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Proceduralize Student Speech

ABSTRACT. This Note proposes an important new dimension for student-speech jurisprudence: procedure. Current doctrine focuses on sorting the speech itself into categories, largely ignoring the school's response. But empirical evidence shows that *how* a school regulates speech determines whether students learn the lessons that schools intend or simply turn against authority they perceive as unfair. Courts have often allowed schools to restrict speech on the assumption that doing so teaches students useful lessons, but without looking at how restrictions are implemented, it is impossible to know whether this assumption holds. This Note therefore develops a framework for judicial scrutiny of the disciplinary process in student-speech cases.

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INTRODUCTION

In the recent student-expression case *Mahanoy Area School District v. B. L. ex rel. Levy*,[1] a high-school cheerleader, B.L., sent a Snapchat to her friends reading "Fuck school fuck softball fuck cheer fuck everything."[2] When classmates turned the snap over to school authorities, B.L. was suspended from the cheerleading team for a year.[3] In reviewing B.L.'s case, the Supreme Court agreed to resolve a question that had caused a years long circuit split: when does the First Amendment prevent schools from punishing off-campus student speech?[4] Since *Tinker v. Des Moines Independent Community School District*,[5] on-campus-speech cases have most commonly turned on the distinction between disruptive (punishable) and nondisruptive (not punishable) speech,[6] with later exceptions also allowing schools to punish or censor speech categorized as "lewd,"[7] prodrug,[8] or school-sponsored.[9] But courts were already struggling to apply these categories to on-campus speech,[10] and attempts to apply them to off-campus speech multiplied the doctrinal challenges.[11]

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1. 141 S. Ct. 2038 (2021).
2. *Id.* at 2043.
3. *Id.*
4. *Compare* Doninger *ex rel.* Doninger v. Neihoff, 527 F.3d 41, 53 (2d Cir. 2008) (allowing punishment if it is reasonably foreseeable that speech will reach the school and cause a disruption there), *and* Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 573 (4th Cir. 2011) (allowing punishment if there is a sufficient "nexus" to the school's "pedagogical interests"), *with* B. L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 189 (3d Cir. 2020) (holding that schools have no special authority to punish off-campus speech), *aff'd*, 141 S. Ct. 2038 (2021). *See generally* Rory Allen Weeks, Note, *The First Amendment, Public School Students, and the Need for Clear Limits on School Officials' Authority over Off-Campus Student Speech*, 46 GA. L. REV. 1157 (2012) (discussing the circuit split and arguing for the Court to grant certiorari to resolve it).
5. 393 U.S. 503 (1969).
6. *Id.* at 514.
7. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).
8. Morse v. Frederick, 551 U.S. 393, 410 (2007).
9. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).
10. *See, e.g.*, Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 214 n.19 (2013) ("Existing student speech doctrine is already so muddled that Supreme Court Justices even joked about the doctrinal confusion during the 2007 oral argument in *Morse v. Frederick* . . . ." (citing Transcript of Oral Argument at 48-50, *Morse*, 551 U.S. 393 (No. 06-278))); Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 542 (2000) ("There are literally dozens of lower federal court cases over the last thirty years dealing with student speech. They follow no consistent pattern . . . .").
11. *See* Weeks, *supra* note 4, at 1163-65.

Rather than doubling down on these categorical brightlines, the Court's opinion in *B. L.* acknowledged that traditional student-speech categories are too blunt a tool to address a complex and sensitive issue fully.[12] Eight Justices agreed that the First Amendment prevented the school from disciplining B.L.'s speech, but the Court explicitly refused to state a "broad, highly general First Amendment rule" for why this was so.[13] Instead, it invited courts presiding over off-campus-speech cases to balance a number of relevant factors – including the extent to which the school stands *in loco parentis*, the burden on students' ability to express core First Amendment views, and the school's interest in protecting unpopular student expression.[14] The Court did not eschew the traditional exercise of classifying speech as "disruptive" or "lewd,"[15] but it acknowledged that other considerations must supplement these simplistic labels – at least in cases of off-campus speech.[16]

But the bluntness of student-speech categories is not only a problem when speech occurs off campus. The failure to look beyond formalistic categories also lies at the heart of a major, largely unexamined issue with on-campus-speech jurisprudence: the striking fact that it consistently supports bad pedagogy. A focus solely on the content of speech – rather than on other relevant factors about speech restrictions – leads courts to uphold speech discipline that is often actively counterproductive, creating a visible backfire effect in student-speech cases.

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12. For additional analysis of the mismatch between the bright lines of student-speech doctrine and the highly contextual process of education, see, for example, Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 702-03 (1987), which cautions judges against "assuming that the blunt tools of legal . . . analysis are a preferred substitute for the subtle, personal, extended process we call education"; *id.* at 705, which notes that "it is virtually impossible for judicial interpretation in student expression cases to achieve much more than the removal of restraints"; Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CALIF. L. REV. 1269, 1272-76 (1991), which suggests that the doctrine is inconsistent with the theoretical imperative of schools to develop "students' knowledge in conjunction with their cognitive capabilities"; and Josie Foehrenbach Brown, *Inside Voices: Protecting the Student-Critic in Public Schools*, 62 AM. U. L. REV. 253, 289-306 (2012), which describes the challenges of a standard based on "disruption" when dealing with students who are critical of educators or the school.
13. Mahanoy Area Sch. Dist. v. B. L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021).
14. *Id.* at 2046.
15. *Id.* at 2047-48 (noting that B.L.'s speech was not substantially disruptive, and that although it was vulgar, this factor was not decisive).
16. *Id.* at 2047 (stating that the location of B.L.'s posts, her target audience, and the fact that she did not identify the school in her posts "diminish the school's interest in punishing B.L.'s utterance").

For example, in the 1986 case *Bethel School District No. 403 v. Fraser*,[17] Matthew Fraser's school suspended him for two days and removed him from a list of graduation speakers due to a sexually suggestive speech he made at a school assembly.[18] The Supreme Court upheld this punishment, reasoning that schools must be able to punish lewd speech in order to teach students "the habits and manners of civility."[19] But the students at Bethel High, it seems, did not learn their lesson. Fraser was still elected graduation speaker as a write-in, students protested his punishment with signs reading "Stand Firm, Matt," and the school newspaper voiced strong support for him.[20] Rather than teaching civility, the punishment seems to have turned students against it.

Fraser is far from the only student-expression case in which students failed to learn authorities' intended lesson. In *Doninger v. Niehoff*, a student who was forbidden from running for student government due to "disruptive" and disparaging comments about administrators received a plurality of votes as a write-in candidate.[21] The student in *Hazelwood School District v. Kuhlmeier*,[22] whose school-newspaper article was censored in a supposed attempt to teach responsible journalism, stated in 2010 that "she 'wouldn't change a thing' about her actions."[23] Joseph Frederick, who was punished for his "BONG HiTS 4 JESUS" banner in an effort to deter drug use,[24] received a standing ovation when he returned to his high school several years later.[25]

The pattern in these cases is that courts allow schools to punish a certain category of speech in order to teach a certain lesson. Schools then punish that speech, with courts' approval—but students do not learn the lesson. This backfire effect happens frequently, yet courts continue to ask only whether speech fits into a punishable category—not whether punishing it will *work*. In other words, they assume, contrary to experience, that punishing that category of speech will necessarily teach the intended lesson. Current jurisprudence implicitly assumes that punishing disruption leads to order, punishing lewd speech leads to civility,

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17. 478 U.S. 675 (1986).

18. *Id.* at 678.

19. *Id.* at 681.

20. *See* JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 102 (2018); Scott A. Moss, *The Overhyped Path from* Tinker *to* Morse*: How the Student Speech Cases Show the Limits of Supreme Court Decisions—for the Law and for the Litigants*, 63 FLA. L. REV. 1407, 1452 (2011).

21. 642 F.3d 334, 343 (2d Cir. 2011).

22. 484 U.S. 260 (1988).

23. Moss, *supra* note 20, at 1454.

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

25. Moss, *supra* note 20, at 1454-55.

and punishing prodrug speech leads to antidrug values—even under circumstances where that assumption is highly implausible.[26]

Perhaps judges believe that whether speech discipline will succeed or fail is unpredictable—or at least beyond the judiciary's capability to predict. But that belief would be false. Empirical research on school discipline provides a clear answer to what makes speech restrictions work, and the answer is one that courts are well equipped to handle: fair and respectful process. When students perceive discipline as fair and respectful, they internalize rules as legitimate guides for conduct.[27] But when students perceive discipline to be ad hoc, discriminatory, or disrespectful, it backfires, teaching students only to turn against authority.[28]

This Note therefore proposes a new dimension for student-speech jurisprudence: procedure. Student-speech jurisprudence abounds with claims that punishing speech teaches students lessons such as civility[29] and positive citizenship.[30] Courts let schools bypass First Amendment protections precisely to teach these lessons.[31] But far too often, those lessons are not learned—meaning that speech suppression is, in fact, not justified. Attending to *how* schools punish speech would help courts ensure that student-speech restrictions do not merely pay lip service to educational ends, but actually achieve them.

The mismatch between means and ends here is not merely a formalistic issue. Courts often extol education as the "foundation of good citizenship,"[32] understanding schooling not as an end in itself, but as part of the development of adults who will contribute to their community and country.[33] While the exact definition of "good citizenship" is up for debate, it certainly excludes fighting, criminal conduct, and alienation from civic life—all of which are more common among students subject to strict but unfair discipline.[34] There is a contradiction, then, when courts inject lofty education goals into their student-speech jurisprudence while ignoring the factor—process—associated most clearly with education and citizenship. Aligning student-speech jurisprudence with education's broader social goals requires attention to the disciplinary process.

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26. See *infra* Section I.C.

27. *See infra* Section II.A.

28. *Id.*

29. *See infra* Section I.C.1.

30. *See infra* Section II.B.2.

31. *Id.*

32. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

33. *See infra* Section II.B.2 for additional evidence of the frequent connection between schooling and citizenship in judicial opinions.

34. *See infra* notes 177-182 and accompanying text.

By focusing on *how* schools punish speech, this Note fills a major gap in the literature. While many scholars have attempted to bring coherence to the question of *what* speech may be punished,[35] few have looked any further.[36] Commentators on the "school" side of the student-speech debate generally suggest that punishment teaches important lessons, even if schools occasionally overreach.[37] The solution, therefore, is to allow more punishments, or at least to maintain the status quo.[38] Commentators on the "student" side worry that schools, if left unchecked, will employ punishment dictatorially, communicating to students that they have no rights.[39] The solution is therefore to allow fewer punishments.[40] But focusing alternatively on procedure reveals a different solution—focusing not on the amount of punishment, but on whether it is, in fact, effective or dictatorial. This approach respects the concerns of both sides of the student-speech debate.

One reason few commentators have moved past the categorical framework may be their reluctance to increase judicial involvement with the specifics of

35. *See, e.g.*, Chemerinsky, *supra* note 10, at 545-46; Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 627, 663-64 (2002); Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1662-63 (1986); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 188-91 (1995); Mark G. Yudof, Tinker *Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN'S L. REV. 365, 367-76 (1995); Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the Public Schools*, 70 NOTRE DAME L. REV. 769, 794-824 (1995); Joanna Nairn, Note, *Free Speech 4 Students?* Morse v. Frederick *and the Inculcation of Values in Schools*, 43 HARV. C.R.-C.L. L. REV. 239, 246-56 (2008).

36. One scholar who does address the issue of procedure in student-speech discipline is Emily Gold Waldman. *See* Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113 (2010). Gold Waldman suggests two dimensions of procedure that deserve court attention: that the student have fair notice and that the punishment be reasonable (i.e., proportional to the misbehavior). *Id.* at 1136-46.

37. *See, e.g.*, RICHARD ARUM, JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY 29-37 (2005); Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 50-52 (1996).

38. Dupre, *supra* note 37, at 50-52; Sherry, *supra* note 35, at 794-824; Bitensky, *supra* note 35, at 841-42.

39. *See, e.g.*, Levin, *supra* note 35, at 1654 ("The argument here is that if educational institutions are not subject to the same constitutional constraints as other governmental agencies, students will not come to an understanding of the value of a democratic, participatory society, but instead will become a passive, alienated citizenry that believes that government is arbitrary." (footnote omitted)); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 290-91 (1988) (Brennan, J., dissenting).

40. *See, e.g.*, Chemerinsky, *supra* note 10, at 545-46; Levin, *supra* note 35, at 1678-80.

school discipline.[41] On that note, it is important to recognize that every procedural reform suggested below can be implemented by schools without judicial or legislative interference—indeed, that outcome would be preferable. Judicial supervision of speech-discipline procedures should not be the norm, but rather a prod for recalcitrant schools to implement reforms.[42]

The rest of this Note proceeds as follows. In Part I, I review the Supreme Court's student-expression jurisprudence. In doing so, I seek to show that, to date, most jurisprudence has focused on categorizing speech into punishable or unpunishable categories, rather than considering the effectiveness of punishment. In a notable exception, *West Virginia State Board of Education v. Barnette*,[43] one of the Court's first student-expression cases, recognized that punishing speech does not necessarily achieve educational goals.[44] But courts have forgotten this insight over time, developing a modern jurisprudence that fails to examine the effectiveness of restrictions.

In Part II, I explain why the failure to evaluate the effectiveness of restrictions is problematic. Undergirding my critique is a significant body of empirical research demonstrating that different types of discipline have different effects on students. While discipline perceived as unfair or coercive can produce compliance in the moment, only discipline perceived as legitimate causes students to internalize intended values. Courts cannot simply assume, therefore, that all disciplinary processes work. Haphazard or unfair discipline can protect the classroom from disruptions, but only fair and respectful discipline can inculcate the school's intended lessons. In fact, unfair discipline turns students against authority, which hinders citizenship development even beyond the classroom.[45] The implications for schools, and for courts, are clear. The disciplinary process matters for regulating student speech.

Part III describes what a procedural focus in student-expression jurisprudence would look like in practice. I propose that, after judges determine the school's interest in disciplining speech, they ask whether its disciplinary process aligns with that interest. Some judicial deference is appropriate for educators' everyday disciplinary decisions. However, I recommend stronger judicial scrutiny over disciplinary processes for two categories of speech: (1) nondisruptive speech, and (2) sensitive political, religious, or other core First Amendment

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41. *See infra* notes 275-279 and accompanying text.

42. *See infra* Section III.B for further development of this theme.

43. 319 U.S. 624 (1943).

44. *Id.* at 641.

45. For an overview of this research, see TOM R. TYLER & RICK TRINKNER, WHY CHILDREN FOLLOW RULES: LEGAL SOCIALIZATION AND THE DEVELOPMENT OF LEGITIMACY 167-71 (2018), which is also discussed *infra* Section II.A.

speech. I suggest that, as a rule of thumb, disciplinary processes for these types of speech should involve a full-warning rule, which would provide for student-authority dialogue and grant the student the chance to change their behavior before enforcement. I close by applying this approach to several prominent student-expression cases.

I. THE ASSUMPTION OF EFFECTIVENESS IN STUDENT-EXPRESSION JURISPRUDENCE

The Supreme Court has historically viewed student-expression cases as a conflict between the student's First Amendment rights and the school's interest in achieving educational goals.[46] On one hand, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[47] On the other hand, these rights "are not automatically coextensive with the rights of adults in other settings,"[48] and schools can therefore limit them to achieve certain ends, such as maintaining classroom order or teaching lessons. Based on a rough weighing of speech categories' value and the importance of school aims, the Court has decided that school aims justify punishing certain types of speech, but not others. Once courts decide speech falls into a punishable category, however, they largely fail to address the question of what *type* of punishment is justified.

According to the Court's most recent formulation in *B. L.*, student speech can be punished if it falls into one of the following four categories: (1) speech that "materially disrupts classwork or involves substantial disorder or invasion

46. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) ("Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities."); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) ("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."); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1987) ("We have nonetheless recognized that the First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings . . . . A school need not tolerate student speech that is inconsistent with its basic educational mission." (citations and quotation marks omitted)); Mahanoy Area Sch. Dist. v. B. L. *ex rel.* Levy, 141 S. Ct. 2038, 2044 (2021) ("We have made clear that students do not shed their constitutional rights to freedom of speech or expression, even at the school house gate. But we have also made clear that courts must apply the First Amendment in light of the special characteristics of the school environment." (citations and quotation marks omitted)).

47. *Tinker*, 393 U.S. at 506.

48. *Fraser*, 478 U.S. at 682.

of the rights of others;"[49] (2) "indecent," "lewd," or "vulgar" speech;[50] (3) "speech . . . that promotes illegal drug use;"[51] or (4) "speech that others may reasonably perceive as 'bear[ing] the imprimatur of the school.'"[52] Courts tend to use a deferential "reasonableness" standard in evaluating the actions of school authorities under this framework. If the school official could "reasonably believe" that speech belongs in one of these categories, the court upholds the punishment.[53] The one caveat to this framework is that school authorities receive significantly less deference when the speech at issue occurs off campus.[54]

This doctrinal framework overlooks a fundamental question: even if speech falls into one of those categories, does punishment work? Schools say that punishing speech helps them establish classroom order,[55] teach civility,[56] and even prevent drug use.[57] Over the past fifty years, courts have rarely questioned these assertions, even when the facts of a case seem to contradict them.[58] Rather, the doctrine implicitly assumes that if speech falls into a punishable category, restricting it is an effective way to achieve a school's aims.

However, student-speech jurisprudence did not always make this assumption. The Supreme Court's very first foray into student-expression issues forced

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49. *B. L.*, 141 S. Ct. at 2044 (quoting *Tinker*, 393 U.S. at 513).

50. *Id.* at 2045 (quoting *Fraser*, 478 U.S. at 685).

51. *Id.* (quotation marks omitted) (citing Morse v. Frederick, 551 U.S. 393, 409 (2009)).

52. *Id.* (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1987)).

53. *See, e.g.*, *Kuhlmeier*, 484 U.S. at 274-75 (finding that the school principal could have reasonably believed that school-newspaper articles were inappropriate and that censoring them was necessary, regardless of whether this was in fact the case); *Morse*, 551 U.S. at 401 (finding that the school principal could reasonably have believed that the "cryptic" message on Frederick's banner promoted illegal drug use, despite the possibility of other interpretations); *see also Morse*, 551 U.S. at 403 (articulating the *Tinker* standard as allowing student expression to be suppressed if school officials "reasonably conclude" that it will be disruptive); Chemerinsky, *supra* note 10, at 544-45 (stating that deference to school authorities' determinations of whether speech suppression is necessary to avoid disruption has become the norm).

54. In addition to discussing the lower deference owed to school officials when disruptive speech occurs off campus, *B. L.* implies that the school's interest in punishing vulgar or lewd speech may be so diminished when applied to off-campus speech that it is essentially inapplicable. *B. L.*, 141 S. Ct. at 2047.

55. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 518 (1969) (Black, J., dissenting) (noting the school's belief that protest armbands would "take the students' minds off their classwork"); *see also infra* Section I.B.

56. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678 (1986); *see also infra* Section I.C.1.

57. *Morse*, 551 U.S. at 408 (accepting the argument that the school's policy of suppressing prodrug speech is necessary to combat drug abuse); *see also infra* Section I.C.3.

58. *E.g.*, *Kuhlmeier*, 484 U.S 260. For discussion of the seemingly ineffective censorship in this case, see *infra* notes 130-131 and accompanying text.

it to acknowledge that punishing speech is not always an effective way for schools to teach lessons.

A. *The Dangers of Assuming Effectiveness:* Gobitis *and* Barnette

Student-expression jurisprudence begins with the closely linked cases of *Minersville School District v. Gobitis*[59] and *West Virginia State Board of Education v. Barnette*.[60] While *Gobitis* advocated near-total deference to school authorities on the effectiveness of expression restrictions, *Barnette* acknowledged that restrictions can backfire. That insight deserves greater attention today.

Decided in 1940, *Gobitis* concerned two young children who refused to participate in a flag salute due to their religious beliefs as Jehovah's Witnesses. Their school expelled them.[61] Bringing suit, the students asserted freedom of religion, against which the government asserted an interest in promoting national unity.[62] One question raised by the case was whether compulsory flag salutes are an effective way to achieve unity. Writing for the Court, Justice Frankfurter deferred to the judgment of school boards on this question, stating that "the end [was] legitimate," and therefore the legislature had "the right to select appropriate means for its attainment."[63] Applying something like rational-basis review, the Court upheld the expulsion.[64]

The consequences of this decision quickly led the Court to reconsider. The formerly limited practice of expelling Jehovah's Witnesses for such violations expanded significantly, and many parents faced prosecution "for contributing to the delinquency of minors."[65] A wave of vigilante violence against Witnesses swept the country.[66] *Gobitis* was widely believed to have caused these developments by implying that Jehovah's Witnesses deserved to be ostracized.[67] Recognizing these negative consequences, the Court revisited the decision only three years later in *Barnette*.[68]

The facts of *Barnette* were nearly identical to *Gobitis*, involving Jehovah's Witnesses threatened with expulsion for refusing to salute the flag and say the

59. 310 U.S. 586 (1940).

60. 319 U.S. 624 (1943).

61. *Gobitis*, 310 U.S. at 591-92.

62. *Id.* at 592-96.

63. *Id.* at 595, 598.

64. *Id.* at 600.

65. DRIVER, *supra* note 20, at 6-7.

66. *See id.* at 64.

67. *Id.*

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

Pledge of Allegiance.[69] However, the Court now explicitly refused to apply rational-basis review. While recognizing that national unity was a valid end, the Court did not defer to the school's claim that compelled recitation was a reasonable means to attain it. Rather, the Court held that when school authorities limit a fundamental right, the school must do more than assert some reason for doing so.[70] "[F]reedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds."[71]

Perhaps it was *reasonable*, in some sense, for the school to believe that a compulsory flag salute would promote national unity. But the Court applied its own judgment, and on closer scrutiny, it found two problems. First, the restriction on student rights was simply too great. The Court asserted that the freedom not to be coerced into speech is essentially absolute, or that "[i]f there are any circumstances which permit an exception, they do not now occur to us."[72] This reasoning suggests that even if the restriction had been successful in fostering unity, it was simply too repugnant to the First Amendment to be maintained.[73] However, this position leaves open the possibility that significant state benefits could justify less coercive regulations—for example, merely punishing speech, rather than forcing students to speak. This line of analysis recurs frequently in subsequent student-speech cases.[74]

The Court's second objection, though, was that the flag salute would not work to advance the school's stated goals. The idea that compulsory salutes would unify our nation had been accepted in *Gobitis*.[75] But subsequent events showed the salutes in fact created division. The Court cast this idea in historical terms, advancing a variety of examples—from Rome's attempt to stamp out Christianity, to the Inquisition, to "the fast failing efforts of our present totalitarian enemies"—that illustrated the "[u]ltimate futility" of government "attempts to compel coherence."[76] Punishments that attempt to force people to

69. *Id.* at 629-30.

70. *Id.* at 639.

71. *Id.*

72. *Id.* at 642.

73. *See id.* at 637 ("Boards of Education . . . have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.").

74. Sections I.B and I.C provide examples of the Court reasoning that the freedom to speak (unlike the freedom not to speak, at issue in *Barnette*) can be outweighed by state ends in various circumstances. *See, e.g.*, *infra* notes 83-85 and accompanying text (upholding speech restrictions intended to help schools avoid disruption); *infra* notes 125-127 and accompanying text (listing "valid educational purpose[s]" that would justify speech restrictions).

75. *Supra* text accompanying note 64.

76. *Barnette*, 319 U.S. at 641.

change their beliefs often backfire, merely turning believers against authority. In reaching this conclusion, the Court noted a straightforward but crucial distinction between the appearance of belief and actual belief.[77] Even if the mandate effectively caused Witnesses to act patriotic, compelling students to fake patriotism would only harden their hearts against the nation.

Concurrences by Justices Black, Douglas, and Murphy elaborated on that point. Black and Douglas suggested that attempts to compel unity trade on a fundamental misunderstanding of the connection between words and beliefs.[78] The school seemed to assume that coercing students into the appearance of patriotism would actually make them patriotic—but that was not so. "Words uttered under coercion are proof of loyalty to nothing but self-interest" as "[l]ove of country must spring from willing hearts and free minds."[79] The school could coerce student expression through fear of punishment, but coercing *beliefs* in this manner was impossible. Similarly, Justice Murphy stated that changing a student's beliefs requires "persuasion" and that attempts to coerce speech can only result in an "empty gesture."[80]

Barnette foregrounded two possible issues with student-speech restrictions. First, restrictions can limit First Amendment rights too severely for schools' stated goals to justify them at all. That issue has taken center stage in subsequent cases.[81] Second, restrictions might be an implausible means to achieve state ends, especially when they try to coerce students into taking on new values. Subsequent jurisprudence has lost this second insight.

B. *Effectiveness and Disruption:* Tinker

Tinker v. Des Moines Independent Community School District[82] created a new foundation for student-speech doctrine, hiding *Barnette*'s nascent insight that speech restrictions do not automatically succeed. Where *Barnette* had suggested that looking at the effectiveness of speech restrictions could be part of student-expression jurisprudence, *Tinker* implied that it is not. And *Tinker*, not *Barnette*, has become the template for future cases.

77. *See id.* at 633 (asking "whether it will be acceptable if [students] simulate assent by words without belief and by a gesture barren of meaning").

78. *Id.* at 644 (Black, J., joined by Douglas, J., concurring).

79. *Id.*

80. *Id.* at 646 (Murphy, J., concurring).

81. *See supra* note 46 (collecting quotations from each subsequent Supreme Court speech case regarding the need to balance the limitation on First Amendment rights against the school's stated goal).

82. 393 U.S. 503 (1969).

In *Tinker*, a group of students planned to protest the Vietnam War by wearing black armbands as a gesture of mourning for soldiers who they believed had died in an unnecessary war.[83] To forestall trouble, their school's administration banned protest armbands and threatened to suspend students wearing them.[84] At least three students wore the armbands and were suspended.[85] The Court held for the students, ruling that schools may not punish speech absent "substantial disruption of or material interference with school activities."[86] Because the record lacked facts that could reasonably lead the school to expect disruption, the school could not discipline the Tinkers for their speech.[87]

The holding that schools may not punish nondisruptive speech was a victory for student rights. However, the Court was at least as concerned with establishing that schools *may* punish speech that creates disruption. The Court explicitly stated that "conduct by the student . . . which . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech."[88] At least fifteen times, the majority distinguished the Tinkers' speech from that involving disorder, disruption, or interference with the rights of others—emphasizing that the latter remained punishable.[89] In doing so, the Court tried to recognize students' First Amendment rights while expressing steadfast commitment to "the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools."[90]

The standard that emerged from *Tinker* is that speech is punishable if it causes a material or substantial disruption in the school environment, or, importantly, if school authorities *reasonably forecast* that it will cause such disruption.[91] The "reasonably forecast" language comes from *Tinker*,[92] and numerous

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83. *See id.* at 504.

84. *Id.*

85. *Id.*

86. *Id.* at 514.

87. *Id.*

88. *Id.* at 513.

89. *Id. passim*.

90. *Id.* at 507.

91. *See, e.g.*, Mahanoy Area Sch. Dist. v. B. L. *ex rel.* Levy, 141 S. Ct. 2038, 2044 (2021) (noting that courts have taken as a standard the statement in *Tinker* that expression which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech" (quoting *Tinker*, 393 U.S. at 513)).

92. *Tinker*, 393 U.S. at 514 ("[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities . . . .").

lower-court cases emphasize that, so long as there is *some* evidence that speech will cause disruption, teachers should be permitted to prevent it proactively rather than reacting afterward.[93] Of course, that approach also provides greater latitude for schools to stifle discussion of potentially divisive topics, without even waiting to see whether a disruption actually occurs.[94]

While the Court's underlying analysis in *Tinker* balances individual and state interests, the framework it created is categorical. If speech fits into the "nondisruptive" category, schools may not punish it. If, however, speech fits into the "disruptive" category, schools may punish it as they see fit.[95] The line between these categories is blurry—and can be high stakes. *Tinker* itself is an example. While the majority characterized arguments over the armbands, and even threats to fight, as "discussion outside of the classrooms,"[96] Justice Black in dissent described them as "divert[ing] students' minds from their regular lessons."[97] On this reformulation, he would have upheld the Tinkers' suspension.[98] The *Tinker* standard focuses courts on minutiae of student behavior, because these details determine the outcome.[99] Despite or perhaps because of the intense focus on

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93. *E.g.*, Hardwick *ex rel.* Hardwick v. Heyward, 711 F.3d 426, 439 (4th Cir. 2013) (stating that the fact that a student's Confederate-flag shirts "never caused a disruption is not the issue; rather, the issue is whether school officials could reasonably forecast a disruption because of her shirts"); Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 777 (9th Cir. 2014) (focusing on whether school records "explicitly referenced anticipated disruption"); Cuff *ex rel.* B.C. v. Valley Cent. Sch. Dist., 677 F.3d 109, 113 (2d Cir. 2012) ("This test does not require school administrators to prove that actual disruption occurred or that substantial disruption was inevitable. . . . '[A]n actual disruption standard would be absurd.'" (quoting Cuff *ex rel.* B.C. v. Valley Cent. Sch. Dist. (*Cuff III*), 714 F. Supp. 2d 462, 469 (S.D.N.Y. 2010))).

94. *See* DRIVER, *supra* note 20, at 85-91 (criticizing "reasonable forecast" language and advocating an "actual disruption" standard); *id.* at 127-28 (noting the potential for limiting speech on divisive issues "[e]ven when schools cannot persuasively claim . . . disruption of school activities").

95. Further evidence of the Court's neglect of how schools punish speech will be discussed *infra* Section I.C. *See also* Transcript of Oral Argument at 31, *B. L.*, 141 S. Ct. 2038 (No. 20-255) (Kavanaugh, J.) ("I mean, a year's suspension from the team just seems excessive to me. But how does that fit into the First Amendment doctrine . . . ? Ms. Blatt: Well . . . I don't think it does . . . ."); Gold Waldman, *supra* note 36, at 1142-44 (collecting instances of lower courts explicitly deferring to school authorities on the question of what sort of speech punishment is reasonable).

96. *Tinker*, 393 U.S. at 514.

97. *Id.* at 518 (Black, J., dissenting).

98. *Id.* at 524.

99. The focus on whether students were "disruptive" makes other potential factors, such as the perceived social or political value of the speech, largely irrelevant. *Compare, e.g.*, Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 769-70 (9th Cir. 2006) (finding that refusing to board a team bus in protest of an allegedly abusive basketball coach was disruptive and, therefore,

student behavior, the *school*'s actions in responding to the speech escape scrutiny.[100]

This focus on student behavior departs from *Barnette*. *Barnette* did not assess the consequences of the student's action. Its question was not whether refusing to salute the flag was divisive or unpatriotic.[101] Rather, it was whether the school's action in enforcing a compulsory flag salute was a proper means to achieve unity and patriotism.[102] By contrast, under *Tinker*, courts only need to determine if the speech fits into a category. This approach does not give courts the opportunity to conduct *Barnette*'s effectiveness analysis.

The absence of effectiveness from the *Tinker* test lends itself to multiple interpretations. One is that the *Tinker* standard presumes that *any* method of punishing disruptions will achieve the state's aim of "control[ling] conduct in the

subject to discipline), *and* Doninger v. Niehoff, 642 F.3d 334, 348-51 (2d Cir. 2011) (finding that a blog post by a student-government member complaining about school-administration policy was disruptive and, therefore, subject to discipline), *with* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 928-31 (3d Cir. 2011) (finding that a joke MySpace page making fun of the principal in crude and vulgar terms was not disruptive and, therefore, not subject to discipline).

100. Some have suggested that one specific type of school action might deserve a *lower* level of court scrutiny: suspension or removal from extracurriculars. *See* Lowery v. Euverard, 497 F.3d 584, 599-600 (6th Cir. 2007) (stating that while plaintiffs could not have been suspended from school for trying to get the football coach fired, they could be kicked off the football team); *Doninger*, 642 F.3d at 350-51 (distinguishing between forbidding Doninger from running for student office and other possible punishments). *See generally* Rebecca L. Zeidel, Note, *Forecasting Disruption, Forfeiting Speech: Restrictions on Student Speech in Extracurricular Activities*, 53 B.C. L. REV. 303, 325-33 (2012) (describing varying approaches to regulating extracurricular speech). However, the Court did not endorse this theory in *B. L.*, in which the only punishment was suspension from the cheer team. *B. L.*, 141 S. Ct. at 2045 (mentioning that litigants had raised the distinction between extracurricular and other speech, but declining to address this distinction).

101. The Court does describe the refusal to salute as "peaceable and orderly," without dwelling on this point. W. Va. State Bd. of Educ. V. Barnette, 319 U.S. 624, 630 (1943).

102. *See id.* at 635-36 ("The question . . . is whether such a ceremony . . . may be imposed upon the individual by official authority . . . .").

schools."[103] An alternative interpretation is that, while not all methods of punishing disruptions will work, courts should defer to educators on which ones will.[104] I raise objections to each of these arguments in later Sections.[105]

The upshot of *Tinker* is that if speech falls into the "disruptive" category, a court has no need to examine the effectiveness of speech regulations. Because *Tinker*'s "disruption" analysis is still the focus of most student-speech cases today,[106] judges' failure to develop *Barnette*'s treatment of effectiveness is not surprising. Though later cases developed several "exceptions" to *Tinker* by allowing punishment of certain categories of nondisruptive speech, these cases followed *Tinker*'s template by asking courts to sort the speech itself into categories—rather than focusing on the school's response. This hides the question of whether or when speech discipline is effective, even though later cases have often addressed questions much more like that in *Barnette*: whether speech restrictions can change students' values and beliefs.

C. *Effectiveness and Values:* Fraser, Kuhlmeier, *and* Morse

In three major post-*Tinker* cases, the Supreme Court carved out exceptions to *Tinker*, allowing schools to regulate *non*disruptive speech that is indecent,[107]

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103. *Tinker*, 393 U.S. at 507. This assumption fits with what has been described as the "inculcative" model of education, where students are merely passive recipients of the information and attitudes handed down to them. *See* Roe, *supra* note 12, at 1273 n.8 (describing the inculcative model and collecting additional references). The Supreme Court has often been accused of subscribing to this inculcative model, which is at odds with modern pedagogical theory emphasizing the role of the student in cocreating learning. *Id.* at 1276-92; Nairn, *supra* note 35, at 249-51; Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 451-52 (2006).

104. *See* Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."); *see also* Dupre, *supra* note 37, at 100-01 (mentioning that although some teachers may abuse their disciplinary power in certain contexts, this is likely not a frequent occurrence); Hafen, *supra* note 12, at 705-06 (discussing the limits of the judiciary compared to educators in determining what sort of restrictions are useful for students).

105. *See infra* Section II.A (showing that speech punishments are often ineffective); *infra* Section III.B (explaining that deference is not always appropriate).

106. *See, e.g.*, DRIVER, *supra* note 20, at 124-31 (connecting free speech in schools today with the continued vitality of *Tinker*, rather than later decisions, and citing a plethora of recent cases, nearly all of which were decided based on *Tinker*); Moss, *supra* note 20, at 1422 ("Tinker remains the most cited student speech precedent . . . .").

107. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

sponsored by the school,[108] or promotive of illegal drug use.[109] With no disruption at hand, these restrictions were justified as necessary to inculcate desired values, such as civility and drug avoidance. Rather than following *Barnette* by scrutinizing whether the school's disciplinary process would actually teach these lessons, the Court followed *Tinker*'s assumption of a connection between punishment and student learning. This was true even when the facts of a given case made this connection highly implausible.

1. Bethel School District No. 403 v. Fraser

In *Bethel School District No. 403 v. Fraser*,[110] high-school senior Matthew Fraser made a speech at a student assembly to nominate a friend for student-body vice president. The speech read as follows:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.[111]

Following his speech, Fraser received a two-day suspension, and the school removed him from the list of graduation-speaker candidates.[112]

The Court did not find convincing evidence that this speech was disruptive to the educational process, as required for punishment under *Tinker*. Some students yelled and some made sexual gestures, but the district court's factual findings were essentially that this was normal assembly behavior.[113] In any event, the school's defense did not rely on the conduct being disruptive, emphasizing instead that the speech was "offensive to the modesty and decency of many of the

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

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

110. 478 U.S. 675 (1968).

111. *Id.* at 687 (Brennan, J., concurring).

112. *Id.* at 678 (majority opinion).

113. *See id.* at 693 (Stevens, J., dissenting).

students and faculty in attendance."[114] That rationale for punishment failed the *Tinker* test, but the Court nevertheless upheld the punishment.

The Court's alternative line of reasoning was that schools may punish sexually indecent speech, even if it is nondisruptive, as a way to teach civility. The majority did cite language from *Tinker* suggesting that speech could be censored if it "intrude[d] upon . . . the rights of other students"[115] by insulting them or causing offense. But the Court did not hang its hat on the notion that preventing offense to listeners justifies speech prohibitions. Rather, it focused on schools' need to teach "the fundamental values necessary to the maintenance of a democratic political system"[116]—including "the boundaries of socially appropriate behavior."[117] The rule emerging from *Fraser*, therefore, is that "lewd, indecent, or offensive"[118] speech is an exception to *Tinker*, punishable regardless of disruption. A necessary assumption of this holding—unexamined in the decision—is that punishing uncivil speech causes students to internalize norms of civility.

2. Hazelwood School District v. Kuhlmeier

In the Court's next major student-expression case, *Hazelwood School District v. Kuhlmeier*,[119] students wrote two articles on teen pregnancy and divorce for their journalism class. The articles were then set for publication in the school newspaper. Just prior to publication, the principal removed the two articles from the newspaper without telling the students.[120] He claimed he did so because the articles left several students and families identifiable and made references to sexual activity and birth control that could be inappropriate for younger students.[121]

Kuhlmeier is known for creating an exception to *Tinker* for school-sponsored speech.[122] The Court distinguished this case from *Tinker* and *Fraser* because the speech took the form of school-newspaper articles. While the First Amendment

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114. *Id.* at 678 (majority opinion).

115. *Id.* at 680 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

116. *Id.* at 681 (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)).

117. *Id.*

118. *Id.* at 683.

119. 484 U.S. 260 (1988).

120. *See id.* at 285 (Brennan, J., dissenting).

121. *See id.* at 264-65 (majority opinion).

122. *E.g.*, Miller, *supra* note 35, at 632 ("[T]he Court concluded that educators could exercise editorial control over the style and content of school-sponsored expressive activities 'so long as their actions are reasonably related to legitimate pedagogical concerns.'"); Bowman, *supra* note 10, at 244 ("[T]he Court set forth what has become known as the *Hazelwood* test: when speech bears the 'imprimatur of the school,' schools' restrictions on that speech are allowed if they are 'reasonably related to legitimate pedagogical concerns.'").

may require that schools *tolerate* student speech within the boundaries set by *Tinker* and *Fraser*, the First Amendment does not, by contrast, "require[] a school affirmatively to promote particular student speech."[123] The Court relied on this distinction to hold that the school could censor the newspaper articles, even though it could not punish similar student speech in noncurricular contexts.[124]

However, the school-sponsored-speech exception came with the caveat that the censorship must still be "reasonably related to legitimate pedagogical concerns" or have a "valid educational purpose."[125] The Court cited various examples of valid educational purposes, including "assur[ing] that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."[126] While some of these purposes seem more reputation-protecting than "educational," the Court's analysis did focus on an actual pedagogical justification: teaching students about journalistic norms.[127]

This could have been a moment for the Court to conduct effectiveness analysis. Was the school's method for restricting speech plausibly teaching students the lesson the school intended? However, the rational-basis test ("reasonably related") that the Court used to evaluate the means-ends relationship took all the bite from its "valid educational purpose" caveat. In equivocal language, the Court suggested that the "valid educational purpose" of censorship "could" have been to teach students about "the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals . . . and the legal, moral and ethical restrictions imposed upon journalists in the school community."[128] The Court, therefore, "[could] not reject as unreasonable" the principal's decision to excise the offending articles.[129] The speculation that the restriction "could" teach ethical journalism was apparently sufficient.

Suggesting that censorship in this case taught norms of ethical journalism, however, requires some measure of willful blindness to the facts. Justice Brennan's dissent picked up on this means-ends disconnect, providing the first sustained treatment since *Barnette* of whether punishing expression works. Brennan found the majority's supposition that the censorship had an educational purpose

123. *Kuhlmeier*, 484 U.S. at 270-71.

124. *See id.* at 272-73.

125. *Id.* at 273.

126. *Id.* at 271.

127. *See id.* at 276.

128. *Id.* (internal quotations omitted).

129. *See id.*

"utterly incredible," given that the principal "never consulted the students before censoring their work" and "explained the deletions only in the broadest of generalities."[130] He suggested that rather than teaching responsible journalism, the principal's action taught "contempt for individual rights."[131]

Brennan's dissent highlights the majority's ironclad presumption that once speech falls into a punishable category, the school's method for punishing it should go unexamined. Even in a case where the way the school censored speech appeared clearly ineffective, the majority contorted its opinion to sidestep the possibility that censoring irresponsible journalism—in a high-handed, poorly explained manner—might not teach responsible journalism. As in *Fraser*, the assumption was that suppressing "wrong" speech will teach the "right" lessons.

3. Morse v. Frederick

In *Morse v. Frederick*,[132] the Court continued this pattern by assuming that punishing prodrug messages would cause students to internalize antidrug values. *Morse* concerned a student in Juneau, Alaska who had unfurled a fourteen-foot banner reading "BONG HiTS 4 JESUS" at a school event observing the Olympic Torch Relay.[133] The relay passed through the street beside the school, and the principal, Morse, allowed the students to watch outside. Morse asked Frederick to take the banner down because other students would construe it as promoting illegal drug use, in violation of school policy. Frederick refused, and he was suspended for ten days.[134] He stated that the banner was a "meaningless and funny" message intended to get him on television, as the news had been covering the event.[135]

The Court relied on *Fraser* and *Kuhlmeier* to hold that the government's interest in preventing illegal drug use justified punishing prodrug speech.[136] According to the Court, the lesson of *Fraser* and *Kuhlmeier* was that nondisruptive speech is punishable if the government asserts a compelling interest besides avoiding disruption.[137] Here, the Court cited a variety of statistics on the harms of drug use in schools to find that "deterring drug use by schoolchildren is an

130. *Id.* at 285 (Brennan, J., dissenting).

131. *Id.* at 290.

132. 551 U.S. 393 (2007).

133. *Id.* at 397.

134. *Id.* at 398.

135. *Id.* at 402; *see also* DRIVER, *supra* note 20, at 115 (giving background information on the case).

136. *Morse*, 551 U.S. at 403-06.

137. *Id.* at 406-07.

'important—indeed, perhaps compelling'—interest."[138] Therefore, schools could "restrict student expression that they reasonably regard as promoting illegal drug use."[139]

The crucial assumption of this chain of reasoning is that suppressing prodrug *messages* deters actual drug use. Chief Justice Roberts's majority opinion suggested that students take drugs primarily because of peer pressure, and that quashing prodrug speech works by preventing students from believing that drugs are acceptable among their peers.[140] But this logic may be flawed. For example, an amicus brief filed when *Morse* was in the Ninth Circuit marshaled significant empirical evidence that zero-tolerance policies do not prevent drug use—and may backfire by diminishing trust between students and educators.[141]

Justice Alito's concurrence advanced an alternative means-ends connection. Alito asserted that the state end was best understood not as teaching antidrug attitudes but as protecting students' "physical safety."[142] He therefore believed restrictions on prodrug speech satisfied *Tinker*'s substantial-disruption test by preventing "threat[s] to student safety."[143] But this change in emphasis makes the restrictions' effectiveness even more dubious, because prodrug speech does not present an immediate physical threat. A blanket speech ban is not designed to stop actions that *themselves* cause direct physical harm, such as carrying out drug sales at schools—something that all would agree that schools may discipline.

Justice Stevens's dissent questioned the majority's assumption that a speech ban teaches the right lessons. His main point was that foreclosing debate on contentious issues does not help students grow up with the "correct" values.[144] While Stevens's (prescient) concern was mainly that the government's view on marijuana might be wrong,[145] his reasoning resonates with *Barnette*. Just as enforcing the appearance of unity did not make the Jehovah's Witnesses more pat-

138. *Id.* at 407 (quoting Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 661 (1995)).

139. *Id.* at 408.

140. *Id.*

141. Brief of Amicus Curiae Drug Policy Alliance in Support of Appellant Joseph Frederick Requesting Reversal at 22-30, Frederick v. Morse, 439 F.3d 1114 (9th Cir. 2006) (No. 03-35701).

142. *Morse*, 551 U.S. at 424-25 (Alito, J., concurring).

143. *Id.* at 425.

144. *Id.* at 448 (Stevens, J., dissenting).

145. *See id.* ("Surely our national experience with alcohol should make us wary of dampening speech suggesting—however inarticulately—that it would be better to tax and regulate marijuana than to persevere in a futile effort to ban its use entirely.").

riotic, enforcing the appearance of antidrug sentiment might not actually decrease drug use.[146] Stevens's doubts about forcing values on students via punishment contrast with the majority's naïve assumption that punishments bring conformity to the values of authority.

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The Court's decisions in *Fraser*, *Kuhlmeier*, and *Morse* took *Tinker*'s assumption that punishing expression prevents misconduct and applied it in the realm of values. This reasoning produced decisions assuming that punishing sexually indecent expression fosters civility, that punishing bad journalism fosters good journalism, and that punishing prodrug speech fosters antidrug views. Except at times in dissent, the Court has applied little scrutiny to such naïve associations of methods and results.

II. THE CASE FOR PROCEDURALIZATION

The problem is that courts' implicit assumption of speech-restriction effectiveness is false. Empirical data show that the effect of punishing speech varies depending on how the discipline is carried out. This means that only by attending to the disciplinary process can schools—and courts—ensure that speech restrictions produce their desired effects.

To support this assertion, this Part describes the empirical evidence supporting two opposing visions for how speech punishment operates. The first is a deterrence theory,[147] which holds that rule obedience depends on cost-benefit calculations, so raising the cost of a behavior teaches people to avoid it.[148] This theory underlies the major post-*Barnette* cases, which assumed straightforwardly that punishment teaches students to avoid the punished behavior and internalize the associated norms.[149]

Opposing this view is the theory of punishment presented by Justices Black and Douglas in *Barnette*:

> Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds,

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146. *See supra* text accompanying note 141.

147. *See, e.g.*, Travis C. Pratt, Francis T. Cullen, Kristi R. Blevins, Leah E. Daigle & Tamara D. Madensen, *The Empirical Status of Deterrence Theory: A Meta-Analysis*, *in* TAKING STOCK: THE STATUS OF CRIMINOLOGICAL THEORY 367 (Francis T. Cullen, John Paul Wright & Kristie R. Blevins eds., 2006); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 269 (2d ed. 2006). The deterrence perspective can be seen as one application of the larger psychological theory of behaviorism. *See infra* note 160 and accompanying text.

148. *See* Pratt et al., *supra* note 147, at 367.

149. *See supra* Section I.C.

> inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions.[150]

Modern psychologists might recognize this as a legitimacy-based theory.[151] This type of theory suggests that obedience to rules – and, especially, internalization of those rules – is not automatic. Rather, it depends on an individual's belief that the authority is "appropriate, proper, and just."[152]

While deterrence theory seems intuitively plausible, the empirical research comes down on the side of Justices Black and Douglas. How students perceive punishment is important. When students perceive authority as illegitimate, they do not learn to avoid punished behaviors – instead, they simply learn not to get caught.[153] Exposure to punitive yet illegitimate discipline has therefore been associated with increased misbehavior, even delinquency, in the long term.[154] Conversely, when students perceive authority as legitimate, they do learn to avoid punished behaviors – not merely to avoid punishment, but because it is the right thing to do.[155] This perception is associated with greater rule following within school[156] and, perhaps even more importantly, with the internalization of lessons that go beyond school walls.[157]

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150. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 644 (1943) (Black, J., joined by Douglas, J., concurring).

151. Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375, 378 (2006).

152. *Id.* at 376.

153. *See* TYLER & TRINKNER, *supra* note 45, at 36.

154. *See* ARUM, *supra* note 37, at 184-85 (presenting an empirical correlation between strict and unfair discipline with fights and arrests); DENISE C. GOTTFREDSON, SCHOOLS AND DELINQUENCY 71 (2001) (illustrating that punitive teacher attitudes and the perception that rules are unclear are factors associated with delinquency based on the results of an empirical study). For a qualitative perspective, see VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS 81 (2011).

155. *See* TYLER & TRINKNER, *supra* note 45, at 39 ("Legitimacy means that a person believes that it is appropriate and right for some external authority to make decisions about law and legal policy and that they ought to voluntarily follow those decisions, without concerns about reward and punishment.").

156. *See, e.g.*, Sandra M. Way, *School Discipline and Disruptive Classroom Behavior: The Moderating Effects of Student Perceptions*, 52 SOCIO. Q. 346, 364-66 (2011); Rick Trinkner & Ellen S. Cohn, *Putting the "Social" Back in Legal Socialization: Procedural Justice, Legitimacy, and Cynicism in Legal and Non-Legal Authorities*, 38 LAW & HUM. BEHAV. 602, 608 (2014).

157. *See, e.g.*, CONSTANCE A. FLANAGAN, TEENAGE CITIZENS: THE POLITICAL THEORIES OF THE YOUNG 187-90 (2011) (drawing on the empirical data to argue that student attitudes toward society are nurtured by their experiences in "mini-polities" such as schools); *cf.* Constance A.

After discussing the research on deterrence and legitimacy, I describe the challenge it creates for student-expression jurisprudence. Schools have been allowed to restrict students' First Amendment rights because, within a deterrence framework, doing so seems to serve important educational purposes. But if discipline is not deterring the intended behaviors, that justification for infringing upon student rights disappears. Even when discipline's stated purpose is merely to forestall disruption, as under *Tinker*, illegitimate punishments may alter short-term behavior at the expense of producing antisocial behavior in the long term. A more accurate psychological model of how student-expression restrictions operate should therefore cause us to reconsider the post-*Barnette* failure to scrutinize how schools discipline speech.

A. Empirical Research on the Disciplinary Process

1. Challenging the Deterrence Perspective

I begin my empirical discussion with the challenges of the deterrence model. The idea that increasing punishment reduces the punished behavior does seem intuitively appealing. From the biblically inspired injunction "spare the rod, spoil the child"[158] to the modern proliferation of zero-tolerance discipline,[159] ample authority suggests that punishment is crucial to children's learning. Put simply, punishment teaches children what to avoid.

This understanding of punishment coheres with behavioralist approaches to learning developed by psychologists such as B.F. Skinner, whose work suggests that people learn to seek pleasure and avoid pain.[160] It seems only common sense

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Flanagan & Michael Stout, *Developmental Patterns of Social Trust Between Early and Late Adolescents: Age and School Climate Effects*, 20 J. RSCH. ON ADOLESCENCE 748, 769 (2011) (pointing to the role of teachers in fostering social trust).

158. *Proverbs* 13:24 (King James) ("He that spareth the rod hateth his son; but he that loveth him chasteneth him betimes.").

159. *See* Am. Psych. Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, 63 AM. PSYCH. 852, 852 (2008) (describing the widespread growth of these policies in the early 1990s).

160. B.F. SKINNER, BEYOND FREEDOM AND DIGNITY 18 (1984) ("Behavior is shaped and maintained by its consequences."). For example, a child who is pinched for giggling in church learns not to do so in the future. *See* Per Holth, *Two Definitions of Punishment*, 6 BEHAV. ANALYST TODAY 43, 44 (2005). B.F. Skinner's work describing behavior as a product of reward and punishment made him one of the most influential figures in his field and also had a strong influence on popular culture. WILLIAM O'DONOHUE & KYLE E. FERGUSON, THE PSYCHOLOGY OF B.F. SKINNER 1 (2001). For discussion of this approach in a school setting, see ARUM, *supra* note 37, at 162.

to assume that "people avoid things that are painful,"[161] and that punishment deters both current and future misbehavior. Demonstrating how widespread the assumption is that punishment "builds character," a majority of Americans support zero-tolerance disciplinary policies while simultaneously stating that the primary goal of teaching is to prepare students for citizenship.[162] The commonsense understanding that punishment deters misbehavior is the traditional view in both education[163] and criminology,[164] and it is also reflected in student-speech jurisprudence.[165]

However, social scientists have criticized the deterrence model heavily. To put it bluntly, increased punishment does not seem to reduce misbehavior. In response to "get tough" policies in criminal justice, one meta-analysis of over 200 studies found that such policies were "consistently among the weakest predictors of crime rates."[166] Similarly, large-scale studies in response to the growth of zero-tolerance policies in schools have found that more punitive discipline is associated only with marginally less misbehavior[167] (or correlates with more in some cases[168]); that misbehavior increases after a student is suspended;[169] and that students at zero-tolerance schools report their schools to be less orderly and safe than students at other schools.[170] These findings contradict the idea that punishment teaches students (or adults) to change their behavior in any straightforward manner.

161. Pratt et al., *supra* note 147, at 368.

162. GEORGE G. BEAR, SCHOOL DISCIPLINE AND SELF-DISCIPLINE: A PRACTICAL GUIDE TO PROMOTING PROSOCIAL STUDENT BEHAVIOR 45 (2010).

163. Way, *supra* note 156, at 346.

164. Pratt et al., *supra* note 147, at 367-68.

165. *See supra* note 103 (collecting sources suggesting that the Supreme Court subscribes to what has been called an "inculcative" model of education—the assumption that students passively internalize whatever adults tell them); *supra* Section I.C (demonstrating the Court's assumption that punishing students for specific types of speech will cause students to recognize that speech, and its associated conduct, as wrong or problematic).

166. Pratt et al., *supra* note 147, at 368.

167. ARUM, *supra* note 37, at 178.

168. Way, *supra* note 156, at 359.

169. *See* Am. Psych. Ass'n Zero Tolerance Task Force, *supra* note 159, at 854; *see also* Gary W. Ritter, *Reviewing the Progress of School Discipline Reform*, 93 PEABODY J. EDUC. 1, 2 (2018) (collecting additional sources).

170. Francis L. Huang & Dewey G. Cornell, *Teacher Support for Zero Tolerance Is Associated with Higher Suspension Rates and Lower Feelings of Safety*, 50 SCH. PSYCH. REV. 388, 402 (2021); Russell J. Skiba & M. Karega Rausch, *Zero Tolerance, Suspension, and Expulsion: Questions of Equity and Effectiveness*, *in* HANDBOOK OF CLASSROOM MANAGEMENT: RESEARCH, PRACTICE, AND CONTEMPORARY ISSUES 1063, 1072 (Carolyn M. Evertson & Carol S. Weinstein eds., 2006).

The issue with deterrence is not that punishment does nothing. People do dislike being punished. The issue is that deterrence only works when the threat of punishment is present.[171] The commonsense idea that punishment leads to avoidance holds well when the authority is all-knowing and consequences are guaranteed.[172] But no authority is omnipresent. If a student decides whether to misbehave solely by calculating the likelihood of rewards and punishments, they will inevitably encounter opportunities where the benefits of disobedience outweigh the probability-weighted costs of getting caught. The simple threat of punishment can achieve obedience as long as the threat lasts, but it takes something more for students to internalize rules as guides for conduct. That something, as discussed below, is the perception that rules are legitimate.

In fact, the deterrence theory's failure to explain most students' behavior is a good thing. Some students *do* view rule following as simply a matter of weighing costs and benefits—and this creates problems.[173] While a cost-benefit relationship to authority is common in elementary-age children, adolescents who retain it are more likely to bully others,[174] join gangs,[175] and engage in criminal conduct.[176]

Importantly, students are more likely to develop this cost-benefit approach to rules—and associated antisocial behavior—when exposed to discipline they perceive as both punitive and illegitimate. This means that punishments designed solely to deter, if poorly implemented, can be *harmful* rather than just

171. TYLER & TRINKNER, *supra* note 45, at 36 ("[D]eterrence[] requires the ability to monitor behavior. . . .When the authority is absent or behavior is hidden people cannot be rewarded or punished.").

172. *See id.* at 12 (stating that "[c]oercive models can work" but that the level of resources required to maintain a fully effective coercive system would be "prohibitive").

173. *Id.* at 37-38.

174. Ersilia Menesini, Virginia Sanchez, Ada Fonzi, Rosario Ortega, Angela Constabile & Giorgio Lo Feudo, *Moral Emotions and Bullying: A Cross-National Comparison of Differences Between Bullies, Victims, and Offenders*, 29 AGGRESSIVE BEHAV. 515, 526 (2003) (finding that bullies focused less on the impact of their behavior on the victim, and more on "the personal consequences they thought they might have to face later on").

175. *See* RIOS, *supra* note 154, at 82-91.

176. Emma J. Palmer, *An Overview of the Relationship Between Moral Reasoning and Offending*, 38 AUSTL. PSYCH. 165, 169 (2003) (summarizing studies showing that adolescent criminal offenders show "immature" moral reasoning, defined as reasoning that focuses on personal costs and benefits).

ineffective. Students subject to strict but unfair discipline are more likely to engage in rule-breaking,[177] fighting,[178] and criminal conduct[179] than students subject to less-strict discipline. Similarly, students' perceptions that their schools are unjust decrease their future trust in society and its institutions.[180] Disciplinary experiences can even affect later participation in community life, like voting and volunteering.[181] One commentator has therefore suggested that "schools that emphasize rewards and punishments may actually be developing the type of reasoning [i.e., reasoning focused on costs and benefits to oneself] that is most commonly found among those students that are the most aggressive and antisocial."[182]

The deeper problem with looking at discipline through a deterrence lens is not, then, that unfair punishments can lead to misbehavior in school, but that the lens misses the crucial factor determining whether students bring lessons with them beyond school walls. Students do not "build character," learn self-discipline, or inculcate any other value by merely weighing rewards and punishments. Punishing students without ensuring that discipline is perceived as legitimate may deter misbehavior while the teacher is watching, but if anything, it makes the student only more likely to rebel when supervision disappears.

2. *The Legitimacy Perspective*

In response to the deficiencies of deterrence theory, a line of research identified with Tom Tyler[183] has suggested that discipline's efficacy depends not on the strength of punishment, but on the authority's legitimacy.[184] Legitimacy is de-

177. Way, *supra* note 156, at 349; ARUM, *supra* note 37, at 182.

178. ARUM, *supra* note 37, at 184-85.

179. *Id.*

180. Nura Resh & Clara Sabbagh, *Sense of Justice in School and Civic Attitudes*, 17 SOC. PSYCH. EDUC. 51, 51 (2014).

181. Aaron Kupchik & Thomas J. Catlaw, *Discipline and Participation: The Long-Term Effects of Suspension and School Security on the Political and Civic Engagement of Youth*, 47 YOUTH & SOC'Y 95, 117 (2015).

182. BEAR, *supra* note 162, at 59.

183. TYLER, *supra* note 147; Tyler, *supra* note 151; TYLER & TRINKNER, *supra* note 45.

184. TYLER, *supra* note 147, at 270.

fined as the belief that an authority is "appropriate, proper, and just," and therefore deserving of obedience.[185] While legitimacy theory has often focused on citizens' encounters with the justice system,[186] it has also been applied to the student-teacher relationship.[187] Legitimacy theory suggests that if students perceive the authorities as legitimate, they will indeed conform to their values and rules, including learning to avoid things the authority punishes.[188] But if students see an authority as illegitimate, they will only obey the rules when doing so benefits them.[189]

Legitimacy theory is a far better match than deterrence theory for the empirical data on school discipline, which overwhelmingly suggest that discipline's effects depend on student perceptions of authority rather than on the strictness of punishment alone. Studies do not generally support the idea that strict discipline inherently reduces misbehavior,[190] but they have found strictness effective *if* the authority is perceived as fair[191] and caring.[192] In one study that explicitly measured student beliefs regrading discipline's legitimacy, perceiving discipline as legitimate correlated with better behavior.[193] Several researchers have found that when an authority is perceived as unfair, stricter discipline produces *worse* behavior than a more lenient approach.[194] This finding is corroborated by qualitative studies of adolescent students' relationship to discipline, which often show students resisting authority perceived as illegitimate.[195]

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185. Tyler, *supra* note 151, at 376.

186. TYLER & TRINKNER, *supra* note 45, at 7 ("Studies . . . have extensively examined adult experiences with and attitudes towards police and the courts.").

187. *See, e.g.*, Way, *supra* note 156, at 347; Anne Gregory & Michael B. Ripski, *Adolescent Trust in Teachers: Implications for Behavior in the High School Classroom*, 37 SCH. PSYCH. REV. 337, 338 (2008); TYLER & TRINKNER, *supra* note 45.

188. *See* TYLER & TRINKNER, *supra* note 45, at 169 ("Students respond to attempts at regulatory control when . . . they are punished in a fair and respectful manner when they deserve it.").

189. *Id.* at 168.

190. *See supra* notes 166-170 and accompanying text.

191. ARUM, *supra* note 37, at 175-77.

192. Anne Gregory & Rhonda S. Weinstein, *The Discipline Gap and African Americans: Defiance and Cooperation in a High School Classroom*, 46 J. SCH. PSYCH. 455, 469 (2008); Lisa A. Pellerin, *Applying Baumrind's Parenting Typology to High Schools: Toward a Middle-Range Theory of Authoritative Socialization*, 34 SOC. SCI. RSCH. 283, 300 (2005); Dewey Cornell, Kathan Shukla, & Timothy R. Kornold, *Authoritative School Climate and Student Academic Engagement, Grades, and Aspirations in Middle and High Schools*, 2 AERA OPEN 1, 11-13 (2016).

193. Way, *supra* note 156.

194. *Id.*; ARUM, *supra* note 37, at 182.

195. *See, e.g.*, AARON KUPCHIK, HOMEROOM SECURITY: SCHOOL DISCIPLINE IN AN AGE OF FEAR 135-39 (2010); Gregory & Weinstein, *supra* note 192, at 469-70; Daniel A. MacFarland, *Student*

The key factors in whether an authority is perceived as legitimate are the procedural-justice values of fairness and respect.[196] This means that in evaluating discipline's legitimacy, students do not look primarily at outcomes – such as grades – but at how the authority treats students.[197] If the authority seems fair and respectful, students will generally conform their behavior to expectations. If the authority seems unfair or disrespectful, students will look for opportunities to get away with – even celebrate – behavior the authority punishes.

There are a huge number of studies showing that student obedience depends on perceiving authorities as fair,[198] and nearly as much data showing that student obedience depends on perceiving authorities as respectful.[199] These two key factors have been drawn together to create a model of "authoritative discipline," which relies on Diana Baumrind's well-known model of parenting types.[200] Baumrind's model has two dimensions – demandingness and responsiveness –

Resistance: How the Formal and Informal Organizations of Classrooms Facilitate Everyday Forms of Student Defiance, 107 AM. J. SOC. 612, 623-26 (2001); ARUM, *supra* note 37, at 182 n.67 (collecting examples).

196. I mention both "fairness" and "respect" to note a distinction between whether an authority makes decisions neutrally, and whether that authority shows positive regard for students. *See* TYLER & TRINKNER, *supra* note 45, at 170-71 (noting a separation between "what decisions are made and how they are made" and whether students "are treated with respect, courtesy, and dignity"). Similarly, school-discipline studies often note the fairness of discipline and the personal connection between teachers and students as separate variables. *E.g.*, Way, *supra* note 156, at 354 (measuring perceptions of fairness separately from perceptions of the student-teacher relationship). These concepts are fuzzy, and my purpose in distinguishing them is to note that both are important to legitimacy, not to draw some clear-cut distinction between the two.

197. *See* Maria Gouveia-Pereira, Jorge Vala, Augusto Palmonari, & Monica Rubini, *School Experience, Relational Justice and Legitimation of Institutional Authority*, 18 EUR. J. PSYCH. EDUC. 309 (2003).

198. *See, e.g.*, Amrit Thapa, Jonathan Cohen, Shawn Guffey & Ann Higgins-D'Alessandro, *A Review of School Climate Research*, 83 REV. EDUC. RSCH. 357, 362 (2013) (reviewing studies to find that "[r]esearch underscores the importance of school rules and perceived fairness in regard to dealing with students' behavior"); Gary D. Gottfredson, Denise C. Gottfredson, Allison Ann Payne & Nisha C. Gottfredson, *School Climate Predictors of School Disorder: Results from a National Study of Delinquency Prevention in Schools*, 42 J. RSCH. CRIME DELINQ. 412 (2005); Anne Gregory, Dewey Cornell, Xitao Fan, Peter Sheras, Tse-Hua Shih, & Francis Huang, *Authoritative School Discipline: High School Practices Associated with Lower Bullying and Victimization*, 102 J. EDUC. PSYCH. 483, 484 (2010).

199. *See* BEAR, *supra* note 162, at 51 (collecting studies).

200. Diana Baumrind, *Current Patterns of Parental Authority*, 4 DEV. PSYCH. 1 (1971).

which come together to create three parenting types.[201] A demanding but nonresponsive parent is authoritarian, a responsive but nondemanding parent is permissive, and a responsive *and* demanding parent is authoritative—the optimal combination of structure and warmth.[202] Similarly, authoritative school discipline combines strict but fair discipline with high levels of student support.[203] This disciplinary style appears to be the best way to shape student behavior. Student reports of discipline being both fair and respectful are associated with lower levels of bullying,[204] aggression,[205] and suspensions.[206] An authoritarian style, which combines strict punishments with little warmth, on the other hand, risks student rebellion and has been associated with truancy and dropout.[207]

Unlike a deterrence perspective, a legitimacy perspective adequately predicts the observation that punishment sometimes backfires. Moreover, it explains why. When authority is perceived as fair and respectful, discipline is internalized as a legitimate guide to conduct. This means that punished behavior is avoided even when authority is not present, and that the student is more likely to behave prosocially as an adult. Conversely, when authority is perceived as unfair and disrespectful, students alter their behavior only as necessary to avoid punishment. Consistent exposure to illegitimate authority fosters a cost-benefit relationship to rules, which increases the likelihood of criminal or delinquent behavior.

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This account of school discipline strikingly vindicates Justices Black and Douglas's description of how an authority can effectively instill values—that is, not through mere "coercion" but through "fair administration of wise laws en-

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201. Diana Baumrind, *Authoritative Parenting Revisited: History and Current Status*, *in* AUTHORITATIVE PARENTING: SYNTHESIZING NURTURANCE AND DISCIPLINE FOR OPTIMAL CHILD DEVELOPMENT 11, 26-27 (Robert E. Larzelere, Amanda Sheffield Morris & Amanda W. Harrist eds., 2014).

202. *Id.*

203. Cornell et al., *supra* note 192, at 2. Beginning teachers are often encouraged to become "warm demanders," pairing caring with high expectations for students. *See* Elizabeth Bondy & Dorene D. Ross, *The Teacher as Warm Demander*, 66 POSITIVE CLASSROOM 54 (2008).

204. Gregory et al., *supra* note 198.

205. Anne Gregory, Dewey Cornell & Xitao Fan, *Teacher Safety and Authoritative School Climate in High Schools*, 118 AM. J. EDUC. 401 (2012).

206. Anne Gregory, Dewey Cornell & Xitao Fan, *The Relationship of School Structure and Support to Suspension Rates for Black and White High School Students*, 48 AM. EDUC. RSCH. J. 904 (2011) (finding such an association with the authoritative style overall and its respectfulness element, alone).

207. *See* Pellerin, *supra* note 192, at 299.

acted by the people's elected representatives within the bounds of express constitutional prohibitions."[208] Modern psychologists would agree with the Justices that merely forcing compliance with certain standards "under coercion,"[209] without a belief that the standards are legitimate, has no real educational effect. As for what *does* work, fair administration figures prominently in both the judicial and empirical accounts. The Justices' idea that laws should be "wise" and formed by "elected representatives" parallels two ways that school authorities can communicate respect: showing concern for students and listening to their voices. Learning from the debacle of *Gobitis*, the *Barnette* Justices articulated a theory of effective punishment that presciently anticipated modern empirical findings.

B. Implications for Student-Expression Jurisprudence

The realization that *Barnette*'s legitimacy-based model better accounts for how punishments operate than the deterrence framework has clear implications for student-speech jurisprudence. As discussed in Part I, the Supreme Court has historically assumed that speech discipline teaches students to avoid what educators punish. Or, at least, the Court has assumed that if educators tell them this is true, it can defer to them as credible authorities. But the empirical findings suggest this is not necessarily true. If discipline appears unfair and disrespectful—such that students will likely view it as illegitimate—students will not plausibly take on the values educators intend. On the contrary, such discipline may turn students against authority and foster antisocial behavior.

This new understanding suggests that not all disciplinary methods are appropriate for all school interests. Consider various scenarios in which educators might find themselves. To the extent educators seek to enforce immediate compliance, the threat of punishment alone may be sufficient (if not ideal) for their purposes. But, to the extent educators aim to teach broader values, discipline's effectiveness relies critically on whether it is fair and respectful. In the remainder of this Section, I describe the issues this creates for student-expression jurisprudence by dividing disciplinary situations into three categories. As will become clear, these categories merely provide a rough guide to what should be seen as a continuum of disciplinary situations: ranging from those where legitimacy is least relevant to those where it is most relevant.

At the outset, it is worth noting that some speech discipline is largely protective—that is, aimed only at ensuring immediate compliance or at halting disruption. Legitimacy concerns are least applicable in such cases. However, I argue

208. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 644 (1943) (Black, J., joined by Douglas, J., concurring).

209. *Id.*

that most speech discipline *also* has a background purpose of developing citizenship—something that courts, scholars, and educators have heavily emphasized. As these citizenship-development concerns gain salience, we reach a middle category of discipline where both the purpose of stopping disruption *and* the purpose of citizenship development must be acknowledged. I identify this category with disruptive core First Amendment speech, and suggest that fair procedure is important in such cases. Finally, some speech is not disruptive at all. For this third category of speech discipline, represented by *Fraser*, *Kuhlmeier*, and *Morse*, punishment's only justification is teaching lessons, and ensuring legitimacy is crucial.

1. *Protective Discipline: Everyday Disruptive Speech*

Legitimacy matters least when discipline primarily serves to protect students from immediate disturbance. Punitive discipline can be effective in creating immediate order even when minimally legitimate.[210] For example, imagine a student is yelling in the halls during class time. The primary goal of a teacher emerging from their classroom is not to teach some lesson to the yelling student, but simply to insulate their instruction from disruption. While a fair, respectful process for treating the yelling student would certainly be ideal, the threat of punishment alone effectively achieves discipline's main goal: getting the yelling to stop. Some other examples of primarily protective discipline might include stopping verbal threats that are escalating towards a fight or telling a student off for talking in class. The unifying factor in these cases is that the discipline is not meant to have some long-term effect but merely to stop an immediate disruption.

This logic might seem to apply to every case where student speech is disruptive. However, in some cases of disruption, protection may not be the only, or even primary, interest at play. Consider a school that bans shirts reading "Border Patrol" and "We Are Not Criminals," due to escalating racial tensions around immigration.[211] Certainly the school has an interest in preventing disruption caused by the shirts. But disciplining this speech also conveys lessons to students about how our society navigates identity expression and political disagreement. Directly below, I argue that discipline for speech labeled as "disruptive" under *Tinker* also has a background educational effect, and that in some cases, this effect is quite significant.

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210. *See* TYLER & TRINKNER, *supra* note 45, at 15.

211. *E.g.*, Madrid v. Anthony, 510 F. Supp. 2d 425, 427-28 (S.D. Tex. 2007).

2. *Mixed-Purpose Discipline: Disruptive Core First Amendment Speech*

When facing disruptions, schools always have some interest in imposing immediate order. However, that interest does not preclude discipline from *also* having a long-term educational purpose. In fact, as shown below, discipline against disruption is commonly assumed to have a dual—or even primary—aim of teaching positive citizenship lessons. As this broader purpose becomes more salient, legitimacy becomes increasingly important. Based on the research discussed above, illegitimate punishment is only likely to create immediate order, if it does so at all, *at the expense of* inculcating long-term prosocial values.[212] Students who see authorities as illegitimate are more likely to bully others, participate in future misbehavior, and become involved in the criminal-justice system.[213]

Importantly, schools and courts have not reckoned with—much less accepted—the fact that some discipline turns students against their schools and society writ large. Courts and schools alike *trumpet* the role of discipline in preparing students for citizenship. However, the judiciary, especially, has historically lacked the tools to distinguish tactics that create immediate order from those fostering long-term orderly behavior. If preparing students for citizenship is as important as courts claim, then understanding the potential separation of short-term and long-term goals motivates increased concern for legitimacy.

a. *The Broader Purpose of School Discipline*

Although the *Tinker* standard focuses on the protective function of disciplining disruptive speech, such discipline is widely assumed to have a broader citizenship-development purpose, too. Whether under the language of "socialization,"[214] "training our children to be good citizens,"[215] "teach[ing] . . . self-discipline,"[216] or "social, emotional, and behavioral skills,"[217] fostering positive citizenship habits is touted as a main purpose—if not *the* main purpose—of

212. *See supra* notes 173-182 and accompanying text.

213. *See id.*

214. ARUM, *supra* note 37, *passim*.

215. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 524 (1969) (Black, J., dissenting).

216. George Bear, *Discipline: Effective School Practices*, NAT'L ASS'N SCH. PSYCHS. S4H18-1 (2010), http://apps.nasponline.org/resources-and-publications/books-and-products/samples/HCHS3_Samples/S4H18_Discipline.pdf [https://perma.cc/F6BZ-9J7V].

217. *Citywide Behavioral Expectations to Support Student Learning: Grades K-5*, N.Y.C. DEP'T EDUC. 3 (2019), https://www.schools.nyc.gov/docs/default-source/default-document-library/discipline-code-kindergarten-grade-5-english [https://perma.cc/J9YE-AD22].

school discipline. This is true in the discourse of courts, scholars, and schools themselves.

Before wading into the evidence, it is important to note that the definition of "citizenship" is highly contested. My goal here is not to endorse any one vision of citizenship for schools to encourage. Rather, I posit that even if not all stakeholders agree on what citizenship should include, they agree on the minimal premise that it should *not* include the effects of illegitimate discipline described in the previous Section—that is, criminal behavior, self-centered decision-making, and withdrawal from civic life.[218] So long as all stakeholders understand these as negative citizenship outcomes, then concern for citizenship should produce concern for legitimacy.

Courts have frequently recognized the connection between discipline and citizenship. In many cases, the idea that punishing disruptions will teach positive citizenship has been used to argue for deference to schools. In *Tinker* itself, Justice Black dissented on the grounds that school discipline is "an integral and important part of training our children to be good citizens," and that court interference with such discipline would lead to behavior like "rioting, property seizures, and destruction."[219] While empirical research contradicts Justice Black's implication that harsh or unquestioned discipline produces better citizenship outcomes,[220] his focus on school discipline as a locus for citizenship development is common in Supreme Court opinions upholding school punishments. *Fraser*, for example, reiterated that "schools must teach by example the shared values of a civilized social order."[221] In another opinion, Justice Powell observed that "[t]he lesson of discipline . . . provides an early understanding of the relevance to the social compact of respect for the rights of others."[222] The Court has also widely recognized in other contexts that preparing students for citizenship is a key or primary aim of schooling.[223]

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218. *See supra* notes 173-182 and accompanying text.

219. *Tinker*, 393 U.S. at 524-25 (Black, J., dissenting).

220. As described above, the issue is not the harshness of discipline but its fairness. *See supra* Section III.A.

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

222. Goss v. Lopez, 419 U.S. 565, 593 (1975) (Powell, J., dissenting).

223. *See, e.g.*, Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982) ("[P]ublic schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.'" (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979))); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (public schools are "the very foundation of good citizenship"); *Ambach*, 441 U.S. at 77 (quoting a statement in *Brown*, 347 U.S. at 493, that the school "is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment," and citing nine additional Supreme Court opinions that support this claim).

The discipline-citizenship connection has also been employed *against* certain types of discipline, on the grounds that they will teach the wrong citizenship lessons. Within speech cases, fears of negative citizenship impact were raised in *Barnette*,[224] as well as in dissent in *Kuhlmeier*.[225] The negative citizenship impacts of unconstitutional discipline have also cropped up repeatedly in nonspeech cases.[226] This suggests that judicial understandings of citizenship development encompass both learning to respect the rights of others and learning one's own rights.

Legal scholars have followed courts in assuming that citizenship development is a key purpose of school discipline, including discipline for student speech. The currents here are similar to those seen in the judicial opinions. Scholars across the political spectrum recognize that "[s]ocialization to values," in some form, is part of schools' core educational mission.[227] Some scholars see this socialization mainly as a conservative process of learning to obey authority and adopting preexisting social values,[228] while others believe that it also includes learning one's constitutional rights against authority.[229] While scholars disagree on what it means to develop citizenship, they agree that discipline's impact on character development should play a key role in how law treats student discipline.

Finally, school authorities themselves recognize that teaching students positive behavior is a core disciplinary aim. In a recent consensus report on school

224. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("That they 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.").

225. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 291 (1988) (Brennan, J., dissenting) ("The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.").

226. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 373-74 (1985) (Stevens, J., concurring in part) ("Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. . . . The application of the exclusionary rule in criminal proceedings arising from illegal school searches makes an important statement to young people that 'our society attaches serious consequences to a violation of constitutional rights,' and that this is a principle of 'liberty and justice for all.'" (first quoting Stone v. Powell, 428 U.S. 465, 492 (1976); and then quoting 36 U.S.C. § 172 (1976))); Doe v. Renfrow, 451 U.S. 1022, 1027-28 (1981) (Brennan, J., dissenting from denial of certiorari) ("Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms.").

227. Levin, *supra* note 35, at 1649; *see, e.g.*, Miller, *supra* note 35, at 626 ("[T]he school has a responsibility to teach its students the bounds of appropriate behavior.").

228. *See, e.g.*, ARUM, *supra* note 37, at 1-5; Bitensky, *supra* note 35, at 772-73.

229. *See* Levin, *supra* note 35, at 1679-80; Chemerinsky, *supra* note 10, at 531-32.

discipline commissioned by the Department of Education and Department of Justice, educational experts described discipline's objectives as including not just school safety, but also "improv[ing] . . . student conduct" – so that students can stay "in classrooms and out of courtrooms."[230] The National Association of School Psychologists counsels that discipline has two distinct aims: "maintain[ing] a safe, orderly, and positive learning environment" and "teach[ing] . . . self-discipline."[231] Turning to individual school districts, the New York City Department of Education characterized the school district's disciplinary mission as "teach[ing] students the social, emotional, and behavioral skills necessary to participate and learn."[232] Other districts assert similar motivations for disciplining students.[233] Schools, in short, disagree with the notion that the purpose of their discipline is merely to protect the classroom environment.

b. *Implications for Discipline of Disruptive Speech*

Once we acknowledge that punishment for disruptions frequently implicates broader citizenship development, too, legitimacy becomes relevant for policing it. Judging by many Justices'[234] and commentators'[235] arguments, part of the appeal of granting schools broad punishment power is its purported benefits for both short-term order and citizenship development. In other words, proponents

230. Emily Morgan, Nina Salomon, Martha Plotkin & Rebecca Cohen, *The School Discipline Consensus Report: Strategies from the Field to Keep Students Engaged in School and Out of the Juvenile Justice System*, COUNCIL ST. GOV'TS JUST. CTR., at ix (2014), https://njjn.org/uploads/digital-library/CSG_The-School-Discipline-Consensus-Report_Jun2014.pdf [https://perma.cc/QGM5-CN62].

231. BEAR, *supra* note 162, at 1.

232. N.Y.C. DEP'T EDUC., *supra* note 217, at 3.

233. *See, e.g.*, *Code of Student Conduct: Secondary*, SCH. BD. MIA.-DADE CNTY., FLA. 7 (2020), http://ehandbooks.dadeschools.net/policies/90/Secondary-COSC-English.pdf [https://perma.cc/Z5J8-XFMH] ("The primary objective of Miami-Dade County Public Schools (M-DCPS) is to enhance each student's potential for learning and to foster positive interpersonal relationships. . . . [S]tudents who possess personal, academic, civic and occupational adequacies will become effective and productive citizens. . . . This document helps students take control . . . by employing appropriate personal choices and skills."); Paul G. Vallas, *Student Code of Conduct: Abbreviated Reference Manual*, BRIDGEPORT PUB. SCHS. 5 (Aug. 2013), https://www.bridgeportedu.net/cms/lib/CT02210097/Centricity/Domain/373/CodeOfConduct_2014-2015.pdf [https://perma.cc/LW9P-N2MK] ("[C]onsequences paired with meaningful instruction and guidance . . . offer students an opportunity to learn from their mistakes and contribute back to the school community.").

234. *See supra* notes 219-222 and accompanying text.

235. *See* ARUM, *supra* note 37, at 201-06; Bitensky, *supra* note 35, at 779-93; Dupre, *supra* note 37, at 97-101.

of broadening school authority have not consciously acquiesced to school practices that turn citizens against the state. The (misguided) rationale, instead, is simply that without strong discipline, students will not become productive citizens. As discussed above, the empirical research throws this logic into doubt. A more accurate assumption is that without *fair* discipline, students will not become productive citizens. Fair and respectful procedure, then, becomes important.

The need for legitimacy should still be understood on a continuum. In situations like those discussed in the previous subsection[236]—yelling in the halls, talking in class, back-and-forth insults—the immediate need to protect learning or student safety may predominate over broader citizenship-development goals. However, as the state's citizenship-development interests become more salient, legitimacy should be a greater concern.

One situation (though perhaps not the only one) where citizenship-development interests seem particularly salient is when speech involves what the Court has referred to as the core of the First Amendment: speech concerning "politics, nationalism, religion, or other matters of opinion."[237] Political and religious speech commonly appear in cases that reach the appellate level, perhaps because plaintiffs are often motivated to litigate, in the first place, to defend the expression of core features of their identity. In addition to the "Border Patrol" case already mentioned,[238] high-profile cases include schools attempting to ban a fist raised in protest during the Pledge of Allegiance,[239] clothing corresponding to a student's gender identity,[240] a shirt reading "Be Happy, Not Gay,"[241] and a shirt reading "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27.'"[242] Many of these attempts at expression caused minimal disruption, and the disruption that did occur often came from peer disapproval rather than the student's own ac-

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236. *See supra* Section II.B.1.

237. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); *see* Roth v. United States, 354 U.S. 476, 484 (1957) (describing the purpose of the First Amendment as assuring "unfettered interchange of ideas for the bringing about of political and social changes desired by the people"); Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (describing the "discussion of public issues" as fundamental to the First Amendment); Meyer v. Grant, 486 U.S. 414, 422 (1988) (describing the core of the First Amendment as "interactive communication concerning political change").

238. Madrid v. Anthony, 510 F. Supp. 2d 425 (S.D. Tex. 2007).

239. Holloman *ex rel*. Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004).

240. Doe v. Yunits, No. 001060A, 2000 WL 33162199 (Mass. Sup. Ct. Oct. 11, 2000).

241. Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist., 523 F.3d 668 (7th Cir. 2008).

242. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006).

tions—in other words, a result of the fact that the student advocated an unpopular perspective.[243] Each school justified the discipline by stating that the speech was "disruptive" under *Tinker*.[244] Nevertheless, from the plaintiffs' perspective, these restrictions likely seemed anything but a neutral, everyday attempt to keep students on task.

In these cases, the state pits itself against expression that likely reflects a core aspect of a student's identity. The school here is not merely managing disruptions, but managing the question of what diversity of views is permissible in our society.[245] The state has a strong interest in avoiding the perception that authorities are biased against one particular set of views, because doing so will quickly alienate the student, and potentially onlookers, from civic life.[246] Even if the state also has an interest in suppressing immediate disorder, focusing solely on that interest unreasonably discounts broader citizenship concerns. Core First Amendment speech therefore seems to be one type of disruptive speech where the legitimacy of punishment is highly salient. For this category of speech, the goal of discipline should be regarded as both quelling disruption and teaching citizenship lessons, requiring some level of fair procedure.

There may also be other situations where disruptive speech strongly implicates the school's interest in citizenship development. To the extent that this interest is salient, fair and respectful disciplinary procedures will be important if the discipline is to serve the school's broader interests effectively.

3. Educational Discipline: Nondisruptive Speech

In some disciplinary situations, at the furthest end of the protection/education continuum, legitimacy is all-important. Discipline for nondisruptive speech

243. *See Holloman*, 370 F.3d at 1272 (explaining that the disruption consisted of other students focusing on Holloman's protest rather than on "planned curriculum of saying the Pledge" (quoting *Holloman*, 370 F.3d at 1298 (Wilson, J., dissenting in part))); *Doe*, 2000 WL 33162199, at *1 (explaining that the disruption consisted of other students threatening plaintiff for spreading rumors and blowing kisses).

244. *See Holloman*, 370 F.3d at 1272; *Doe*, 2000 WL 33162199, at *4-5; *Nuxoll*, 523 F.3d at 673-74 (trying to fit a rule against "derogatory comments" into the *Tinker* framework); *Harper*, 445 F.3d at 1177-79 (similar).

245. *See, e.g.*, William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 WM. & MARY L. REV. 869, 904-05 (1999) (connecting school accommodation of diverse student and parent perspectives to the need for a liberal political community to "embrace divergent views concerning the ultimate source of moral authority").

246. *Cf.* Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. 150, 206-09 (1999) (arguing that when judges fail to include or engage with minority perspectives, this reduces social cooperation and "threaten[s] both the stability and the legitimacy of the institution").

relates minimally to protecting students, and it has been upheld primarily for its educational value. *Fraser* justified punishing lewd and vulgar speech because doing so would teach civility,[247] and *Morse* justified punishing advocacy of illegal drug use because it would teach students to refrain from use.[248] While *Kuhlmeier*'s holding for curricular-speech restrictions is more complicated,[249] that decision also leaned heavily on the idea that discipline teaches certain lessons.

When discipline aims solely to teach, how punishment operates is critical. Because the point of discipline here is solely to achieve a long-term effect,[250] punishing speech in an arbitrary or haphazard fashion achieves no state end. Speech discipline must be fair and respectful in order to teach the lesson schools intend. Therefore, if discipline meant to be educational is implemented poorly, the primary justification for infringing a student's First Amendment rights disappears.

The failure to scrutinize effectiveness in these cases allows schools to infringe on student rights without clear justification. Without examining process, a court simply cannot know whether a restriction infringes student rights for good cause or whether it will backfire by, for example, leading to glorification of drugs and sex.[251] Instead, courts must ask whether disciplinary processes are fair and respectful enough to have a chance of teaching desired values.

* * *

In sum, disciplinary situations fall on a continuum depending on the extent they implicate educational, as opposed to protective, goals. As we move toward the educational end of the continuum, the legitimacy of discipline becomes increasingly important. Illegitimate discipline is justifiable only to the extent discipline is primarily protective rather than educational. And that kind of discipline

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247. *See supra* Section I.C.1.

248. *See supra* Section I.C.2.

249. On one hand, the Court did explicitly hold that curricular speech could be censored only pursuant to "legitimate pedagogical concerns." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988). However, one of these legitimate concerns appears to be to "disassociate" the school from controversial or "unsuitable" speech, which seems to relate to preserving the reputation of the school rather than any actual student learning. *Id.* at 271-72. If censorship is justified solely on the basis of these reputation-maintaining aims, process becomes much less important in curricular-speech cases. But if this is the case, then it is unclear why the Court so extensively detailed the lessons the young journalists were meant to learn.

250. Arguably, discipline in each of these cases is meant to "protect" sensitive ears from vulgar, immoral, or otherwise inappropriate speech. *See* Gold Waldman, *supra* note 36, at 1121-22. However, I still consider this mainly an educational purpose, in the sense that what is being "protected" is not a safe and orderly environment for students to learn curricular subjects, but rather a certain conception of what values and norms students should have.

251. This rebellion is seemingly what happened in both *Morse* and *Fraser*. *See supra* notes 17-25 and accompanying text.

is likely rarer than most think. Even when partly protective, speech discipline often has broader educational purposes, which courts implicitly ignore when they fail to scrutinize process. To the extent that long-term educational purposes predominate or become the sole purpose of discipline, a legitimate disciplinary process becomes critical.

III. PROCEDURALIZATION IN PRACTICE

The previous Part argued that at least some speech discipline in schools is clearly ineffective, and that current student-speech doctrine fails to scrutinize such discipline adequately. If that is true, how do we fix it? Fundamentally, any solution must aim for all schools to discipline speech in fair and respectful—and therefore legitimate—ways, causing students to learn intended lessons and develop prosocial values. But what, then, does "fair and respectful" discipline actually look like? What policies and practices should schools implement so that their discipline is perceived as legitimate? This Part first sketches brief answers to this question by outlining suggestions from experts in the field.

This Part's subsequent question, perhaps more pertinent to a legal audience, is how *judges* should examine schools' methods for punishing speech. Even a cursory treatment of relevant school practices shows that courts have limited tools to address this issue—a judge, for example, cannot simply order a teacher to build positive relationships with her students. In addition, the notion that judges should not be involved in the day-to-day details of school discipline has some merit.[252] For these reasons, I suggest that even though process always matters to *some* extent, judges should not scrutinize the legitimacy of primarily protective discipline.

However, it falls well within judges' capabilities to attend to legitimacy in situations where it is more salient. Doing so would provide a useful corrective to the current status quo. I therefore suggest that as discipline moves toward the educational end of the continuum described above, judicial scrutiny of its legitimacy should rise. I suggest that judges should scrutinize legitimacy in cases of (1) disruptive core First Amendment speech and (2) nondisruptive speech. In such cases, a useful rule of thumb would be a judicial presumption that the speech discipline is appropriate if, and only if, the school has given students a warning and discussion of alternatives before levying any punishment. Because disruptive core First Amendment speech and nondisruptive speech present

252. *E.g.* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 598 (1940) ("[T]he courtroom is not the arena for debating issues of educational policy"). For a discussion of the merits and limits of this argument, see *infra* Section III.B.

somewhat different disciplinary situations, this "full warning" rule may be adjusted to match. This Part closes by applying this framework to several recent student-expression cases.

A. Effective Speech Discipline in Schools

The end goal of any effort to address the problems discussed above must be for schools to implement speech discipline that students perceive as legitimate. But what does this mean? Recognizing that such discipline must be fair and respectful merely raises the question: what does it mean for discipline to be fair and respectful?

As this is a key question in education studies, many scholars have outlined factors that contribute to the perception that an authority is fair and respectful. These include the following:

Fairness

- Clarity of rules[253]
- Consistent application of rules[254]
- Accuracy of punishment[255]
- Proportionality of punishment to misbehavior[256]

Respect

- Showing care for students and interest in students' lives[257]
- Listening to student voices; reciprocal relationship with students[258]
- Warm or supportive demeanor[259]
- Explaining decisions[260]

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253. *E.g.*, Denise C. Gottfredson, Gary D. Gottfredson & Lois G. Hybl, *Managing Adolescent Behavior: A Multiyear, Multischool Study*, 30 AM. EDUC. RSCH. J. 179 (1993); Gottfredson et al., *supra* note 198, at 412.

254. *E.g.*, Gottfredson et al., *supra* note 253.

255. *E.g.*, BEAR, *supra* note 162, at 155.

256. *E.g.*, *id.* at 154.

257. *See e.g.*, Victor Battistich, Daniel Solomon, Marilyn Watson & Eric Schaps, *Caring School Communities*, 32 EDUC. PSYCH. 137 (1997) (describing the benefits to students and teachers of such an environment).

258. *E.g.*, Maria D. LaRusso, Daniel Romer & Robert L. Selman, *Teachers as Builders of Respectful School Climates: Implications for Adolescent Drug Use Norms and Depressive Symptoms in High School*, 37 J. YOUTH & ADOLESCENCE 386, 395 (2008).

259. *E.g.*, Bondy & Ross, *supra* note 203.

260. *E.g.*, TYLER & TRINKNER, *supra* note 45, at 170.

While some of these factors (e.g., a warm demeanor) apply more clearly at the level of individual teachers, others can be influenced easily by schoolwide interventions. For example, Denise C. Gottfredson and colleagues advocate for interventions that would clarify school disciplinary codes and communicate clear norms for behavior to all members of the school community.[261] Especially when iterated over time, such interventions have demonstrated success.[262]

Several of today's most popular school-discipline interventions are also aimed at improving the factors above, directly or indirectly. Schoolwide positive behavior supports (SWPBS) are a type of intervention that seeks to create a uniform system for recognizing and rewarding positive behavior across the school.[263] This intervention is intended to improve the consistency of discipline and create a climate of support.[264] Social and emotional learning (SEL) interventions explicitly seek to teach students self-management and relationship skills. Helping students learn to manage themselves demonstrates caring, and teachers who think about discipline through this lens tend to provide supportive responses when misbehavior does occur.[265] By providing easy hooks for standardizing discipline and building relationship with students, interventions like SWPBS and SEL can help authorities establish legitimacy.

Zooming in from these general programs, some scholars have even proposed specific procedures for responding to misbehavior in an authoritative manner.[266] George G. Bear, a well-known school psychologist, suggests that serious misbehavior should result in a conference with the following four steps: (1) identify the problem behavior and explore why it occurred; (2) discuss why the behavior is a problem; (3) encourage responsibility for one's actions; and (4) help the

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261. *See* Gottfredson et al., *supra* note 198, at 437 (summarizing the interventions). For the individual studies, see generally Denise C. Gottfredson, *An Empirical Test of School-Based Environmental and Individual Interventions to Reduce the Risk of Delinquent Behavior*, 24 CRIMINOLOGY 705 (1986); Denise C. Gottfredson, *An Evaluation of an Organization Development Approach to Reducing School Disorder*, 11 EVALUATION REV. 739 (1987); and Gottfredson et al., *supra* note 253.

262. *See* Gottfredson et al., *supra* note 198, at 437.

263. David Osher, George G. Bear, Jeffrey R. Sprague & Walter Doyle, *How Can We Improve School Discipline?*, 39 EDUC. RESEARCHER 48, 50 (2010). Although schoolwide positive-behavior-support programs are open to criticism from a legitimacy perspective on the grounds that such programs focus on managing behavior through rewards and punishments rather than causing students to internalize norms, it is possible to use the positive aspects of such programs while also focusing on internalizing more permanent lessons. *See id.* at 53.

264. *Id.* at 50-51.

265. *Id.* at 51.

266. "Authoritative discipline" is discipline that is strict but also fair and respectful. *See supra* notes 198-207.

student learn to avoid repeating the behavior.[267] This procedure routinizes a number of the fairness and respect factors noted above, such as listening to students, explaining decisions, and clarifying rules. Some schools might memorialize the outcome of such a conference in a written behavior agreement, and enlist the student and relevant adults to track compliance.[268] Others might infuse the disciplinary conference with restorative-justice practices.[269] While the details may vary, responding to perceived misbehavior with a structured conference that explains rules, and actually attempts to help the student avoid breaking them, seems well calculated to enhance legitimacy.

B. Judicial Responses to Ineffective Speech Discipline: Calibrating Deference

If judges could wave a magic wand and force all schools to adopt such legitimacy-enhancing systems and procedures, then solving the problem of ineffective speech discipline would be easy. But judges cannot. Therefore, the crucial question from a judicial perspective is the extent to which judges should interfere with the way schools discipline speech.[270]

Before embarking on this analysis, it is important to clarify that nothing in the following discussion of speech-discipline *processes* aims to change the Court's current jurisprudence regarding which state *purposes* justify speech discipline in the first place. To date, the Court has implied that, in the student-speech context, legitimate school purposes include protecting the educational environment from disruption (*Tinker*), teaching civility (*Fraser*), preventing illegal drug use (*Morse*), and teaching aspects of school curriculum (*Kuhlmeier*). Based on the

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267. Bear, *supra* note 162, at 169-72.

268. *See, e.g.*, *id.* at 172-78 (describing a "reflective action plan"); Sarah Chandler, Brooke C. Schuster, Abbie Jenkins & Eric Carter, *Using Behavior Contracts*, Vand. Kennedy Ctr. (Jan. 2015), https://vkc.vumc.org/assets/files/resources/psibehaviorcontracts.pdf [https://perma.cc/8G2F-Y8UP] (suggesting the Tennessee Department of Education's endorsement of similar plans); N.Y.C. Dep't Educ., *supra* note 217, at 15 (noting the New York City Department of Education's approval of written "behavior contracts").

269. *See, e.g.*, David R. Karp & Beau Breslin, *Restorative Justice in School Communities*, 33 Youth & Soc'y 249, 255-66 (2001) (describing the use of restorative-justice practices to respond to drug and alcohol issues in schools in Minnesota, Denver, and Pennsylvania); Trevor Fronius, Hannah Persson, Sarah Guckenberg, Nancy Hurley & Anthony Petrosino, *Restorative Justice in U.S. Schools: A Research Review*, WestEd Just. & Pres. Rsch. Ctr. 2 (Feb. 2016), https://jprc.wested.org/wp-content/uploads/2016/02/RJ_Literature-Review_20160217.pdf [https://perma.cc/YK5Q-WAAN] (explaining that these practices are being increasingly embraced in U.S. schools).

270. *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1809-24 (1987) (describing the crucial role of deference when courts must evaluate government actions in managerial domains such as schooling and the military).

discussion above,[271] I would add to this somewhat haphazard list the purpose of preparing students for citizenship. Other than that, I express no opinion on this question. The approach here is to take the purposes above as given, and focus on ensuring that disciplinary processes for student speech are consistent with these purposes. Courts should continue to analyze speech restrictions to ensure they serve a purpose justifying speech suppression. However, this should not end the analysis. Rather, after finding a legitimate purpose (or purposes) for discipline, courts should ask the following: was the school's disciplinary process consistent with its purpose(s)?

In answering this question, judges' degree of deference to educators is largely determinative. At one extreme, judges could complete a fully independent evaluation of fit between process and purpose, putting themselves in the place of school authorities. This would result in discipline being disallowed whenever a judge perceives it to depart from the best practices outlined above. At the other extreme, if courts entirely defer to educational judgment on the fit between process and purpose, all discipline will be permitted regardless of how well it conforms to best practices. This is the current situation. So long as the educator's belief that the speech fell into a punishable category was "reasonable"[272] and the educator "could reasonably have concluded" that censorship was warranted,[273] judges take seemingly any method of punishment as an appropriate means.[274]

While I do not believe this level of deference is warranted, many of the concerns motivating it are legitimate. First, and most centrally, judges are not competent to determine in detail exactly which disciplinary procedures fit which school aims.[275] Even if all judges had full knowledge of the empirical research, the research itself is not specific enough to determine the optimal process in every case. Though the empirical research supports a new focus on the legitimacy of student-speech restrictions, it does not, and cannot, tell us exactly what procedures maintain legitimacy for particular students in particular circumstances.

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271. *See supra* Section II.B.2.

272. Morse v. Frederick, 551 U.S. 393, 410 (2007).

273. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988).

274. *See id.* (finding that censoring student work without telling students was a "reasonable" way to teach journalistic norms).

275. Judicial competency is commonly understood as a factor affecting the appropriate level of deference, including in the education context. *See, e.g.*, R. Randall Kelso, Standards *of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 229 n.19 (2002); Edward N. Stoner II & J. Michael Showalter, *Judicial Deference to Educational Judgment: Justice O'Connor's Opinion in* Grutter *Reapplies Longstanding Principles, as Shown by Rulings Involving College Students in the Eighteen Months Before* Grutter, 30 J. COLL. & U.L. 583, 587 (2004); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 597-98 (1940).

Additionally, deference is appropriate because excessive judicial interference in education would likely impair the school's ability to achieve its purposes. In other contexts, the Supreme Court has recognized that deference to an agency's aims is appropriate when the mere fact of judicial oversight would harm the agency's effectiveness.[276] A number of commentators, inspired by Justice Black's dissent in *Tinker*,[277] have suggested this could be the case for school discipline.[278] Richard Arum has been especially vocal in suggesting that, regardless of whether students win in litigation, the mere fact that they *can* seek redress in court for school discipline undermines school authority—and therefore legitimacy.[279] Empirically, Arum's view about what makes school discipline legitimate is fraught.[280] However, the broader point that constant judicial supervision could impair the student-teacher relationship is well taken. Neither students nor teachers benefit from playing out minor disagreements about fairness in court. Within an ongoing educational relationship, all sides benefit from a system that encourages everyday fairness concerns to be worked out between students, teachers, and families, rather than in the adversarial court system.

Recognizing these concerns, I believe courts should not examine the process by which schools punish run-of-the mill cases of disruptive speech—the situations I have described above as largely protective.[281] If a student is talking out of turn in class, the judiciary should stay out of it. The salience of lessons about values or citizenship in such cases is relatively low, and the practical issues surrounding judicial intervention seem insuperable.

However, I do not believe this deference should extend, as it currently does, to all student-speech discipline. In a relatively low number of cases, legitimacy concerns are highly salient. Judicial supervision of process in such cases will not be overly intrusive in the work of the school, and competence concerns in these

276. *See* Post, *supra* note 270, at 1772-73 (discussing this idea in the context of military operations).

277. *See supra* note 219 and accompanying text.

278. *See* Hafen, *supra* note 12, at 719-20 (suggesting that the law "cannot regulate such delicate processes" in the teacher-student relationship "without impairing their existence") (emphasis omitted); ARUM, *supra* note 37, at 160 ("When courts ruled in favor of students and their parents, they indirectly eroded the disciplinary authority of school personnel.").

279. *See* ARUM, *supra* note 37, at 27-37.

280. Richard Arum presents correlational evidence showing a relationship between court involvement in school discipline and student misbehavior. *Id.* at 127-58. However, concluding from these correlations that the courts are to blame for issues with student discipline is an overreach. Broad-scale correlations like those Arum presents are notoriously difficult to interpret, and the evidence for the importance of fair and respectful discipline, which Arum also cites, is simply better evidence. If we know for a fact that fair and respectful discipline is crucial to legitimacy, then a few vague correlations are not persuasive evidence that the problem is courts' fairly minimal involvement in school discipline.

281. *See supra* Section II.B.1.

cases are easier to surmount. Judges can distinguish egregious cases. In cases where only highly fair and respectful discipline can achieve the school's purposes, judges can see that punishment for a vague and arbitrarily applied rule of which the student had no notice is inadequate. This is especially true because the necessary criterion is one at the core of judicial competency: fairness of procedure.[282]

I therefore suggest that judicial scrutiny of procedure is appropriate in the two situations described in Section II.C where legitimacy is especially salient: in cases of disruptive core First Amendment speech and in cases of nondisruptive speech. The government may suppress the former category of speech because it is disruptive and the latter because of the school's interest in values education. But even if the school is allowed to suppress speech in such cases, the government has a strong interest in ensuring that the school does not suppress it by fiat. For disruptive core First Amendment cases, allowing arbitrary use of punishments sells short the state's interest in preventing the alienation of students with "disapproved" views. In cases of nondisruptive speech, process scrutiny seems even more important, because a fair and respectful process is crucial for achieving the sole purpose of the discipline: teaching lessons.

C. The Full-Warning Model

The remaining question is what courts should look for when they scrutinize process. Given that courts cannot simply order schools to use specific processes, what kind of process is "fair enough" and "respectful enough" for courts to conclude that it fits the educational purpose? For disruptive core First Amendment speech, what process will suppress the disruption while being "legitimate enough" that students are not marginalized? For nondisruptive speech, what process is "legitimate enough" that students will internalize the desired lessons rather than merely going through the motions?

Some restrictions may be egregious enough that they have no pretense of legitimacy. Suspending students haphazardly or censoring speech that transgresses unclear boundaries is almost guaranteed to backfire. For closer cases, we could imagine a multifactor standard based on some of the factors outlined above. For example, for fairness, a court could look at factors such as prior notice, clarity of rules, and consistency of application.[283] For respectfulness, a court could look at factors such as whether the decision was explained to the student and whether the student had a voice in the process.[284] Hypothetically, a court

282. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73-104 (1980).

283. *See supra* notes 253-256 and accompanying text.

284. *See supra* notes 257-260 and accompanying text.

could form a composite "index" of legitimacy, drawing from each factor, to evaluate whether processes are sufficient.

However, an open-ended and amorphous standard is not useful here. A multifactor test would open the courts to claims from essentially any disciplined student and provide little guidance for schools to adjust disciplinary policies. Such a standard is therefore antithetical to the principle that schools, rather than courts, should take the lead on fixing ineffective disciplinary practices.[285]

In addition, and as described above, judges do not have the social-science expertise to apply properly any standard that requires them to follow all the relevant research. Judges are not teachers or psychologists, and they have neither the time nor inclination to update themselves constantly on school-discipline findings. An open-ended directive to ensure discipline is fair and respectful could easily lead courts to overemphasize irrelevant details within the social-science literature or simply revert to the current state of complete deference.

The need for clear rules when courts supervise school discipline is reflected in the existing requirement of due process prior to a student suspension, from *Goss v. Lopez*.[286] This requirement is not a multifactor standard, but a clear rule that the student must have notice of the charges and opportunity to respond. But despite this admirable clarity, the *Goss* rule is insufficient here. While it may render "the risk of error substantially reduced,"[287] "correctness" is not the only significant factor in whether students internalize intended values.[288] A hearing that will never alter the outcome of suspension is still essentially coercive, and it will not convince students that the restriction is legitimate. The *Goss* standard has been in effect since 1975, yet expression restrictions have continued to backfire.[289]

Instead, I propose a rule of thumb that might be called "full warning" or "second chance." Under this rule, when discipline is for (1) disruptive core First Amendment speech or (2) nondisruptive speech, schools should give students a

285. *See supra* note 275 and accompanying text.

286. 419 U.S. 565, 582-83 (1975).

287. *Id.* at 584.

288. While correctness of outcome has been mentioned as one relevant variable by which students judge the fairness of discipline, the bulk of student perceptions of legitimacy rely not on outcomes but on the way students are treated. *See* Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCH. 117, 118 (describing research findings that people are more likely to be upset about being treated inconsiderately or impolitely than by negative material outcomes); *cf.* Yuen J. Huo, *Justice and the Regulation of Social Relations: When and Why Do Group Members Deny Claims to Social Goods?*, 41 BRIT. J. SOC. PSYCH. 535, 552-53 (2002) (finding that participants valued dignity and respect most highly, procedural fairness next, and material goods the least).

289. See *supra* notes 17-25 and accompanying text.

warning and conference before levying any punishment. In other words, punishment would not occur upon the first violation of a speech rule. On that first violation, the student would have a chance to discuss with an authority what rule the student broke, how they broke it, and how to avoid doing so in future. School officials would then issue a first strike or warning rather than punishing the student. Punishment would only occur if the expression continues.

To emphasize the difference between this approach and the *Goss* standard, the goal of the conference is not merely to find out whether the student in fact broke the rule. Rather, the goal is to show respect for the student, explain the fairness and purpose of the rule, and educate the student on how to change their behavior. All of these ends are sabotaged if the discussion is merely a prelude to suspending the student for expression they may not have realized was prohibited, or may not believe is wrong. In an adversarial punishment situation, both parties will inevitably focus on defending their positions, fostering the oppositional consciousness that is most likely to undermine authority.

When school officials have warned a student about their behavior and they continue to engage in it, both the student and peers are much more likely to regard the punishment as legitimate. On the other hand, in a case where the hearing merely preludes inevitable punishment, the charged and emotional context of many student-expression situations will enable the student to make a case to their family and peers that the punishment is unfair. In this sense, a full-warning rule flips the likelihood of success of the restriction from impermissibly low to permissibly substantial. If an authority specifically explains a speech rule to a student (or group of students) and asks them to change their speech, the authority is clearly trying to teach the student something. Subsequent punishment as a part of this persuasion effort should be presumed valid.

Of course, this does not mean discipline following this model will necessarily be perceived as legitimate, or that discipline not following the full-warning rule will necessarily be perceived as illegitimate. Rather, the full-warning rule is an attempt to draw a line in the sand regarding which disciplinary processes should be *presumed* legitimate and which should not. Judicial reliance on this line provides a clear procedure that schools can follow, and it does not require judges to dive into the intricacies of how particular discipline will be perceived by particular students in particular contexts. While surely this sort of line could be drawn in a variety of ways, the idea of a warning or second chance is familiar to school stakeholders, easily administrable, and incorporates many of the legitimacy "best practices" described above.[290]

The full-warning approach may appear lenient. However, there is relatively little downside to not punishing students for nondisruptive speech—or even

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290. *See* Section III.A.

somewhat disruptive expression—the first time it occurs. This contrasts with many kinds of proscribed nonspeech conduct: few schools want to give students a "second chance" before punishment for offenses like bringing a weapon to school. Conversely, because speech discipline often aims at shaping minds, not some imminent protective purpose, discipline must be calibrated to make students understand the lesson being taught.

The full-warning model is intended as a rule of thumb for both nondisruptive speech, such as incivility or advocacy of illegal drug use, and disruptive core First Amendment speech. However, the rule may operate somewhat differently for the two types of speech. If core First Amendment speech is simultaneously highly disruptive, judges may grant authorities leeway to depart from aspects of the rule. For example, a judge might allow an authority to warn and punish nearly simultaneously—for example, by telling the student to "stop, or you will be punished," and then punishing—rather than having a separate conference before punishment. Conversely, for nondisruptive speech, there is no excuse for failing to maintain the most scrupulous standards of legitimacy, because if legitimacy is not maintained the entire speech suppression exercise is useless. Judges may therefore wish to shift the rule upwards by disallowing punishment with egregious legitimacy deficits in other dimensions even if the full-warning rule is observed.

In the following Section, I examine how this framework could be applied to several student-expression cases. Using the "full-warning" model as a rule of thumb, I suggest how courts might adapt it to meet the demands of various cases. I also describe the relationship between disciplinary-process examination and off-campus speech.

D. Application to Cases

1. *Standard Application of the Full-Warning Model:* Harper v. Poway Unified School District

The Ninth Circuit case, *Harper v. Poway Unified School District*,[291] decided in 2006, provides a strong example of a school implementing fair and respectful procedure to deal with sensitive speech. In *Harper*, the plaintiff protested the Day of Silence, which is meant to show solidarity with LGBTQ+ students,[292] by wearing a shirt with the message "BE ASHAMED, OUR SCHOOL EM-

291. 445 F.3d 1166 (9th Cir. 2006).

292. *See Day of Silence*, GLSEN, https://www.glsen.org/day-of-silence [https://perma.cc/E7TJ-6Y95].

BRACED WHAT GOD HAS CONDEMNED" on the front, and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" on the back.[293] School officials suggested that the shirt was not appropriate because it was inflammatory and derogatory.[294] One official talked to Harper about ways "he and students of his faith could bring a positive light onto this issue without the condemnation that he displayed on his shirt."[295] The principal "did not want him suspended from school . . . for a stance he felt strongly about,"[296] so the school did not formally suspend Harper. Instead, it simply isolated him from other students for the rest of the day and prohibited him from wearing the shirt in the future.[297]

The first question in this case was what school interests were at stake, and whether those ends justified suppressing speech. The court identified the interest as protecting lesbian and gay students from demeaning speech, analogizing Harper's t-shirt to "name-calling."[298] While discipline was therefore portrayed as protective, it is clear that disciplining the student's political, religious speech also implicated long-term citizenship-development interests. Especially given that in this case evidence of actual disruption was minimal, the court should therefore have explicitly scrutinized the disciplinary process, requiring that it be consistent with the school's citizenship-development aims.

A rule of thumb the court could have turned to is the full-warning rule. Here, the school's process satisfied this rule. The school apparently counseled Harper in a respectful manner regarding ways to express religious opposition to homosexuality that would not be derogatory. The school also did not punish Harper for a first offense, giving him an opportunity to change his mode of expression. If Harper had come back another day with the same shirt, or otherwise continued making derogatory comments toward homosexual students, punishment would likely have appeared legitimate—if not to him, at least to other student onlookers.

This case highlights the important fact that many schools are already disciplining sensitive speech in ways that track my prescriptions. Litigated cases, in other words, do not represent the set of speech restrictions our schools "typically" use. The discussion above might imply that injecting fairness into school

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293. *Harper*, 445 F.3d at 1171.

294. *Id.* at 1172.

295. *Id.*

296. *Id.*

297. *Id.* at 1172-73.

298. *Id.* at 1178. The Court found this interest under *Tinker*, which had language about speech that "intrudes upon . . . the rights of other students." *Id.* at 1177-78 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)). While this interpretation of *Tinker* is unusual, I express no position on whether this is a valid end of public schooling that justifies suppressing speech.

procedures would upend the entire landscape of student-expression discipline. But this illusion results from the fact that students are most likely to litigate—at least in higher courts—those restrictions that seem manifestly unfair to them. As reflected in lower-court cases, many schools are already quite sensitive to how discipline will be perceived in emotionally charged speech cases, and they therefore take care to discipline students in a procedurally fair manner.[299] Applying greater scrutiny to disciplinary procedures would aim to bring lagging schools in line with these positive examples.

2. *Full Warning on a Schoolwide Level: Fixing Fraser*

In some cases, it might not be necessary or appropriate for a school to give each student individual warnings. This is especially so in the context of schools' broader attempts to teach values. If the school already has a large-scale program in place, and students are aware of the relevant rules and their rationales, individual warnings may be unnecessary. Under these circumstances, a court might allow punishment on a first offense, so long as the school has made such a clear educational effort that all students have "full warning" of what is being punished and why.

This idea can be illustrated with reference to *Fraser*. As the school in *Fraser* did *not* have such a program in place, a more procedurally aware court might have used the case to highlight this deficit.

In *Fraser*, the Court held that suppressing vulgar or lewd speech is permissible because the school has a legitimate interest in teaching civility. After this finding, the Court's inquiry should have moved to a second phase: was the disciplinary process consistent with that end? Because the school's purpose was teaching values, the Court should have limited its deference to educators on procedural appropriateness and searched for fair and respectful processes. Again, the starting point would be the full-warning rule.

In *Fraser*, the preexisting rule authorizing discipline did not clearly cover the speech at issue.[300] Several teachers had told Fraser the speech might "cause problems" and counseled him against delivering it, but they had not stated that he

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299. In addition to the case highlighted here, it is clear that many other schools are taking care *not* to suspend or harshly punish students for advocating political positions without efforts to demonstrate fairness and respect. *See, e.g.*, Madrid v. Anthony, 510 F. Supp. 2d 425, 427-29 (S.D. Tex. 2007); Dariano v. Morgan Hills Unified Sch. Dist., 745 F.3d 354, 357-59 (9th Cir.), *amended by* 767 F.3d 764 (9th Cir. 2014); Barr v. Lafon, 538 F.3d 554, 559-61 (6th Cir. 2008).

300. The school rule that Fraser supposedly violated prohibited "[c]onduct which materially and substantially interferes with the educational process . . . including the use of obscene, profane language . . . ." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678 (1986). But Fraser's

would be punished or that it was against school rules.[301] In addition, it is unclear whether the school had a general pattern of applying the rule, or of making an effort to teach civility at all. Fraser was punished for using language in an assembly that others were likely using in the hallways with impunity, and he may have lacked notice of the likelihood of punishment. The facts of *Fraser* portray a school trying to "save face" at the expense of one of its students, rather than genuinely attempting to educate the student body on civility.

The Court might therefore have found that Fraser did not have full warning, and accompanied its ruling with guidance on the type of alternative scheme that would pass constitutional muster. The overarching principle should be to ensure that students know what sort of speech will be punished and why, and have a chance to reform their behavior before they are punished. As it does not necessarily make sense to conference with each individual student about lewd speech, the school might have publicized broadly (at assemblies, etc.) that it was trying to teach students to be upright citizens and that certain types of speech will therefore no longer be accepted on school grounds. In doing so, the school would have needed to specify what exactly was prohibited; for instance, it might have clarified that sexual innuendo and profanity were punishable. The school would need to enforce this rule with at least some fairness and regularity—rather than saving it for application when the school looks bad. In such a case, where the speech rule was part of a widely understood educational program, it would be reasonable for a court not to require individual warnings for each student who broke the rule before punishment could occur. The "full warning" would exist on a group level, and Fraser's punishment would be presumed legitimate.

If the school did not consider issues of civility before Fraser's speech, it might only have a chance to address the issue ex post. If so, the school might use Fraser's speech as a teachable moment. The school could have another assembly or smaller class discussions on why it believes Fraser's speech was inappropriate, and it could change its policy to prohibit this speech clearly. If these assemblies or smaller discussions clearly conveyed the new policy to students as part of a genuine educational effort, it would be reasonable to understand this as the full warning, and allow Fraser or any *other* student who broke the rule to then be punished. This approach would hold Fraser accountable without a suspension, and it would arguably better serve the school's purpose of teaching values.

speech only included sexual innuendo, not obscenity or profanity per se, *see id.* at 677-78, and the lower court found it did not cause a substantial disruption, *see id.* at 693 (Stevens, J., dissenting).

301. *Id.* at 695.

3. The Full-Warning Model and Off-Campus Speech

Finally, I will address how my model intersects with *B. L.*'s treatment of speech location. In general, maintaining legitimate authority is harder for schools when regulating speech that takes place off campus. This suggests that courts should ratchet up the requisite processes.

However, as a practical matter, only a limited set of processes apply to both on-campus and off-campus speech. I have suggested that courts only scrutinize the disciplinary process when the speech at issue is either disruptive core First Amendment speech or nondisruptive speech. But *B. L.* heavily implied that these two types of speech cannot be punished at all when they take place off campus. Even before reaching process, the school has a "heavy burden" to justify disciplining "political or religious speech that occurs outside school or a school program"[302] and its "anti-vulgarity interest is weakened considerably" when speech occurs off campus.[303] If the courts do permit discipline for nondisruptive or politically sensitive off-campus speech, of course, they should scrutinize procedure closely, and the full-warning model seems applicable. But courts seem unlikely to permit this as a general matter after *B. L.*

One relevant question would be whether courts should sometimes scrutinize disciplinary procedures in cases of off-campus speech where deference considerations would counsel against scrutiny had the speech occurred on campus. For example, imagine if B.L.'s speech had been disruptive. On campus, judges' desire not to interfere with everyday discipline might counsel deference on how to punish disruptive, noncore First Amendment speech. But if such speech occurs off campus, should the court scrutinize the method of punishment?

This may be a close question, but the process dimension at least gives courts more options for treating such cases. At oral argument in *B. L.*, Justice Kavanaugh expressed concerns that schools could not punish students at all for rude and insubordinate speech taking place off campus, even if the student had used a racial epithet about the coach.[304] Supposing other Justices shared this concern, it would be difficult to address it without expanding educators' general off-campus-speech sanction powers.[305] Or it would be difficult to do so without

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302. Mahanoy Area Sch. Dist. v. B. L. *ex rel.* Levy, 141 S. Ct 2038, 2046 (2021).

303. *Id.* at 2047.

304. Transcript of Oral Argument, *supra* note 95, at 100-01 (Kavanaugh, J.). In keeping with my theme, Justice Kavanaugh suggested that what bothered him was not that the speech was punished, but rather that the length of punishment seemed "excessive" given "how important [athletic participation] is and . . . how much it means to the kids." *Id.* at 31.

305. The attorney for B.L. conceded that a school could not punish a student who used a racial epithet about a coach on Snapchat as a general matter. *Id.* at 101. However, he suggested that

considering procedure. Looking to procedure, though, the Court might have found discipline permissible if subject to the full-warning rule. This would mean that even if derogatory speech by a student reached an administrator's attention, punishment could not be levied for a first offense. Rather, a student like B.L. would first be warned to be more careful about the consequences of putting derogatory speech on the internet. If the student then continues to create insulting content and share it indiscreetly, the school could punish. This minimizes the concern that schools will punish students for momentary gripes or attempted jokes of which they happen to learn, while still letting schools punish repeated bullying or intentional disrespect where students seek to use their off-campus venue as a shield.

CONCLUSION

Barnette is celebrated for a stirring defense of our antiauthoritarian values, including a national understanding that although orthodox behavior can be compelled, orthodox beliefs cannot. While punishment can coerce immediate behavior, values can only be imparted through persuasion. This critical insight is also supported by a significant body of social-science literature. Nevertheless, student-speech jurisprudence continues to assume schools may simply coerce students into become upstanding citizens through fear of punishment, leading courts to approve restrictions that often backfire and turn students against the exact values the school is trying to impart. Fortunately, there is no need for courts simply to defer to school administrators on how to improve the poor efficacy of speech restrictions. By attending to procedural-justice concerns well within the competence of the judiciary, courts can vastly improve the chances that speech restrictions will actually serve some educational purpose.

The greatest barrier to judicial reform in this area may be reluctance to intrude on the work of the schools. Fortunately, all of the reforms discussed in this Note can be achieved without judicial action. At best, judicial scrutiny of student-expression procedures will only be a spur for school officials, students, and parents to do the real work of changing the disciplinary culture in their schools. Creation of a coherent, fair, and respectful plan for regulating student expression is the best way to ensure that these issues never reach the courts, instead being settled consensually in schools where they belong.

there could be a workaround if the athletic team made clear rules against such behavior to which students agreed. He also suggested that if a student did this and there were no rule in advance, the school could "bring that person in and . . . say that is unacceptable . . . . And then, if they ever do it again, they are off the team." *Id.* While the basis for the petitioner's argument is not clear, it certainly comports with my argument above.