they can't regulate speech in a way students, as a class, will not accept. And this, after all, is what *Tinker* does as well: constrain the regulators of speech and the providers of fora for that speech. What is different in the virtual world is that these will not necessarily be the same groups, especially in the short term.

Such a model could generate virtual school platforms that focus on features of interstudent communication important both to student-consumers and society. That communication should be easy. It should be free. It should be effective, that is, networked across students and interactive with as many major functions of the school as practical. It should involve adults as well as children. These adults should be in a position to interact, to supervise, to teach, and, occasionally, to sanction inappropriate uses. And, in doing all this, it should offer students a *desirable* forum for communication with classmates or schoolmates, one that they will prefer to, say, commercial social media.

BACK TO *HAZELWOOD*

As a formal matter, the pedagogy of *Barnette* and *Tinker* pedagogy is not required by the Constitution. The cases merely limit the scope of school regulation of whatever speech occurs in the third *Tinker* zone. *Tinker* is the law of speech in school corridors, cafeterias, and ballfields, when those things exist; it imposes no mandate to create them. Educators moved by the *Barnette/Tinker* theory of educating for citizenship might both view the sort of positive regulation I propose here, to create virtual analogues of regulated student free-speech zones, as a good idea, and conclude at the same time that the Constitution does not, as currently understood, require them.

As a matter of implementation, however, a bricks-and-mortar school can hardly function without hallways, lunchrooms, and grounds. *Tinker* therefore has the effect of mandating some zones of free expression for bricks-and-mortar students. It is nearly as hard, again as a matter of implementation, to imagine a virtual school that does not provide technology whereby students can communicate with one another. Michael K. Barbour and Cory Plough describe the reasons that the active creation of social

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[164] Lawrence Lessig, Code: And Other Laws of Cyberspace (2009).

[165] West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 637 (1943).

networking spaces for students is certain to accompany the development of cyberschools. Because children's learning is a "social process," socialization of children is a key educational goal, and one which cannot be met in the formal settings of cyberclassrooms.[166]

Digital analogues for non-classroom social spaces for student interaction are therefore important to effective education, especially students do not meet physically.[167] Such spaces are also necessary to allow students to speak with teachers and to collaborate with classmates on schoolwork outside of class.[168] And they create a "more profound sense of connection to the school, which could lead to greater motivation and academic achievement."[169]

Existing platforms for digital learning, therefore, very often incorporate some technology that facilitates interstudent communication. These platforms are customizable; each school can approach the question of how to facilitate interstudent communication differently. The platforms offer functionality as real-time chat spaces, as venues for student blogs and profiles, and as social media.[170] Schools can operate multiple channels simultaneously and control their membership, restricting it to particular classes, turning access off or on, and allowing different levels of access to guests and invitees.[171]

How will these spaces, once created, be understood legally? One obvious analogy is to *Tinker*'s third zone. Indeed, some online schools establish areas called "cafeterias" for students to converse socially and discuss issues not necessarily related to their classes.[172] Such an analogy suggests that schools would be required to limit speech regulation in those spaces. If students in a public virtual-school's chatroom spoke in a way that could not be expected to disrupt school operations or interfere with the rights of others — say, by appending the image of a black armband to each of their comments — they could not be prevented from doing so.

But this analogy is not a given. Consider the case, described above, of *Hazelwood School District v. Kuhlmeier*, which involved school censorship of a student newspaper. The newspaper was produced by students in a journalism class; the principal blocked publication of an issue that contained what he viewed as inappropriate stories concerning teen pregnancy and divorce.[173] Although the newspaper was produced in class, it was the publication and distribution outside of class that concerned school authorities. It was also difficult to argue that the newspaper would have created substantial disruption of

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[166] Michael K. Barbour & Cory Plough, *Odyssey of the Mind: Social Networking in Cyberschool*, The International Review of Research in Open and Distance Learning Vol 13 Iss. 3 (June 2012) at 3–4.

[167] Id. at 1–4.

[168] Ruth E. Brown, *The Process of Community-Building in Distance Learning*, JLAN Vol 5 Iss 2 Sept (2001) P. 20-21

[169] Michael K. Barbour & Cory Plough, *Odyssey of the Mind: Social Networking in Cyberschool*, The International Review of Research in Open and Distance Learning Vol 13 Iss. 3 (June 2012) p.10.

[170] Roberta Hammett, *'Tech FTW!!! Ninth Graders,* Romeo and Juliet, *and Digital Technologies*, Language and Literacy, Vol. 15, Iss. 1, Special Issue (2013), p. 9

[171] RJ Stangherlin, Using Ning as a School Social Network, Discovery Education Blog (Feb 2 2010) available at http://blog.discoveryeducation.com/blog/2010/022/22/using-ning-as-a-school-social-network-dianne-krause/

[172] Eds. Michael Grahame Moore, William G. Anderson, Handbook of Distance Education, Ch. 7 Otto Peters, Learning With New Media in Distance Education, p.96. (Other areas of virtual schools might be labeled as "shop," "office," or "library.").

[173] Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 262-63 (1988).

school operations, as *Tinker* requires for the censorship of student speech in the third zone. *Tinker* seemed to require that the issue be allowed to go forward.

Nevertheless, the Court held, with little apparent difficulty, that the censorship was appropriate. The school newspaper was a school-sponsored activity; the school functioned as publisher. As sponsor, teacher, and publisher, the Court found it well within the rights of the school to censor the stories; a school would be within its rights, the Court held, to refuse to publish writing that was "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[174] All that is required to legitimize official regulation of such school-sponsored speech is that censorship be "reasonably related to legitimate pedagogical concerns."[175] The "closer a student's expression comes to school-sponsored speech," an appellate court has concluded, "the less likely the First Amendment protects it."[176]

Hazelwood is hard to disagree with as a matter of law, although one might strongly disagree with a school's newspaper censorship as a matter of educational judgment. School-sponsored speech is not in the "third zone" at all. It is a different animal, and much closer to speech in class.

This unobjectionable principle takes on a different coloration in the context of virtual education. In the virtual school, *all* student speech and interaction takes place on a digital platform that is defined by the school. While in traditional schools students might meet off-campus, or speak on the phone at night, all interstudent communication might well take place inside of school platforms. Regulation of such platforms therefore becomes more important.

Moreover, virtual schools have regulatory powers that traditional schools do not. Like bricks-and-mortar schools, virtual schools can make rules defining legitimate and illegitimate kinds of expression, investigate alleged infractions, and mete out punishment when rules are broken. But virtual schools can also limit expression through code. Current platforms already available demonstrate the ubiquity of software design choices in shaping every expressive act that occurs or might occur on the platform. The way that a forum is coded and implemented determines the time, place, and manner in which students are able to speak. It could also determine who hears what speech, in what way, and for how long.

Likewise, platforms have the potential to filter the content of speech. A filter could look for cybernastiness and block its dissemination, for instance. Similarly, it could look for and block criticism of the school or political speech of any kind.

A critical question for virtual education, therefore, will be to determine the right analogy for a school-provided educational platform that facilitates student speech. How close does speech on an electronic platform created, monitored, and maintained by the school come to writing an article in a school-sponsored student newspaper? If it is sufficiently close, then *Hazelwood* applies, and schools enjoy total constitutional authority to regulate speech for any and all "legitimate pedagogical" reasons. As a purely analytical matter, a school blog or closed social network, whose content can be seen but not supplemented or edited by the public, could be plausibly analogized to a school-sponsored newspaper. Like the newspaper, the school provides and actively manages the technological platforms upon which student

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[174] Id. at 271.

[175] Id. at 273.

[176] Ward v. Polite, 667 F.3d 727, 734 (6th Cir. 2012), citing Hazelwood School District et al. v. Kuhlmeier et al., 484 U.S. 260, 273 (1988).

speech occurs. On the other hand, the blog or network might be better analogized to the school's corridors and cafeterias. The schools purchase, maintain, and manage these spaces as well. But that does not make them the legal "sponsors" of speech in those areas. In such areas, speech is permitted, without its being harnessed towards a particular pedagogical goal. Schools, even though they fund such places and in that sense facilitate the speech in them, do not "sponsor" speech there. If a school building is the right analogy, *Tinker* applies and virtual school cannot regulate speech at will in forums and social media areas that they make generally available as places in which students can speak among themselves.

Law and policy have embraced the latter analogy with respect to other areas of virtual technology. By statute, web hosts that are open to the public are not liable for the speech that appears on their sites.[177] If speech is libelous or threatening, the speaker can be held responsible, but not the website hosting the speaker. This is the case even though the website creates and maintains the channels of dissemination. The website is nevertheless not the *sponsor* of the speech. Even a limited amount of filtering or prioritizing of speech by an internet forum does not transform it into a sponsor.

Nevertheless, the direction of the post-*Tinker* cases, which have in the Supreme Court and most of the courts of appeal consistently reduced the extent to which student speech rights are protected, suggest that courts might be persuaded by the newspaper analogy when it comes to virtual schools. In that case, virtual schools would have no third zones and there would be no real limits on school regulation of student speech on school platforms. Any such limits that did exist would have to be created by schools or states as a matter of positive law.

I submit that this is the wrong direction. Again the reasoning of *Tinker* shows the way. *Tinker* rests not only on the principle that rights are retained inside the schoolhouse gate, but that diversity of expression is a vital, positive value:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school … may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.[178]

These are instructions for how to create a constitutional regime of free speech in a virtual school. The pedagogical reasoning of *Barnette* and *Tinker*, not the cases' holdings, are guideposts for the future. That reasoning may not itself require schools to establish a third zone with the *Tinker* rules. But it does suggest that some amount of open communication within a school community must be facilitated by the state as a matter of the First Amendment. Similar arguments, moreover, suggest that a somewhat free zone of in-school speech is required by the state constitutional guarantee that all schoolchildren be provided with an adequate public education.[179]

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Barnette and *Tinker* have it right. Free expression is a bedrock of a free a society. Schools must teach its use. To do that, without appearing hypocritical or platitudinous, they must permit its exercise. It is true

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[177] Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 Harv. L. Rev. 2296, 2313 (May 2014); 47 U.S.C. § 230(c)

[178] Tinker v. Des Moines Community School Board, 393 U.S. 503, 511 (1969).

[179] Harvard Law Review Association, *Right to Education*, 96 Harv. L. Rev. 298, 298 (November 1982); Brown v. Board of Education, 347 U.S. 483, 493 (1955).

that a central goal of schools is and should be to "accommodate … personal intercommunication among the students." This is not just "inevitable," says *Tinker*, but intentional: "it is also an important part of the educational process."[180]

When there is conflict over students' use of virtual communication, as there surely will be, democratic education requires a presumption in favor of student expression. That does not mean that any and all student speech must be tolerated. But we cannot afford to privilege concern for those subject to insult, a preference for children's obedience to authority, or an expansive notion of sponsorship to turn schools — even virtual ones — into places where schools routinely determine what students say. In order to teach civic values like in a bricks-and-mortar school, virtual schools need to create platforms that allow students to communicate freely with one another. The law of virtual schools must guarantee that such communication enjoy, albeit within some limitations, First Amendment protection.

[180] Tinker v. Des Moines Community School Board, 393 U.S. 503, 512 (1969).