A Civics Lesson

LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS. By Catherine J. Ross. Cambridge, Massachusetts: Harvard University Press. 2015. 368 pages. $39.95.

William S. Koski*

Introduction

"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1]

With that famous passage, the Supreme Court established the high watermark for protection of public school students' right to free speech. With the publication of *Lessons in Censorship* some forty-five years later, Professor Catherine Ross forcefully argues that "[a] mix of ignorance about, indifference to, and disdain for the speech rights of students permeates society"[2] leading to "rampant constitutional violations that plague our schools."[3] Not only does the erosion of free speech in school harm the individual student, Ross argues it also threatens the very core of our democracy when schools fail to model and inculcate the norms of citizenship that include the right to express and the obligation to tolerate a multitude of ideas and perspectives. Simply put, suppression and punishment of student speech threatens to undermine the constitutional bulwark that protected the Tinker and Eckhardt children the days they wore their black armbands to school in protest of the Vietnam War.[4] "That [schools] are educating the young for citizenship 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 youth to discount important principles of our government as mere platitudes."[5]

* Eric & Nancy Wright Professor of Clinical Education and Professor of Law, Stanford Law School; Professor of Education (by courtesy), Stanford University Graduate School of Education. I am grateful to Payal Kapadia, Alyssa Corrigan, Grady Jung, and Cina Littlebird for their research and summary of restorative justice and social–emotional learning practices in connection with their work with our Stanford Center for Public Research and Leadership. I also appreciate the insightful feedback from Rob Reich and editing assistance from Joanne Newman.

1. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

2. CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS 1 (2015).

3. *Id.* at 287.

4. *Tinker*, 393 U.S. at 503–04.

5. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

Lessons in Censorship is not only a comprehensive and colorfully written treatment of the Court's student-speech jurisprudence, but it also reminds us that we must remain vigilant in our protection of free speech in the classroom and the courtroom. After bringing clarity to the Court's often opaque student-speech decisions in the wake of *Tinker*, Ross demonstrates that modern free speech controversies go beyond the schoolhouse gate and reflect the heated battles being waged in the culture wars. Whether it's banning a t-shirt that says "All the Cool Girls are Lesbians" because it's "offensive to some people" in one school district,[6] or banning another elsewhere that proclaims "Be Happy, Not Gay" because it disparages a group of students,[7] Ross explains that suppression of speech isn't solely a conservative or progressive impulse. Such sensational examples of what Ross calls "pure" speech aside,[8] Ross also aims to show how speech that seems less valuable in the marketplace of ideas, such as insubordinate, hurtful, uncivil, or just-plain-offensive speech (what Ross calls *sans-gêne* speech),[9] ought to be protected in schools so long as the speech does not materially disrupt the educational process. Along the way, Ross offers an analytic approach to and ways of thinking about the law that would forcefully protect free expression without creating disruption in school.

Here I first summarize *Lessons in Censorship* with a focus on its contributions to First Amendment analysis. I then probe Ross's argument that protection of all pure student speech, even that which is hurtful, insubordinate, and offensive, is essential to the school's duty of modeling and transmitting the values of citizenship. Though we must value the robust exchange of ideas, even at the expense of allowing hurtful and disrespectful language, I argue below that we must also ask our schools to convey that the values of civility, mutual respect, and safety for all persons are part of our duties of citizenship. In schools especially, where learning is the central mission, we must ensure that all students feel safe and free from threat or harm so that they are free to learn. Moreover, in the often chaotic hallways of our schools, administrators must constantly make split-second decisions on how to respond to insubordinate or offensive speech that may also be tangled up with perceived threats or subtle conduct. Navigating free speech landmines under such conditions is challenging.

This tension between protecting student speech and ensuring civility and safety is real. But resolution is possible. As Ross points out, school administrators can respond constructively to insubordinate, hurtful, or *sans-*

6. ROSS, *supra* note 2, at 139 (citation omitted).

7. *Id.* at 187.

8. Ross calls "'pure' student speech" that which "isn't school sponsored, lewd, or pro-drug." *Id.* at 129–30.

9. *Id.* at 71–73.

gêne speech.[10] In addressing such—let's call it "low value"—speech, schools need not suspend, expel, or otherwise harshly punish students. Exclusionary discipline is unnecessary and unproductive for such minor offenses, particularly where there are better methods for both preventing and responding to those infractions. Through social–emotional learning and restorative justice practices, school-wide positive behavioral interventions, and other culture-shifting programs, schools can establish a climate in which students internalize the values of mutual respect, social responsibility, and freedom from threat.

Stated differently, what at first appears to be a free speech problem may be better characterized as a problem of appropriate school-discipline practices. I see no deep controversy or problem over free speech in principle; rather, there are simply inappropriate administrative responses to everyday, yet ambiguous and complicated, interactions in school that may involve protected speech. The reduction and even elimination of exclusionary school discipline for minor, often discretionary, offenses, such as disruption of school activities or willful defiance,[11] not only protects student speech, I argue, but it also narrows the school-to-prison pipeline.

I. Overview of *Lessons in Censorship*

The ambitious agenda of *Lessons in Censorship* is to make sense of student-speech controversies in our schools—ranging from online bullying, to adolescent humor, to unpopular political speech—and explain the constitutional law that governs student speech. Ross, an unrepentant defender of student speech, argues that the lack of legal clarity, lack of understanding among school administrators,[12] and the fear of controversy on campuses[13] have lead both administrators and courts to censor expression. This, she argues, is not only an affront to constitutional rights but also a challenge to our democracy. "Schools have a unique opportunity and obligation to demonstrate the importance of fundamental constitutional values as an integral part of preparing students to participate in a robust, pluralist democracy," she argues.[14] "And the best way of transmitting values is by modeling them—showing how the principles that govern us work in action."[15]

10. *Id.* at 67.

11. *See, e.g.*, CAL. EDUC. CODE § 48900(k)(1) (West 2017).

12. ROSS, *supra* note 2, at 3–4 (stating that a "complex series of tests" causes a lack of legal clarity and misunderstanding among judges, which makes it "expected that teachers, principals, and school board members should fail to understand [the] legal intricacies").

13. *See id.* at 74 ("Administrators want to avoid public controversy that might call their performance into question, and school board members presumably want to be reelected.").

14. *Id.* at 6.

15. *Id.*

It's hard to argue with that proposition in theory. But schools are messy. Should the principal tell a white student that she can't wear a Confederate flag to a school with a large African-American population? If the school sponsors a Day of Silence to show support for LGBT youth, must it also tolerate a group of evangelical Christian students who oppose homosexuality informally holding a "Day of Truth," and donning t-shirts that say "My Day of Silence"? Ross recognizes the inherent tension in instilling "intolerance for intolerance in elementary and secondary schools"[16] but demands that the "First Amendment doesn't permit schools to silence or punish students for what they say merely because their opinions differ from the school's preferred values."[17]

It is against that backdrop that *Lessons in Censorship* weaves together three stories: how our nation's most volatile racial, religious, and sexual disagreements inevitably find their way onto K–12 campuses; how an increasingly conservative Supreme Court has eroded student-speech rights; and how schools themselves frequently fail to foster the free exchange of ideas so essential to citizenship and democracy. But this is not a story of a lost cause because Ross concludes with practical ideas for protecting speech without materially disrupting the classroom.

A. Bringing Clarity to a Muddled Free Speech Jurisprudence

In the first section of the book, Ross explains the history of the Supreme Court's treatment of the Speech Clause of the First Amendment, with a focus on cases arising from the public school context.[18] Here Ross accomplishes the delicate task of writing for a sophisticated legal audience while at the same time making her prose and analysis accessible to parents, teachers, and school administrators. In less skilled hands, for instance, Ross's tutorial in the common law method would prove tedious for a legal audience, but Ross manages to maintain the attention of both audiences with her clear and engaging voice.

Though the Court initially took a narrow view of the Speech Clause beginning in the 1920s by upholding government censorship of speech, particularly that which expressed politically dissident views, Ross explains how the view of Justices Brandeis and Holmes (channeling John Stuart Mill)—that the "marketplace of ideas" was the best crucible for arriving at the "discovery and spread of political truth"—eventually prevailed.[19] When

16. *Id.* at 7.

17. *Id.* at 8.

18. *Id.* at 13.

19. *Id.* at 14–15 (quoting Whitney v. California, 274 U.S. 357, 375–76 (Brandeis, J., concurring)).

the argument first surfaced in *Minersville School District v. Gobitis*,[20] a majority of the Court refused to extend the marketplace to the classroom and cited "national cohesion" in upholding the school district's refusal to exempt young Jehovah's Witnesses from reciting the Pledge of Allegiance.[21] But that deference to local authorities was short-lived; when school districts and localities, emboldened by *Gobitis*, adopted strict compulsory-Pledge laws that would offend the religious beliefs of Jehovah's Witnesses and subject them to expulsion, public ridicule, and worse should the religious schoolchildren refuse to take the Pledge.[22] It was against that backdrop that the Barnette sisters refused to salute the flag and recite the Pledge, were consequently expelled from school, and sued the state of West Virginia for violating their free speech rights.[23]

"In an unusual somersault," Ross explains, the *Barnette*[24] Court reversed the *Gobitis* decision and issued a resounding defense of public school students' right to free speech.[25] While the Court could have declared West Virginia's actions unconstitutional on religious freedom grounds, it took the more ambitious route of establishing the right to be free from coerced speech generally. Ross further explains, the Court "resisted the temptation to treat a question involving the rights of schoolchildren as less significant than other controversies."[26] Indeed, schoolchildren particularly should be free to speak their minds because school is the place where children learn lessons in liberty and tolerance.

It would be more than twenty-five years before the Court would take another student-speech case (they have reviewed only four such cases since *Barnette*), but during that hiatus from student-speech cases, the Court continued to protect free speech outside the schoolhouse gate, while recognizing that certain speech—such as "true threat[s]"—could be punished,[27] and all speech could be subjected to "reasonable 'time, place, and manner' regulations."[28] In 1969, hardly was there a more controversial issue than America's participation in the Vietnam War. Naturally, that issue found its way into our schools, famously on the black-armbanded sleeves of the

20. 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

21. *Id.* at 591, 595–600.

22. ROSS, *supra* note 2, at 17.

23. *Id.* at 16, 18.

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

25. ROSS, *supra* note 2, at 18.

26. *Id.* at 21.

27. *See* Watts v. United States, 394 U.S. 705, 707–08 (1969) (per curiam) (finding that a criminal statute prohibiting threats against the President "must be interpreted with the commands of the First Amendment clearly in mind" and requires the Government to prove a true threat rather than hyperbole).

28. Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (quoting Cox v. New Hampshire, 312 U.S. 569, 575–76 (1941)).

Tinker and Eckhardt children. In what would prove to be the pinnacle of protection of speech in schools, the Court overturned the Des Moines schools' rule against wearing black armbands as a violation of the children's speech rights.[29] But, as Ross points out, the Court did not stop there. It went on to establish an enduring and workable constitutional standard, "one that would balance the need for order with the right to free speech."[30] To justify suppression of student speech, school officials must demonstrate that the student speech "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school," and collides "with the rights of other students to be secure and let alone."[31] Recognizing that this standard departs from the "strict scrutiny" afforded speech outside of school, but that it also does not allow schools unfettered discretion to censure student speech, Ross labels this standard "demanding" and establishes it as the default test for the constitutionality of speech regulation in schools.[32] Having established the pinnacle of student-speech protection, it would only be downhill from there for the Court.

Elucidating the second story of *Lessons in Censorship*, Ross opens Chapter 2 by describing how the *Tinker* Court, led by liberal Justices Warren, Fortas, Marshall, Brennan, and Douglas, was realigned with President Nixon's appointing to Chief Justice the conservative Warren Burger and would drift further rightward under Chief Justices William Rehnquist and John Roberts.[33] As Ross explains, the Burger Court took the first swipe at *Tinker* in 1986 when it upheld the suspension of Matthew Fraser for his nominating address of a friend running for school office that "might easily have been dismissed as a mix of juvenile humor and miscalculation about adult tolerance."[34] In *Bethel School District No. 403 v. Fraser*,[35] the Court, which labeled Fraser's speech "an elaborate, graphic, and explicit sexual metaphor," did not object to the viewpoint or content of the speech, but rather ruled that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as [Fraser's] would undermine the school's basic educational mission."[36]

Two years later, the Rehnquist Court further eroded *Tinker*, Ross argues, by holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related

29. *See supra* note 4 and accompanying text.

30. ROSS, *supra* note 2, at 29.

31. *Id.* at 29–30 (describing what is known as the *Tinker* test).

32. *See id.* at 33–34 (stating that *Tinker* remains "the starting point for analyzing student speech rights").

33. *Id.* at 34–37.

34. *Id.* at 38.

35. 478 U.S. 675 (1986).

36. *Id.* at 678, 685.

to legitimate pedagogical concerns."[37] By simply categorizing student speech as "school-sponsored" rather than *personal* speech, Ross argues, the Court not only complexified the Speech Clause doctrine, it provided a "get out of jail free" card to any administrator who could shoehorn student speech into "school-sponsored" speech that might be reasonably perceived as bearing the "imprimatur of the school."[38] Then came the Roberts Court's turn to carve out an exception—albeit a narrow one—to *Tinker*'s robust protection of student speech. In upholding the suspension of Joseph Frederick for his goofy parade-route banner that proclaimed "BONG HiTS 4 JESUS,"[39] the Court not only explicitly stated that the *Tinker* rule is not the sole test for the restriction of student speech but also, for the first time, permitted the school to regulate the content—not merely the manner—of student speech.[40] Narrowly, a school could prohibit speech that promotes the use of illegal substances,[41] but more broadly, the decision begs the question of what other speech could be banned based on its content.

Ross later summarizes and clarifies the Court's student-speech decisions with a handy infographic and the simple rule that schools may only silence student speech in three circumstances: (1) if it is the student's own (pure) speech, it cannot be suppressed unless the school "reasonably anticipate[s] material disruption" or the violation of the rights of others; (2) if the speech appears to be school sponsored, it may be censored for "legitimate pedagogical reason[s]"; and (3) if the speech is "lewd, pro-drug, threatening, inciting violence, or defamatory," it may be censored and punished full stop "unless the pro-drug speech is 'political.'"[42] Notwithstanding this clear formulation, at the close of Chapter 2, Ross laments the Court's proliferation of categories and standards that undermine *Tinker*'s robust and workable test and punt to the lower courts and school officials the job of applying the incoherent and general exceptions to the rule of *Tinker*.[43]

B. Expansion of the Exceptions

In Part II of the book, "Pushing Porous Boundaries," Ross argues that school administrators and courts alike have taken advantage of the vague and general departures from the *Tinker* standard to crack down on speech that

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

38. ROSS, *supra* note 2, at 52–54 (quoting *Hazelwood*, 484 U.S. at 281 (Brennan, J. dissenting)).

39. Morse v. Frederick, 551 U.S. 393, 397 (2007).

40. *Id.* at 396–97, 403; *see* ROSS, *supra* note 2, at 57 ("[T]he decision inadvertently admitted that the content of expression—including expression protected by the Speech Clause—may determine how much liberty the speaker has to voice it, at least in school.").

41. *Morse*, 551 U.S. at 403 (holding that "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use").

42. ROSS, *supra* note 2, at 294.

43. *Id.* at 62.

would be protected under *Tinker*.[44] In Chapter 3, Ross argues that schools have stretched *Fraser*'s exception for "lewd" speech to ban "inappropriate," "off-color," and "insubordinate speech."[45] Seeking to restore *Fraser*'s boundaries, Ross first identifies what I will later argue is at the heart of the problem: the manner in which schools respond to such "low-value" speech. Generally speaking, Ross explains, schools can take an instructional approach that treats "inappropriate" student speech and language as an opportunity to teach and model socially acceptable behavior; or schools can punish such speech with either on-campus penalties such as barring students from activities and reducing student grades; or schools can exclude students from school through suspension and expulsion.[46] The former, she concedes, is not constitutionally barred, while the latter two raise constitutional concerns.

Take *sans-gêne* speech, for instance. Ross is technically correct in arguing that a distasteful student campaign speech that made fun of an assistant principal for stuttering (even though he had no such speech impediment), or a pregnant Crystal Kicklighter's defiant conduct and crude insult to a male classmate that "[y]ou just mad because you ain't got nobody pregnant," or Ryan Posthumus's comment to his buddy that the dean of students was a "dick" are not lewd and therefore can't be shoehorned into *Fraser*, as the schools attempted to do in each case.[47] But it is far from clear that such inappropriate speech couldn't be interpreted by administrators as "genuinely insubordinate" speech or conduct that requires some type of response.[48] Ross is keenly aware that

> [t]he harm genuinely insubordinate speech can cause is clear. The problem is how to define and confine the scope of the speech educators can legitimately punish as insubordinate, especially when they point to intangibles such as "tone of voice" or facial expression that students will never be able to rebut.[49]

Precisely. That is the problem; a problem that should not reach constitutional proportions, because even First Amendment heavyweights such as Eugene Volokh and Kent Greenawalt haven't been able to craft a widely implemented, bright-line rule that would meaningfully "help educators (or their attorneys) sort out the distinctions between students who have an insubordinate attitude and those who engage in insubordinate conduct."[50] Parsing conduct from speech in the fluid and sometimes chaotic

44. *Id.* at 65–66.
45. *Id.*
46. *Id.* at 67.
47. *Id.* at 76, 78–81.
48. *Id.* at 83.
49. *Id.*
50. *Id.*

environment of a school weight room, student commons, or seminar room should not subject teachers and administrators to constitutional liability.

I'll return to this later, but for now it seems fair to recognize that the split-second decisions of school officials in response to perceived minor offenses should be only rarely subjected to constitutional scrutiny. Better to avoid *Tinker* and *Fraser* altogether, as Ross recognizes when she notes that "[r]eflective exercise of common sense in the first instance instead of severe penalties for teachers or students would help to defuse most of these controversies."[51]

Turning from the outer limits of *Fraser* to the expansion of *Hazelwood*, Ross argues in Chapter 4 that school "[o]fficials exploit the construct of school sponsorship to roll students' rights further back than the Supreme Court had envisioned. . . . [S]chools have pushed relentlessly to bring virtually every sort of speech on campus within the definition of *school sponsored*, including the spontaneous speech of students in their classrooms."[52] Although I have no doubt that some schools have justified suppression of student speech on the ground that it bears the school's imprimatur—Ross provides several outrageous examples of such post hoc rationalizations[53]—such a bold assertion begs empirical support. The empirical evidence in *Lessons in Censorship* is derived from reported cases, media accounts, and "the websites of reputable public interest organizations."[54] Ross suggests that such selective data collection probably only represents the tip of the suppressive iceberg due to the hurdles in bringing legal action.[55] I have represented hundreds of students in school-discipline matters (many of which implicated First Amendment concerns), and I heartily concur with the notion that many potential free speech infringements go unreported and unprosecuted. Yet it has not been my experience that cases involving pure speech or certainly those that suggest content or viewpoint censorship, as opposed to the murky insubordinate speech–conduct allegations, are not pursued. My view is that a few schools may have pushed the limits of *Hazelwood* in defense of censorship, but schools generally seem to want to steer clear of First Amendment controversy.

Scope of the threat aside, schools *have* invoked *Hazelwood* to ban theatrical performances (e.g., *The Crucible*) and censor school newspapers

51. *Id.* at 91.

52. *Id.* at 96.

53. *See id.* at 96–97 (describing with skepticism school-administrator rationalizations for censorship in which the censored speech alleged to be school sponsored was highly critical of the school); *see also id.* at 99–109 (describing specific cases that involve school-administrator rationalizations for censorship that Ross views skeptically).

54. *Id.* at 5.

55. *Id.*

(e.g., a review of the films *Mississippi Burning* and *Rain Man*).[56] This despite the fact that even if such speech bears the imprimatur of the school, the censorship may not be reasonably related to a legitimate pedagogical concern. Rather, it is merely an effort to avoid controversy in the community. Ross also raises the specter of teachers stifling classroom discussion and even engaging in viewpoint discrimination under *Hazelwood*'s rationale, but she lucidly preempts the effort to bring student discussion under the banner of school-sponsored curriculum by arguing that such personal speech cannot be perceived to bear the school's imprimatur.[57] More important, she warns, if schools convince courts that classroom speech is school sponsored and cannot deviate from the school's viewpoint, those "classrooms could become precisely the closed-circuit environment the First Amendment forbids."[58] This is a threat to critical thinking and democratic values, indeed.

C. Threats to Tinker

Having cabined *Fraser* and *Hazelwood* to their original parameters, *Lessons in Censorship* turns in Part III to several contemporary and thorny challenges to student speech that threaten *Tinker*'s protective ruling. Here Ross analyzes specific types of speech that schools have restricted even using *Tinker*'s two-pronged test of "material disruption" or infringement on the "rights of others."[59] Those speech types include the labeling of speech as "threatening" and overblowing minor inconveniences and distractions to material disruptions; the stated efforts to protect the rights of others by punishing speech that bullies individuals or disparages groups; and the censoring of online taunts, and off-campus and *sans-gêne* speech.[60]

In the wake of Columbine, Paducah, Jonesboro, Santee, and other horrific episodes of gun violence on school grounds perpetrated by students, administrators have become understandably wary of even the slightest threat. Ross argues, however, that these fears are sometimes (often?) overblown, as schools treat as a "true threat"—and therefore beyond the First Amendment's protection—even those student remarks that are not concrete enough to justify restrictions on speech and punishment.[61] Ross helpfully isolates three factual patterns that place in stark relief the difficult choices that administrators must make: "private expression" that was never communicated to others; "recipient projection" in which a person

56. *See id.* at 101–02 (recounting a high school principal's decision to cancel a student production of *The Crucible*); *id.* at 105–06 (describing resulting litigation after a middle school principal blocked publication of student reviews of *Rain Man* and *Mississippi Burning*).

57. *Id.* at 120–21 (arguing that a student's profane speech can't be said to be school sponsored unless the teacher adopts such speech).

58. *Id.* at 125.

59. *Id.* at 131.

60. *Id.* at 129–30, 160, 207.

61. *Id.* at 142–43.

unreasonably misconstrues speech as threatening; and "stale expression" that was held privately for so long that it is unlikely to lead to action.[62] I'd add to the confusion the sometimes lack of cultural competency or implicit bias that infects many interactions with students of color and may lead to recipient projection. Ross argues that courts give too much deference to school officials tasked with making such nuanced determinations, but she does recognize that the "(probability of harm) × (severity of harm)" assessment is the necessary and appropriate way to analyze such perceived threats.[63]

Closely related are those situations in which "some school officials . . . push the boundaries of 'material disruption' beyond recognition."[64] Essential to this argument is Ross's premise that the *Tinker* standard of material disruption is "not designed to be easily satisfied" because school officials must be able to point to specific "facts which might reasonably have led school authorities to forecast . . . material interference"[65] that amounts to "more than a . . . desire to avoid . . . discomfort and unpleasantness."[66] What if political speech might lead to student demonstrations on campus? What if David Griggs's t-shirt with an M-16 rifle or Zachary Guiles's t-shirt with an impolite montage of words describing President Bush might cause arguments in the classroom?[67] "Heckler's vetoes" aside, Ross makes a compelling case that the censorship of such speech is often an overreaction given the high bar that *Tinker* sets and the "undifferentiated fear of controversy" that the situations present.[68]

Perhaps the most delicate student-speech controversies are those Ross tackles in Chapters 6 and 7—harmful words that may threaten the rights of others such as group disparagement and hate speech, insults hurled at individuals, and verbal bullying.[69] Incidents involving these speech forms are made more difficult by the *Tinker* Court's vague and unexplained second category of speech that may be punished—that which trammels on the rights of others—and the lower courts' avoidance of interpreting that language.[70] Given that vacuum, Ross stakes out the speech-friendly position (bolstered by Judge Richard Posner's opinion in *Nuxoll* ex rel. *Nuxoll v. Indian Prairie*

62. *Id.* at 143.

63. *See id.* (suggesting the examination of the degree of risk and the potential severity of the risk with respect to the timing of the action, the investigation, and the penalties imposed).

64. *Id.* at 150.

65. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

66. ROSS, *supra* note 2, at 151 (quoting *Tinker*, 393 U.S. at 509).

67. *Id.* at 157.

68. *Id.* (explaining that the "normal background noise of schools" is insufficient to constitute a material disruption and exemplifying the argument with cases in which the school has censored speech that is far from meeting the high standard of material disruption).

69. *Id.* at 160, 207.

70. *Id.* at 160–61 (noting that the Supreme Court has never applied the "rights of others" prong from *Tinker* and lower courts have mostly ignored it).

School District #204)[71]: "[T]he rights of others rubric alone never provides a sufficient rationale for censoring student speech, no matter how unpleasant. *Tinker*'s second prong has been found to justify censorship only when accompanied by a reasonable apprehension of material disorder."[72] Ross may be correct in her reading of the case law, but I'm less persuaded that the rights of others cannot be an independent reason for suppressing speech. After all, the Court did cite it separately from material disruption.[73]

More important, as I explore below more fully, children and adolescents require a sense of safety and belonging to be prepared to learn, and it is the school's responsibility to create that safety, the freedom from verbal abuse, so that all children—whether disfavored minorities or social outcasts—can learn.[74] Let's call it the individual's right to learn or at least be free from serious verbal abuse.[75] Does this necessarily mean that schools should punish such harmful speech? No, there are better alternatives. But Ross seems less protective of those students who feel and experience a real lack of safety that affects their learning. Yet she is not so unwavering in her position that the rights of others are unimportant to the free speech calculus. To the contrary, she lays out a thoughtful "infringement matrix" for school officials to employ before relying on the rights of others to censor student speech, which includes how aggressive the speech was, the effect the speech had on the targeted students, and the ages of the targets.[76]

In Chapter 7, Ross takes her analysis of hurtful and *sans-gêne* speech off campus and online. Much ink has been spilled in recent years on the question of under what circumstances and on what grounds schools may regulate online hate speech and cyberbullying.[77] Ross carefully analyzes the

71. *See* 523 F.3d 668, 672 (7th Cir. 2008) (noting that there is no legal right to be free from criticism).

72. ROSS, *supra* note 2, at 161.

73. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (holding that speech that is a material disruption *or* invades the rights of others is not constitutionally protected).

74. Here I am not talking about a *legal* responsibility to create a safe learning environment, but rather a pedagogic responsibility. *See infa* subpart II(C).

75. I agree with Ross that "tepid" disparagement or even one-time "scalding" name-calling should at most draw a firm rebuke, but repeated, serious verbal disparagement that creates an unsafe learning environment may require heightened intervention. *See* ROSS, *supra* note 2, at 202 (arguing that *Tinker* "protects bullying speech unless the school has legal grounds to restrain it," and the legal grounds could potentially be found in an individual's right to educational opportunity).

76. *Id.* at 195.

77. *See generally* DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014); AMY ADELE HASINOFF, SEXTING PANIC: RETHINKING CRIMINALIZATION, PRIVACY, AND CONSENT (2015); Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641 (2011); Karly Zande, *When the School Bully Attacks in the Living Room: Using* Tinker *to Regulate Off-Campus Student Cyberbullying*, 13 BARRY L. REV. 103 (2009); Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845

emerging legal regime that "requires schools to show a connection between off-campus speech and events at school before schools can punish student expression,"[78] and offers her own view as to where the line between the school's authority and the parent/guardian's authority should be drawn. As headline-grabbing as online bullying, sexting, and disparaging school authorities in social media may be, Ross makes it clear that without a close nexus between the speech and school and without satisfying *Tinker*'s requirements, the school cannot punish students posting in the privacy of their bedrooms.[79]

D. Protecting Speech

In her concluding chapter, "Living Liberty," Ross reemphasizes her lodestar principle that schools must provide good models by respecting rights, and further adds that "less authoritarian environments promote mutual respect between educators and [students]" leading to better academic results and fewer disciplinary problems.[80] I concur with this ideal. And Ross goes further by making several concrete recommendations, including better teacher and administrator training in civil liberties and First Amendment rights, vigilance on the part of parents and students, and a less deferential judiciary when it comes to adjudicating student-speech matters.[81] I agree with these proposals and I will offer a few of my own that focus on how schools can prevent or diminish student-speech controversies and appropriately respond to them when they occur, thus avoiding Speech Clause challenges. But first, I offer a somewhat broader view of the school's role in teaching "citizenship."

II. Civics Lessons

We ask our schools to teach our children to become citizens. It is a legitimate and understandable purpose of education. But complications arise when we define—or courts define—what it means to be a citizen and therefore which civics lessons—both formal and informal—our schools must

(2010); Jamie L. Williams, *Teens, Sexts, & Cyberspace: The Constitutional Implications of Current Sexting & Cyberbullying Laws*, 20 WM. & MARY BILL RTS. J. 1017 (2012).

78. ROSS, *supra* note 2, at 207.

79. *See id.* at 210, 224–27 (noting that the Supreme Court's decisions make it clear that "[t]he school's authority generally ends at the campus perimeter" and the majority of appellate decisions have held that schools may only discipline students for off-campus speech "if threshold conditions are met"). While there is a circuit split on how to define these threshold conditions, most lower courts agree that *Tinker* should govern and require a nexus between the speech and the school community. *Id.* at 224–27.

80. *Id.* at 289.

81. *See id.* at 295–98 (recommending, *inter alia*, that school administrators have at least a rudimentary understanding of the governing law, that parents and other citizens outside of the school community take ownership of the important roles they play in the "battle over student speech," and that judges rule less deferentially in student-speech cases).

teach.[82] *Lessons in Censorship* provides a robust case for the respect for individual liberty as the central pillar of citizenship. But in any reasonable understanding, "citizenship" is more complicated and the duty and role of schools to teach citizenship goes beyond respect for individual liberty.

A. Liberty, Autonomy, Individual Rights, and Democracy

It's difficult to argue with Ross's idea—what she calls "living liberty"—that "[s]chools teach rights best by honoring them, by modeling a government that means what it says about individual liberty, thus creating an environment in which liberty can flourish. Students for their part learn rights by living them in a respectful setting."[83] Schools are viewed as laboratories for democratic citizenship and spaces that model good citizenship, and in the process, help cultivate citizenship. This idea is a conception of civic education that is consistent with liberal theories of education that aim to inculcate individual rights and liberties even though they manifest themselves politically in the form of freedom of expression, formal equality under the law, and respect for privacy (i.e., freedom from unwarranted search and seizure).[84] Liberal theorists "also typically emphasize autonomy, the freedom to develop and revise a life plan, and the need for an informed citizenry capable of critical thinking so that political participation can be effective."[85]

Thus, when schools engage in viewpoint repression—e.g., permitting students to honor LGBT rights through a "Day of Silence," yet censoring an evangelical Christian student for wearing a "Be Happy, Not Gay" t-shirt—they are squelching the robust debate that our democracy requires. Or, when school officials punish students for openly criticizing their coaches or teachers,[86] they implicitly teach that our democratic institutions will not tolerate dissent or the hearing of grievances. These are relatively easy cases with teachable moments in which schools ought to allow discourse, disagreement, and lessons in our classically liberal citizenship.

But we demand more of our citizens than autonomy and respect for individual rights, and schools must similarly take a more expansive view of what it means to be a citizen.[87] The liberal tradition agrees with this as well.

82. For a succinct discussion of the many dimensions and contested definition of "citizenship," see Dominique Leydet, *Citizenship*, STAN. ENCYCLOPEDIA PHIL. (Aug. 11, 2011), http://plato.stanford.edu/archives/spr2014/entries/citizenship/ [https://perma.cc/XW8K-56YW].

83. ROSS, *supra* note 2, at 288.

84. ROB REICH, BRIDGING LIBERALISM AND MULTICULTURALISM IN AMERICAN EDUCATION 11 (2002).

85. *Id.*; *see also* AMY GUTMANN, DEMOCRATIC EDUCATION 50–52 (1987) (discussing the school's role in teaching "deliberative" or "democratic" character traits).

86. ROSS, *supra* note 2, at 82.

87. For a comprehensive discussion of the differing approaches to teaching "citizenship" and the potential conflicts that arise among them, see generally Joel Westheimer & Joseph Kahne,

B. Civility, Tolerance, Social Cohesion, and Democracy

One point of civic education in a democracy is to raise free and equal citizens who appreciate that they have both rights and responsibilities. Students need to learn that they have freedoms, such as those found in the Bill of Rights in the U.S. Constitution (press, assembly, worship, and the like). But they also need to learn that they have responsibilities to their fellow citizens and to their country. This requires teaching students to obey the law, not to interfere with the rights of others, and to honor their country, its principles, and its values. "Schools must teach those traits or virtues that conduce to democratic character: cooperation, honesty, toleration, and respect."[88]

Along with the rights of citizenship come responsibilities to our fellow citizens.[89] Take hate speech, for example. Disparagement of groups or

Educating the "Good" Citizen: Political Choices and Pedagogical Goals, 37 POL. SCI. & POL. 241 (2004), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/430F5F14810632DD0A0E99812E9AF1D4/S1049096504004160a.pdf/div-class-title-educating-the-good-citizen-political-choices-and-pedagogical-goals-div.pdf [https://perma.cc/5K5W-VFNM]. *See also* CAMPAIGN FOR THE CIVIC MISSION OF SCHS., GUARDIAN OF DEMOCRACY: THE CIVIC MISSION OF SCHOOLS (Jonathan Gold et al. eds., 2011) http://civicmission.s3.amazonaws.com/118/f0/5/171/1/Guardian-of-Democracy-report.pdf [https://perma.cc/4A26-CALT].

88. Jack Crittenden & Peter Levine, *Civic Education*, STAN. ENCYCLOPEDIA PHIL. (May 30, 2013), http://plato.stanford.edu/archives/sum2013/entries/civic-education/ [https://perma.cc/97US-FC6B]. For an elegant and thoughtful argument that children in liberal democracies must be educated in both "free and equal citizenship," as well as a "shared way of public life" which includes "an active commitment to the good of the polity" and "a respect for fellow citizens and a sense of common fate," see EAMONN CALLAN, CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY 2–3 (1997). *See also* IAN MACMULLEN, CIVICS BEYOND CRITICS: CHARACTER EDUCATION IN A LIBERAL DEMOCRACY 20–31 (2015) (discussing the proper role, degree, and scope of civic character education); William Galston, *Civic Education in the Liberal State*, *in* LIBERALISM AND THE MORAL LIFE 89, 89 (Nancy L. Rosenblum ed., 1989) (arguing that civic education in a liberal state that "embrace[s] fundamentally differing conceptions of choiceworthy lives" is "both necessary and possible").

89. Here I recognize that I come close to aping Chief Justice Burger's argument in *Fraser*:

> The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." . . . These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting CHARLES A. BEARD & MARY R. BEARD, THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

individuals based on arbitrary and often immutable characteristics is unacceptable in public and private discourse, and schools should not shy away from addressing such offensive and hurtful speech. This is particularly necessary in a nation in which minority groups have been historically and routinely ostracized, dehumanized, and subordinated by hate speech.[90] While I recognize the difficult and mostly unsuccessful efforts of public school districts and college campuses to regulate hate speech by censoring and punishing such (difficult-to-define) speech, this does not mean that schools should idly sit by and tolerate disparaging speech that ultimately undermines democratic values in civil discourse and deliberation.[91] As I discuss below, schools should actively create a culture of tolerance, cohesion, and respect. This too is what it means for the school to be a laboratory for citizenship.[92]

Similarly, teachers need to ensure civility and respect for others and the learning environment.[93] As I've already discussed, in the hurly-burly of the school day, it is challenging to make the constitutional distinction between disruptive conduct—such as failure to comply with a teacher's instruction—that can be censured and protected speech.[94] Heated exchanges can be further problematic because teachers' perceptions of student conduct may reflect implicit racial bias or outright racial hostility. It is better to establish school-

90. *See, e.g.*, U.S. DEP'T OF EDUC., DATA POINT: TRENDS IN HATE-RELATED WORDS AT SCHOOL AMONG STUDENTS AGES 12 TO 18 (July 2016), http://nces.ed.gov/pubs2016/2016166.pdf [https://perma.cc/6E24-ZZGU] (finding that, while incidences of hate speech in U.S. middle and high schools has decreased overall, the percentage of students called hate words based on their race, ethnicity, or sexual orientation increased in 2013 as compared to 2001); Scott Jaschik, *Epidemic of Racist Incidents*, INSIDE HIGHER ED (Sept. 26, 2016), https://www.insidehighered.com /news/2016/09/26/campuses-see-flurry-racist-incidents-and-protests-against-racism [https://perma.cc/S3RU-NFZS] (detailing a rise in the incidence of hate speech on U.S. college campuses in 2016, which included the use of blackface on social media and the graffitiing of swastikas and racist language in dormitories).

91. Ross recognizes this:

> Schools can transform offensive speech into teachable moments. In the real world children will grow up to live in, they will likely have to learn how to respond to speech they find objectionable and even unbearable without sinking to the offensive speaker's level or slugging him. It may be best to learn how to respond, whether by walking away or questioning, as a student under the watchful guidance of teachers rather than as an adult at a bar.

ROSS, *supra* note 2, at 186.

92. *See infra* Part II.

93. Ross also recognizes this; she says:

> The Constitution is no obstacle to teaching norms of civility, including the words not to be used in polite company that can get people fired from their jobs when directed at bosses, coworkers, or customers. It only prevents the school as an arm of the state from imposing a formal penalty with long-term repercussions on the wayward student for expression that the First Amendment places beyond the school's authority to regulate.

ROSS, *supra* note 2, at 67.

94. *See supra* notes 48–49 and accompanying text.

wide norms for appropriate conduct, model those norms through explicit curricula and activities, and avoid mistakes in the heat of the moment.

C. Safety and Security

"Bully!" The label is usually a show stopper. No one wants to be a bully and no one tolerates bullying. But the ease with which the term is deployed belies its complexity and nuance.

In Chapter 6, Ross aims to strictly define "bullying," accuses schools of over-diagnosing students as bullies, and specifically criticizes school officials for failing to distinguish between punishable conduct and protected speech.[95] Having represented many children and youth who were labeled "bullies" and recommended for expulsion, I am sympathetic to Ross's argument. But here's the rub: many (most?) of the bullies I've represented have themselves been exposed to bullying language and conduct, as well as to violence and trauma; in many instances they have identified or unidentified emotional disabilities. Naturally, I want to protect these putative bullies from expulsion, but, equally as important, I want schools to take seriously the culture of bullying that may have contributed to their behavior. Bullying is more than a single student's actions: it's a manifestation of a school's or a community's climate. Indeed, a culture of harsh discipline itself may be a contributor to bullying.[96]

Among the more sobering recent breakthroughs of neuroimaging and genetics has been the recognition that childhood trauma can cause changes in brain architecture and function, as well as gene expression and regulation.[97] These changes are detrimental to the child's capacity to learn. This means that children who have experienced trauma are more likely to face serious learning and behavioral challenges.

The young brain is particularly sensitive to environment and experience, and significant trauma or repeated stressful events can alter the functioning of the brain's neural circuits that regulate and manage stress.[98] A brain that

95. *Id.* at 200 (recognizing that although good intentions may motivate administrators' efforts to reduce and control bullying, those efforts may still be in violation of First Amendment speech protections).

96. Alfie Kohn, *Why Punishment Won't Stop a Bully*, EDUC. WK. (Sept. 6, 2016), http://www.edweek.org/ew/articles/2016/09/07/why-punishment-wont-stop-a-bully.html?qs=bullying+the+bully [https://perma.cc/R634-ANMZ] (noting that punishment "is likely a hidden contributor to bullying, both because of what it models and because of its effects on the students who are punished"—because it is the deliberate use of power to make a child suffer, it may cause anger or frustration, it teaches that it is okay to use power over someone who is weaker, and it does not focus on the effects of an action on others).

97. My sincere thanks to Pamela Shyme for her research and summary of the literature regarding childhood trauma, its effects on brain architecture and functioning, and the consequences for behavior and learning.

98. *See* Nat'l Sci. Council on the Developing Child, *Excessive Stress Disrupts the Architecture of the Developing Brain* 2 (Ctr. on the Developing Child at Harvard Univ., Working Paper 3, 2014),

cannot regulate its response to stress, one that is set to "red alert," may cause a person to "flee, fight, or freeze" in response to common stressors, even if there is no danger.[99] In children, the result may be difficulty in concentrating, learning, or even sitting still.[100] Children whose brains are in hypervigilant mode may also erupt into rages, lash out at others, or hurt themselves.[101] But none of this behavior is completely volitional, though some of it may be labeled verbal bullying.

The problem is that a school with an unchecked culture of bullying, teasing, and taunting is not safe for children who have experienced childhood stress. And those children, in turn, may lash out with hurtful, offensive, and bullying language. Then administrators might punish the bully with suspension. Thus, a cycle of bullying is created. Below I discuss what to do about it.

III. Protecting Student Speech *and* Promoting Civility, Tolerance and Safety

In fulfilling their obligation to prepare our children to be citizens, public schools must not only "live liberty," they must also teach our students to respect one another's rights to be free from harm and create a safe environment where all children can learn. They must also teach civility and tolerance, and the democratic view that all citizens are equals. Invoking individual liberty to be uncivil, intolerant, or to treat others as political inferiors/subordinates is no good defense. Living liberty is not enough, or more precisely, it's not the only thing civic education requires.

Though these separate civic virtues/values are frequently aligned, tensions arise when students engage in hurtful, harmful, and offensive

http://developingchild.harvard.edu/wpcontent/uploads/2005/05/Stress_Disrupts_Architecture_Developing_Brain-1.pdf [https://perma.cc/S5FV-LQBD] ("The neural circuits for dealing with stress are particularly malleable (or 'plastic') during the fetal and early childhood periods. . . . Toxic stress during this early period can affect developing brain circuits and hormonal systems . . . throughout the lifespan.").

99. *See id.* ("[C]hildren may feel threatened by or respond impulsively to situations where no real threat exists, such as seeing anger or hostility in a facial expression that is actually neutral, or they may remain excessively anxious long after a threat has pas.

100. *See id.* at 7 (suggesting that "children who exhibit symptoms related to abnormal stress responses" may "exhibit excessive fears, aggressive behavior, or difficulties with attention or 'hyperactivity'").

101. *See, e.g.*, DC'S CHILDREN'S LAW CTR., ADDRESSING CHILDHOOD TRAUMA IN DC SCHOOLS 2 (2015), http://www.childrenslawcenter.org/sites/default/files/CLC%20--%20Addressing%20Childhood%20Trauma%20in%20DC%20Schools--June%202015.pdf [https://perma.cc/G52C-KREH] (describing how "[t]raumatized children may develop hyper-vigilance," which, in turn, leads to "higher rates of school discipline referrals and suspensions, lower test scores and grades[,]" and a lowered likelihood of graduation); Kenneth A. Dodge et al., *Hostile Attributional Bias and Aggressive Behavior in Global Context*, 112 PROC. NAT'L ACAD. SCI. U.S. 9310, 9314 (2015), http://www.pnas.org/content/112/30/9310.full.pdf [https://perma.cc/QA3C-XM5Y] (finding that hypervigilance may lead to aggression in children).

speech. Rather than resolving these tensions by invoking the ultimate value of individual liberty and free speech, I claim that many, if not all, such tensions can be handled by wise administrative school policies. There is no need to ascend to high principle; there is just a need for wise principals.

Traditionally, schools might censor, exclude, or otherwise punish such speech under the banner of willful defiance of valid school authority or material disruption of school activities.[102] But those disciplinary practices, as Ross argues, raise serious First Amendment concerns.

Over the last decade or so, however, many schools and school districts have begun to recognize the damage caused by exclusionary school discipline. Such practices—often the first step on the school-to-prison pipeline—increase the risk of grade retention, dropout, arrest, and incarceration; create a climate of alienation and fear in schools; and disproportionately affect African-American and Latino students, economically disadvantaged students, and students with disabilities.[103] In response, schools have begun to develop and experiment with several promising practices that aim to create a school environment that will prevent behavior (and speech) that might previously have resulted in suspension, and interventions that respond to "willful defiance" and "disruption of school activities" not with exclusion,[104] but rather with accountability, restoration, and an opportunity for all to be citizens of the school community. As an added benefit, these practices also avoid the risk of squelching student speech, even that speech with little value in the marketplace of ideas.[105]

---

102. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (holding that student speech that "materially disrupts classwork" is not constitutionally protected and can be punished).

103. *See* Catherine J. Ross, *"Bitch," Go Directly to Jail: Student Speech and Entry into the School-to-Prison Pipeline*, 88 TEMP. L. REV. 717, 719–23, 735 (2016) (arguing that the practice of using exclusionary school discipline for minor offenses and language that does not materially disrupt the educational process helps to prime the school-to-prison pipeline and disproportionately harms students of color).

104. Several large, urban school districts—including Los Angeles and San Francisco—have banned the use of suspension for "willful defiance," while the State of California has followed suit for the early elementary grades and discourages its use at all levels. DANIEL J. LOSEN ET AL., THE CTR. FOR CIVIL RIGHTS REMEDIES, CLOSING THE SCHOOL DISCIPLINE GAP IN CALIFORNIA: SIGNS OF PROGRESS 6, 18 (2015), https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/summary-reports/ccrr-school-to-prison-pipeline-2015/UCLA15_Report_9.pdf [https://perma.cc/367V-MQZQ].

105. Ross broadly recognizes that schools can (and do) engage in creative interventions as a response to such speech:

> Throughout, I have offered examples of constructive interventions to problematic episodes involving student expression. I have emphasized the distinction between censoring or punishing speech and using protected but ill-advised, inappropriate, or offensive speech as the basis for teaching about norms of respect and civility in public discourse. Consistent with constitutional limitations, these lessons can take the form of private discussions with individual students or public discussions with a whole class, a grade level, or the student body and can even bring in parents and community groups

Here I will only summarize three promising school- and district-wide approaches to creating a safe environment while respecting student speech: school wide positive behavior intervention and supports; restorative justice practices; and social–emotional learning.

School wide positive behavior intervention and supports (SWPBIS) originated with the use of positive behavioral interventions and supports for children with disabilities, particularly those with emotional and behavioral disabilities. Starting from that individualized approach, educators and researchers developed a school-wide approach to discipline "that is intended to create safe, predictable, and positive school environments that are responsive to entire school populations' varying needs for certain types and levels of support."[106] Central to the SWPBIS strategy is the focus on changing adult behavior rather than punishing student behavior. Accordingly, SWPBIS practices: (1) define behavioral expectations that are valued in the school community; (2) teach those behaviors in various school settings; (3) reward students for compliance; (4) administer a tiered continuum of consequences for violations; and (5) continuously collect and analyze data to determine the causes of behavioral incidents and students' responsiveness to nonpunitive interventions.[107] What sets SWPBIS apart from other strategies for addressing student behavior is that it enjoys some twenty years of experience in almost every state and thousands of school districts.[108] More importantly, it works. SWPBIS is linked to a reduction in discipline referrals and an improvement in adults' perceptions of school safety.[109]

Much more could be said about SWPBIS, but for our purposes, the most salient feature of this intervention is its focus on how adult actions can create a school culture that results in fewer disciplinary referrals—including referrals for verbal incidents—and a reduction in exclusionary discipline for such low-level offenses.

Restorative justice (RJ) practices have become a critical component of behavioral management in schools that attempt to depart from zero tolerance and harsher punitive and exclusionary school discipline strategies toward

> if the grievances the speech generates seem to require dialogue with a broader audience.

ROSS, *supra* note 2, at 292.

106. Claudia G. Vincent et al., *Effectiveness of Schoolwide Positive Behavior Interventions and Supports in Reducing Racially Inequitable Disciplinary Exclusion*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 207, 208 (Daniel J. Losen ed., 2015).

107. *Id.* at 208–09.

108. *School-wide Positive Behavioral Interventions and Supports (Tier 1)*, COUNTY HEALTH RANKINGS AND ROADMAPS (Feb. 4 2016), http://www.countyhealthrankings.org/policies/school-wide-positive-behavioral-interventions-and-supports-tier-1 [https://perma.cc/C5QJ-KCXN]

109. Robert H. Horner et al., *Examining the Evidence Base for School-Wide Positive Behavior Support*, FOCUS ON EXCEPTIONAL CHILD., Apr. 2010, at 1, 7–8.

measures that focus on inclusion and community building.[110] RJ practices center on three key pillars: accountability, community safety, and competency development.[111] RJ practices give "wrongdoers" opportunities to be held accountable to those they have harmed directly, enabling them to repair the harm they caused (as much as they possibly can).[112] Finally, RJ aims to increase prosocial skills of "offenders" by addressing underlying factors that lead youth to behave poorly and builds on the strengths of each individual.[113]

Restorative practices can take the form of conferences, restorative circles, and mediation. Conferences and mediation occur when an event has taken place that requires the involved parties to come together in order to come to a resolution.[114] Restorative circles can be both preventative, as a daily classroom practice that begins and ends each day, and reactive, used as needed when a conflict occurs.[115] A restorative circle can include just a class and the teacher (which is often the more preventative model), or in reaction to conflict, a circle may bring in other affected parties such as administrators, parents, and other family or friends.[116]

Evidence of RJ's success is more sparse than SWPBIS due, in part, to the fact that there is no singular RJ "model" and schools often implement RJ practices in an *à la carte*, often-haphazard manner. For our purposes, among the greatest assets restorative practices offer schools is their view of discipline from a lens of growth. Rather than leaving students out of the picture once they have broken a rule, restorative practices offer students a

110. *See generally* Martell L. Teasley, Editorial, *Shifting from Zero Tolerance to Restorative Justice in Schools*, 36 CHILD. & SCHOOLS 131 (2014) (advocating for the research into and implementation of RJ and other less punitive methods in schools).

111. Gordon Bazemore, *What's "New" About the Balanced Approach?*, JUV. & FAM. CT. JUDGES, Feb. 1997, at 1, 3.

112. *See, e.g.*, Thalia González, *Socializing Schools: Addressing Racial Disparities in Discipline Through Restorative Justice*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 106, at 151, 161–62 (describing a restorative justice policy focusing on students' ability to learn from their mistakes while addressing the needs of those affected by their misconduct).

113. *See* TREVOR FRONIUS ET AL., WESTED JUSTICE & PREVENTION RESEARCH CTR., RESTORATIVE JUSTICE IN U.S. SCHOOLS: A RESEARCH REVIEW 21 (2016), http://jprc.wested.org/wp-content/uploads/2016/02/RJ_Literature-Review_20160217.pdf [https://perma.cc/3J22-BCJ9] (finding positive increases in prosocial attitudes for participants in RJ).

114. *Id.* at 11 (explaining that restorative justice practices such as "victim–offender mediation conferences, group conferences, and various circles . . . [are used to] determine a reasonable restorative sanction for the offender").

115. *See* González, *supra* note 112, at 153 (admitting that RJ is often perceived as a way to respond to student misconduct, but arguing that proactive restorative exchanges have the greatest impact).

116. *See id.* at 160 (describing the use of restorative circles in classrooms to generally "support learning outcomes, set boundaries, and develop positive relationships" and also to resolve specific conflicts between particular parties).

way to remain part of the community and constructively learn from their actions.[117] In this way, restorative practices allow schools to frame low-value verbal incidents as teachable moments rather than punishable offenses.

"Social and emotional learning (SEL) is the process through which children and adults acquire and effectively apply the knowledge, attitudes, and skills necessary to understand and manage emotions, set and achieve positive goals, feel and show empathy for others, establish and maintain positive relationships, and make responsible decisions."[118] SEL came out of the recognition that the traditional view of education was not comprehensive and that there should be an explicit focus on educating the whole child. This includes "fostering a wide range of life skills, dispositions, and knowledge including social and emotional competencies, character, and social responsibility."[119] SEL programs teach, model, practice, and apply the competencies of self-awareness, self-management, social awareness, relationship skills, and responsible decision making. SEL is meant to create an ethos that is embedded into all actions and interactions at school and outside of school. It engenders the skills and motivations to practice healthy behaviors and make decisions in responsible ways.

SEL often starts with the adoption of one of many possible well-defined practices or curricula.[120] This might look like teaching students about the chemical reactions that happen in the brain when someone is triggered so that they are aware when they are triggered and can wait until they are detriggered before acting or making a decision. Or, it might look like each student identifying a SEL goal at the beginning of each day. Or, SEL might look like classroom or physical education class time wherein the activities are wholly student driven. In support of all of these more well-defined practices, teachers may then emphasize specific SEL qualities during anticipated

117. *See* HEATHER T. JONES, UNIV. OF TEX. SCH. OF SOC. WORK, RESTORATIVE JUSTICE IN SCHOOL COMMUNITIES: SUCCESSES, OBSTACLES, AND AREAS FOR IMPROVEMENT 3 (2013), http://irjrd.org/files/2016/01/Jones_Restorative-Discipline_12-29-13.pdf [https://perma.cc/4B3V-43B5] (describing RJ as a method of discipline that involves students in constructive dialogue with the goal of repairing relationships and learning from mistakes that is more educative than traditional disciplinary methods).

118. *What is SEL?*, COLLABORATIVE FOR ACAD. SOC. & EMOTIONAL LEARNING, http://www.casel.org/what-is-sel [https://perma.cc/HT8D-G22G].

119. Kimberly A. Schonert-Reichl & Roger P. Weissberg, *Social and Emotional Learning: Children*, *in* ENCYCLOPEDIA OF PRIMARY PREVENTION AND HEALTH PROMOTION 936, 936 (Thomas P. Gullotta & Martin Bloom eds., 2014), http://link.springer.com/content/pdf/10.1007%2F978-1-4614-5999-6_133.pdf [https://perma.cc/M6Y8-SGLQ].

120. SEL can refer to such a huge variety of practices with an equal variety of goals that it is impossible to list them here. Two useful resources that provide lists of programs and information as to their efficacy are the CASEL website which provides an extensive list of quality programs (http://www.casel.org/guide [https://perma.cc/QA78-F2CK]), and Edutopia which provides a list of studies conducted on different SEL programs (http://www.edutopia.org/sel-research-annotated-bibliography [https://perma.cc/C4NA-MXFM]). No written description, however, can substitute for seeing how SEL works in practice.

teachable moments, helping students apply SEL skills throughout the day. In this way, SEL becomes part of the school culture and infuses all classroom lessons and school interactions rather than being limited to the confines of the class time during which SEL values are explicitly taught.

"An incredible wealth of research links SEL programs to decreased truancy, less drug use, lower dropout rates, improved academic performance, improved connection to school, and fewer behavioral problems."[121] Naturally, such improvement in connectedness to school and behavioral incidents reflects a school culture that frowns upon language and speech that is harmful, hurtful, and offensive, while in no way impairing authentic dialogue and disagreement.

Conclusion

Catherine Ross teaches us three important things in *Lessons in Censorship*. First, controversies surrounding student speech on campus reflect the culture-war schisms that have arisen in our nation at large. Second, it is essential that our schools teach the values of critical dialogue, a robust exchange of ideas, and tolerance of the views of others by modeling those values, not censoring and suppressing speech that might be controversial or even hurtful to some. And third, the courts (and consequently school administrators) have failed to defend student speech and instead have slowly chiseled away at the robust protection provided by *Tinker*. This is where Ross steps in to provide a full-throated defense of student speech and a clear-headed reading of the case law that will ensure that constitutional values are not trammeled by administrative expediency, fear of controversy, or misguided disciplinary actions aimed at student speech.

I accept and endorse these lessons. Yet in the hectic hallways of America's high schools, making split-second decisions about hurtful, hateful, offensive, and defiant speech is difficult. Sometimes free speech challenges our other values such as civility, tolerance, respect, cooperation, and the demand to treat others as equals. Sometimes hurtful words make schools unsafe for learning for some students. But, as Ross recognizes, squelching speech is not the answer. Rather, creating a teachable moment from such speech and facilitating a robust (and hopefully restorative) conversation can address such low-value speech. To that I would add school-wide practices

121. Danfeng Soto-Vigil Koon, *Exclusionary School Discipline: An Issue Brief and Review of the Literature*, CHIEF JUST. EARL WARREN INST. ON L. & SOC. POL'Y, Apr. 2013, at 1, 15–16 https://www.law.berkeley.edu/files/BMOC_Exclusionary_School_Discipline_Final.pdf [https://perma.cc/D4ZZ-BENY].

aimed at creating a culture of positive behavior, tolerance, and respect through school wide positive behavior intervention and supports, restorative practices, and social emotional learning. With a focus on how they prevent and respond to disruptive speech (and conduct), school administrators can similarly avoid the constitutional landmines that *Lessons in Censorship* reveals.